

SMALL CLAIMS COURT

The Quest for Access to Justice for the Majority of Namibians

A Case Study for Namibia



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TABLE OF CONTENTS

ALPHABETICAL LIST OF ABBREVIATIONS.....	iv
DECLARATION	v
ACKNOWLEDGEMENTS.....	vi
ABSTRACT	vii
DEDICATION	x
CHAPTER 1: ORIENTATION OF THE STUDY.....	1
1.1 INTRODUCTION.....	1
1.2 RESEARCH OBJECTIVE.....	3
1.3 RESEARCH QUESTION.....	4
1.4 PROBLEM STATEMENT	4
1.5 RELEVANCE OF THE STUDY.....	5
1.6 SCOPE AND LIMITATIONS OF THE STUDY.....	10
CHAPTER 2: OVERVIEW OF THE SMALL CLAIMS COURT	11
2.1 THE EVOLUTION OF THE SMALL CLAIMS COURT	11
2.2 THE PURPOSE AND FUNCTIONS OF THE SMALL CLAIMS COURT.....	12
2.3 ADVERSARIAL AND INQUISITORIAL EVIDENTIAL SYSTEM.....	14
2.3.1 Adversarial Trial Procedure.....	15
2.3.2 Inquisitorial Trial Procedure	15
2.3.3 Inquisitorial versus Adversarial System of Law	16
2.3.4 The Inquisitorial Nature of the Small Claims Court	17
CHAPTER 3: THE SMALL CLAIMS COURT AS AN INSTRUMENT OF ACCESS TO JUSTICE IN NAMIBIA	18
3.1 SMALL CLAIMS COURT VIS-À-VIS ACCESS TO JUSTICE.....	18
3.1.1 Respect for Human Dignity	19
3.1.2 Equality and Freedom from Discrimination	20
3.1.3 Fair Trial.....	21

3.1.4	Property and Housing Rights	22
3.1.5	Tenancy Rights	24
3.1.6	Legal Aid.....	25
3.1.7	The Mandate of the Ombudsman	26
3.2	FACTORS OBSTRUCTING ACCESS TO JUSTICE.....	28
3.2.1	Overview	28
3.2.2	Cost of Litigation	29
3.2.3	Population.....	30
3.2.4	Income	30
3.2.5	Poverty.....	31
3.2.6	Education.....	32
CHAPTER 4: SCOPE, JURISDICTION AND RATIONALE OF THE PROPOSED SMALL CLAIMS COURT		34
4.1	NAMIBIAN SMALL CLAIMS COURT DRAFT BILL 1997	34
4.2	CONSUMER PROTECTION	35
4.3	HOMEOWNERS AND TENANTS	37
4.4	PERSONAL INJURY	38
CHAPTER 5: COMPARATIVE STUDY		39
5.1	SOUTH AFRICA.....	39
5.2	CANADA	41
5.3	REMARKS.....	43
CHAPTER 6: CONCLUSIONS		44
6.1	OVERVIEW	44
6.2	COMPARATIVE STUDY	44
6.3	LAW REFORM AND DEVELOPMENT COMMISSION	44
6.4	COST OF LITIGATION.....	45
6.5	LEGAL AID.....	45
6.6	ALTERNATIVE DISPUTE RESOLUTION (ADR)	45
6.7	JOB CREATION.....	45

6.8	SOCIO-POLITICAL IMPLICATIONS	46
6.9	TRADITIONAL AUTHORITIES AND COMMUNITY COURTS	47
6.10	FURTHER REMARKS	47
CHAPTER 7: RECOMMENDATIONS AND THE WAY FORWARD		49
7.1	ACCESS TO JUSTICE	49
7.2	COMPARATIVE STUDY	49
7.3	HOUSING-, TENANCY- AND CONSUMER RIGHTS AND INJURY CLAIMS 49	
7.4	INDIGENT LITIGANTS.....	50
7.5	PROMULGATION AND IMPLEMENTATION OF LEGISLATION.....	50
7.6	ADJUDICATION AND INQUISITORIAL SYSTEM OF LAW	50
7.7	LEGAL AWARENESS/EDUCATION	51
7.8	LEGAL AID.....	51
7.9	CIVIL SOCIETY AWARENESS	51
BIBLIOGRAPHY.....		53

ALPHABETICAL LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CIA	Central Intelligence Agency
ICESCR	International Covenant on Economic, Social and Cultural Rights
LAC	Legal Assistance Centre
LARRI	Labour Research and Resources Institute
LRDC	Law Reform And Delopment Commsision
MOJ	Ministry of Justice
NDP1	First National Development Plan
NDP2	Second National Development Plan
NDP3	Third National Development Plan
NEPRU	The Namibian Economic Policy Research Unit
NGOs	Non-Governmental Organisations
NHIES	Namibia Household Income and Expenditure Surveys
NPC	National Planning Commission
NSCB	National Small Claims Bill of 1997
TNDP	Transitional National Development Plan
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme

DECLARATION

I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources other than those listed in the bibliography and quoted in the references.

ALYNSIA GRACE PLATT

DATE

I, **FRANCOIS XAVIER BANGAMWABO**, hereby certify that the research and writing of this dissertation was carried out under my supervision.

FRANCOIS-XAVIER BANGAMWABO

DATE

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ABSTRACT

The United Nations Development Programme states that:

“Access to justice is a basic human right, as well as an indispensable means of combating poverty and preventing and resolving conflict... the poor and other vulnerable groups may be victimised by corrupt or indifferent officials, without having a reasonable chance to seek legal remedies for mistreatment. Moreover, it is important to understand that access to justice means much more than improving an individual’s access to courts or guaranteeing legal representation. It is about ensuring that legal and judicial outcomes are just and equitable and that systems work in practice for the poor and disadvantaged as well.”¹

This paper seeks to address the issue of access to justice through the Small Claims Court (SCC), which is lacking in Namibia. In a Small Claims Court, a person may sue someone for claims that will be too expensive to sue for in the ordinary civil courts. Such cases may include, amongst others, suing for small liquid claims, bad workmanship, sub-standard products, goods and services paid for but not delivered, damage to property, damage to vehicle as a result of a motor vehicle accident, disputes between landlords and tenants as well as medical injuries. These cases are normally considered trivial for the ordinary civil courts and as such a Small Claims Court is more desirable under these circumstances since the procedures are simpler than in the ordinary courts, which results in speedier and less cumbersome resolution of disputes. Since legal representation is not allowed in the Small Claims Court system it is also a lot less expensive process. This is the purpose and function of the Small Claims Court, which has been in existence in many countries, including the United States of America, England, Wales, Canada and even South Africa, for decades already. In South Africa it has been proven to be very successful and many new branches of these courts are opening each year across the country, showing its increasing need and expedience and the South African government’s mission to ensure access to justice for its people.

¹ United Nations Development Programme (UNDP). 2004. *Access to Justice Practice Note*. Accessed online at <http://europeandcis.undp.org/governance/hrj/show/D8C74305-F203-1EE9-B8B6C3C07F451806> on 22 September 2011.

Namibia, on the contrary, has no Small Claims Court despite the fact that, as a result of the South African administration and South Africa's mandate over then South West Africa, many of South African laws have made their way to Namibia and until today apply here. Unfortunately the South African Small Claims Court Act 61 of 1984, which established Small Claims Courts in South Africa, was not made applicable to Namibia and hence Namibia is today without a Small Claims Court. Namibia attained independence in 1990 after decades of being under South African rule but 21 years later, no Small Claims Court has yet been established. The Law Reform and Development Commission (LRDC) of the Ministry of Justice drafted the National Small Claims Bill (NSCB)² in 1997³, which was never promulgated. Furthermore, the Third National Development Plan (NDP3)⁴ of the National Planning Commission dated 15 October 2007, which sets out the Public Development Programme for the years 2007/8 to 2011/12, specifically recommended the establishment of a Small Claims Court as part of the national objective towards access to justice for all. Unfortunately the Bill of 1997 had not been tabled with Parliament to date⁵.

The fact that Namibia has a number of outdated and ineffective commercial laws inherited from South Africa, these laws generally inhibit the ability of the citizens to take full advantage of economic activities which could improve their standard of living. A Small Claims Court will create a platform where citizens could assert their rights to economic equality through access to justice, in most spheres of their everyday economic life. A Small Claims Court would not only make the law and the judicial system more accessible to all citizens, especially indigent citizens, but will at the same time enable them to safeguard their rights with regard to property, tenancy, consumer matters and injury claims. It is against this backdrop that this paper is looking at the need for the Bill of 1997 to be promulgated and a Small Claims Court to be established in terms of this proposed legislation.

² Hereinafter called 'the Bill'.

³ *ibid*

⁴ Government of the Republic of Namibia, National Planning Commission. 2007 *First Draft of the Third National Development Plan (NDP3): 2007/08-2011/12*. Volume 2, Windhoek.

⁵ Confirmed personally on 6 September 2011 with Legal Advisor to Parliament, Mr. P. Husselmann.

The focus of this research therefore is on the aforementioned commercial areas and the need for access to justice through the promulgation of a Small Claims Court Act and subsequent establishment of the Small Claims Court. Further, having regard to persistent trade practices and recent public outcry on consumer rights evidenced in the media over the past couple of years, this research will focus on the demographics of indigent citizens and how a Small Claims Court would benefit the majority of the population. The promulgation of a national Small Claims Court Act will not only grant most Namibians access to the law and judicial system but will also speed up civil litigation, protect their human rights as enshrined in the Constitution and prevent the poor from being further impoverished by unfair, dishonest and unequal treatment in their everyday commercial activities. In order to deliver on the aspirations set forth in the Namibian Constitution, the objectives of Vision 2030⁶, the latest development plan, i.e. the NDP3, and to keep abreast with the needs of society, the legislative framework for a Small Claims Court needs to be addressed as a matter of urgency in order to ensure consumer protection and access to justice.

⁶ Government of the Republic of Namibia, National Planning Commission (NPC). 2004. *Vision 2030*. Windhoek, Namibia.

DEDICATION

I dedicate this paper to my wonderful family, my husband, Vincent, and my daughter, Ayesha, for their continuous patience, understanding, love and support throughout this paper and course.

CHAPTER 1: ORIENTATION OF THE STUDY

1.1 INTRODUCTION

‘The public expects a judicial process that is affordable, transparent, accessible, fair, impartial and easy to understand; and one that dispenses justice reasonably speedily.’⁷

The concept of justice is an area of increasing importance in developing countries, particularly a country with a political history such as Namibia. The concept is closely related to human development and poverty eradication and is a fulcrum for human rights. Accordingly, access to justice and human rights is an explicit part of democratic governance practice. Since a well functioning justice sector is a precondition for economic growth, most programmes tend to focus in increasing the capacities of the judiciary to deal with civil and commercial matters. However this research wants to reveal that access to justice is more important than being merely a means to economic growth and to prevent and overcome poverty, but that it also strengthens the choices of indigent people to seek and obtain alternative avenues to remedy their grievances. This research thus looks at the Small Claims Court system as an alternative avenue within the formal legal framework to provide a forum that is *‘affordable, transparent, accessible, fair, impartial and easy to understand; and one that dispenses justice reasonably speedily’⁸* and which is in line with the supreme law of the land, The Namibian Constitution⁹.

It is common knowledge that litigation is an expensive exercise in Namibia, particularly in civil cases. In order to assure fair representation and to have a successful suit, a litigant has to hire a private legal representative, which is expensive and unaffordable for most Namibians. In criminal cases, the litigant is represented by a lawyer paid by the State, which is a state prosecutor. The right to private legal

⁷ Damaseb P.T., JP. August 2010. *Promoting Access to Justice in the High Court of Namibia: The Case for Judicial Case Management*. First Report, Windhoek.

⁸ As quoted by Hon. Mr. Justice Petrus T. Damaseb, *ibid*

⁹ Act 1 of 1990, hereinafter referred to as ‘The Constitution’.

representation is not afforded to accused persons in a criminal case¹⁰ and also not guaranteed to litigants in civil cases. The non-existence of a Small Claims Court thus denies many ordinary Namibians the right to access to justice in civil matters. Even though the Legal Aid Act¹¹ makes provision for legal aid in both criminal and civil cases, the discretion for the provision of legal aid in rests with the Director of the Legal Aid Department (as defined in Section 3 the Act¹²). This provision does not grant an absolute right to litigants, particularly litigants in civil matters, and the discretion of the Director is statistically not exercised for litigants seeking legal aid in civil matters. In a Small Claims Court, however, litigants are not allowed legal representation and therefore represent themselves. This is possible due to less cumbersome procedures followed in the Small Claims Court.

The absence of a Small Claims Court in Namibia and the discretion of the Director of the Legal Aid Directorate, as per the Act, is a denial of the right to access to justice. This denial runs contrary to the ideal of the rule of law and that all persons are entitled to the equal protection of law. The Legal Aid Act provides that legal representation be given to litigants in criminal cases. According to this provision legal representation is an inalienable and unequivocal right in the instance where the litigants has no resources to acquire legal representation of their own in criminal litigation. This right is however not guaranteed to litigants seeking legal representation in civil matters and these litigants have to acquire private legal representation. The current judicial system provides no other forum, such as a tribunal or a committee, where matters of a civil nature could be heard without a litigant having to acquire legal representation.

Furthermore, the Ombudsman, who has the mandate to investigate and report on matters pertaining to the infringement of rights of citizens, does not have the mandate to adjudicate. The Ombudsman therefore does not serve as a recourse to indigent citizens in civil matters as these matters could only be mediated by the Ombudsman without any formal enforceable judgement.

¹⁰ Konrad Adenauer Stiftung. 2008. Amoo, S.K., Skeffers, I. *The Rule of Law In Namibia: In Human Rights and the Rule of Law in Namibia*. Windhoek. Macmillan 29.

¹¹ Act 27 of 1990.

¹² Ibid.

The Law Reform Directorate of the Ministry of Justice drafted the National Small Claims Bill in 1997, which was never promulgated. The Third National Development Plan (NDP3)¹³ of the National Planning Commission dated 15 October 2007, which sets out the Public Development Programme for the years 2007/8 to 2011/12, specifically recommended the establishment of a Small Claims Court as part of the national objective towards access to justice for all. Unfortunately the Bill of 1997¹⁴ had not been tabled with Parliament to date¹⁵.

Based on the above statements, inter alia, this research will look at the right to access to justice to ordinary, indigent Namibians from the Small Claims Court perspective.

1.2 RESEARCH OBJECTIVE

The primary objective of this research paper is to review important areas of consumer rights under the umbrella of access to justice and in the context of civil litigation. This paper also endeavours to highlight the importance of a Small Claims Court and how such court would benefit the majority of Namibians in exercising their right to access to justice in civil matters. National statistics will shine light on the percentage of the population that falls within the bracket of 'indigent litigants' who would benefit from the establishment of a Small Claims Court. Furthermore, having regard to the current legal framework and the discriminatory past of Namibia, this research will also address the socio-economic and political impacts the lack of a Small Claims Court has, and could have in the future, on the Namibian society as a whole.

The fact that the Small Claims Court system is based on the inquisitorial, rather than adversarial, evidential system of law also plays an important role in the determination of the right to access to justice. A comparison between these two systems of law will

¹³ Government of the Republic of Namibia, National Planning Commission. *2007 First Draft of the Third National Development Plan (NDP3): 2007/08-2011/12*. Volume 2, Windhoek.

¹⁴ *ibid*

¹⁵ Confirmed in person on 6 September 2011 with Parliament Legal Advisor, Mr. P. Husselmann.

shed light on whether access of justice is ensured through the prevailing adversarial system of law or whether the inquisitorial system of law would be more desirable.

Finally, a brief comparison will also be made with the Small Claims Court systems in Canada and South Africa in order to stress the importance of a Small Claims Court for Namibia.

1.3 RESEARCH QUESTION

This research endeavoured to highlight the importance of a Small Claims Court and how such court could benefit the majority of Namibians in the exercise of their constitutionally enshrined right to access to justice. This research will also review how consumer-, housing-, property- and tenancy rights could be addressed through the Small Claims Court. Therefore, the research question is whether a Small Claims Court will positively contribute to the existing legal framework and the promotion of access to justice and a better way of life for ordinary indigent litigants.

1.4 PROBLEM STATEMENT

Namibia's constitutional framework and numerous legislations guarantee and protect the human rights of a cross-section of its people to a great extent. The Namibian law gives special attention to promoting the rights of the previously disadvantaged and vulnerable Namibians, such as non-whites, women and the disabled persons. However, despite progressive legislation and an independent judiciary, the poor and the disadvantaged citizens are still unable to secure the protection or benefit of their rights and entitlements. This poses a serious challenge to the rule of law and democracy in Namibia.

Access to justice in Namibia is limited and virtually out of reach by both economic and geographic boundaries or the majority of Namibians. Nearly 67% of Namibians live in rural areas with only 33% based in urban areas,¹⁶ whilst virtually all lawyers

¹⁶ Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek. NPC, p 4.

reside and practice in the capital city of Windhoek and other urban centres. Thus access to legal assistance is not readily available. Moreover, in the event that legal assistance is available to indigent citizens, it is very expensive. The reason therefore being that the established fee schedule determined for all lawyers precludes most Namibians from obtaining the services of a lawyer. The cost of legal services makes it unattainable for the average Namibian, with an estimated 66% of people in Namibia unable to afford the services of a legal practitioner¹⁷.

The lack of a Small Claims Court in Namibia is a problem that not only concerns the right to access to justice as constitutionally enshrined, but also has economic and social implications for the majority of Namibians. There is thus a critical need for law reform to increase access to justice for the thousands of rural Namibians who have no opportunity to obtain legal assistance and information about how to pursue their legal, socio-economic and political rights.

1.5 RELEVANCE OF THE STUDY

The Constitution and the law in general provide for the right to a fair trial, but this right in the Namibian context is limited by long delays in the hearing of cases in the ordinary courts, which in turn ends up being very expensive for most Namibians. The Namibian legal system further provides for public trials and defendants have the right to be present at trial, to consult with a lawyer in a timely manner and to have access to evidence. In criminal cases, indigent defendants are entitled to a lawyer provided by the State. In civil cases, indigent defendants are also entitled to legal aid but due to insufficient number of public prosecutors, legal aid is primarily reserved for criminal cases and litigants of civil cases are forced to seek private legal representation. As such, provision of legal aid to civil litigants are subject to the discretion of the Director of the Legal Aid Directorate¹⁸.

Namibia has an independent judiciary in both criminal and civil matters, which is widely perceived as impartial or unbiased. Everyone has access to a court to bring

¹⁷ United States Government. 2007. *Namibia: Bureau of Democracy, Human Rights, and Labor*. <http://www.state.gov/g/drl/rls/hrrpt/2007/100496.htm> accessed on 4 October 2011.

¹⁸ Legal Aid Act, *ibid*.

lawsuits seeking damages for or cessation of human rights violations. The Constitution, in line with its human rights protection clauses. In addition, it provides for administrative justice as well as judicial remedies for alleged wrongs against members of the community¹⁹. Similarly, the law provides for justice to citizens who have disputes of a commercial nature to seek remedies in the civil court. Civil court orders are generally enforced, but the process of civil litigation is a time-consuming and expensive exercise, often even discouraged by legal practitioners, and is unattainable to the majority of the population.

In order to eradicate this problem, a Small Claims Court which ensures speedier, inexpensive and equal representation within the legal system, will make the judicial system more accessible to ordinary, indigent Namibians. This could root out many problems, both socio-economically and politically. With no overbearing formalities, timely preparations and long court rolls, these cases could be dealt with quicker, be more transparent and be conducted at a pace determined by the parties to the disputes and the presiding officer. Each party could make their own case and need no lawyer, who are not only expensive but often delay the process as well²⁰. The presiding officer would facilitate the entire proceeding and thus eliminate the theatrics of the lawyers, which often leads a delay in the proceedings²¹. Each party presenting their own case, would rely on a verdict by a presiding officer, whose main object is simply to resolve the dispute before them. Thus, the inquisitorial evidential system of law applied in a Small Claims Court will eliminate the time-consuming process of the civil court since the presiding officer controls the entire proceeding, in contrast to the civil court process where the lawyers set the pace of the proceedings, one party often delaying the process and causing frustration to the other party.

There has lately been an outcry in the local media with complaints varying between service providers, such as the local authorities, encroaching on citizens' human rights

¹⁹ Article 18, The Constitution.

²⁰ Advice Guide. 2011. *Small Claims.*
http://www.adviceguide.org.uk/index/your_rights/legal_system/small_claims.htm accessed on 28 March 2011.

²¹ Advice Guide. 2011. *Small Claims.*
http://www.adviceguide.org.uk/index/your_rights/legal_system/small_claims.htm accessed on 28 March 2011.

by not providing the necessary services²². In other instances, community members are crying out against poor products and services²³ and the need for consumer rights legislation²⁴. Considering the socio-economic conditions prevailing in Namibia since the apartheid era with the majority of the population struggling to make a living or are living in extreme poverty, the global economic recession, an unofficial unemployment rate of approximately 51.2% and literacy levels in Namibia, it has become increasingly important for Namibians to be able to assert their rights. Where the value of N\$1 had become more and more important to the majority of the nation, it is practically unfathomable that there are no inexpensive ways for the public to assert their rights through the legal system.

The need for a Small Claims Court is especially necessary in a country such as Namibia where the income disparity is so big, the majority of the citizenry cannot afford legal representation and where protecting basic rights had become more important than ever before. Those citizens with the necessary financial means, such as wealthy individuals and corporations, are in fact using the law to their advantage by ensuring that the poor do not assert their rights. This leads to the poor being further marginalised, not only by the inaccessible judicial system but by wealthy individuals and corporations as well.

Consider the situation where a creditor²⁵, for example, attaches and sells at execution immovable property belonging to an indigent citizen, even pensioners, for a debt far below the value of the property to be sold in execution²⁶. These properties normally are sold for ridiculously low amounts, primarily to secure the debt since the objective of the sale is to cover the debt. This happened many times in the past, in several towns around Namibia where the local authority or other creditors would repossess the property of indigent citizens for a relatively small claim. The only manner

²² Smith, J-M, Smit, N. 29 July 2011. *City in Crisis*. Windhoek. The Namibian, p. 1.

²³ Parker, R. 11 August 2011. *Yesteryear's Juice*. Windhoek. The Namibian, p. 14.

²⁴ Immanuel, S. 29 July 2011. *Prepaid Electricity: People Have their Say*. Windhoek. The Namibian, p. 8.

²⁵ Examples of these creditors include municipalities, commercial banks and other mortgage lenders. Many creditors, including local authorities, had followed this route before to secure outstanding arrear accounts.

²⁶ This happened before, even where the debtor was a pensioner. The City of Windhoek recently agreed (Smit, N. '*City Writes Off Pensioner Debt*' Die Republikein, September 2011) to write off debt of pensioners in an attempt to avoid repossession of property belonging to pensioners.

through which the indigent citizen could assert their rights would be to obtain private legal representation but since the indigent citizen does not have the financial means to obtain legal representation, it is argued that such a citizen had no fair representation in the matter. In fact, not having the financial means is what prevents the debtor from paying his debt in the first place. The person who does not have the financial means to settle his debt, obviously does not have the financial means to acquire legal representation and on top of that, lacks the necessary education to defend himself in a case of foreclosure on his property.

The creditor in a situation such as this, would usually approach the court for a default judgement against the debtor and would subsequently sell the property for next to nothing in order to cover the debt plus legal fees. The defendant in this case, would even be worse off than before, now homeless, further impoverished and contributing to a further decline in the overall socio-economic situation of the country. Should the claim be for a debt of N\$15,000, for example, this matter could be heard in a Small Claims Court where the defendant could represent himself, thereby ensuring access to justice, fair representation and equality before the law for such a disadvantaged person. Through a Small Claims Court process a situation, such as the current example, would not be made worse, the circumstances of the defendant would not be further aggravated and the situation could possibly be resolved without foreclosure ensuing.

In another example where a furniture store, for example Bed Stores²⁷ sells a bed to an indigent citizen for N\$1,000 with full warranty of 3 years. In the event that the bed does not last beyond 1 year, the aggrieved indigent citizen will not recourse to the ordinary court as he would not be able to afford it and, despite the delay in civil proceedings and escalated legal fees, the person would not even consider to institute an action against Bed Stores. Bed Stores will no doubt defend itself in a suit against it. Just to open a file with a lawyer for an initial consultation would already exceed the price of the bed, thus the unsatisfied client and indigent citizen would be forced not to proceed with a suit and accept the loss. This further empoverishes this indigent citizen who now has to buy another bed costing another N\$1,000. In a

²⁷ Name invented for illustrative purposes.

Small Claims Court the indigent citizen would stand a chance of recovering at least a portion of the N\$1,000 from Bed Stores. This would allow such person to assert his right, to be treated fairly and not to be further impoverished by the current system.

Furthermore, most businesses in Namibia exercise freedom with regard to the quality of their goods and services. These businesses know very well that to hold them accountable for poor quality of goods and services in any forum would cost the unsatisfied client a lot of money. These service providers often ensure that where the unsatisfied client has the financial means, that the quality of their goods and services are upgraded. In the instance where the unsatisfied client is an indigent citizen, however, the attitude is that of 'take it, or leave it'. This is a clear example, especially in supermarkets, of lack of respect for the law and abuse of the rights of the indigent citizen. In addition, most of the businesses are owned by previously advantaged citizens and in a country where racial divide is very prominent, income is hugely unequal and the racial divide is distinguished by wealth, this contributes towards socio-political instability, as for many previously disadvantaged people there is no change in the divide since independence.

A well functioning justice sector is a precondition for spurring economic growth. Consequently, most justice reform programmes should focus on increasing the capacities of the judiciary to deal with civil and commercial matters. However, rather than simply being a mechanism to foster economic growth, access to justice is more importantly a means to prevent and overcome human poverty, by strengthening the choices of disadvantaged people to seek and obtain a remedy for grievances.

A Small Claims Court in Namibia would not only ensure the assertion of the right to access to justice but also to ensure equality before the law, irrespective of social status, wealth, race or education. It would also contribute to socio-political stability as well as enriching the lives of many an indigent citizen, preventing injustice and further impoverishment. In Namibia, the poor are getting poorer whilst the rich are getting richer. Social injustice is very prominent. It is therefore unfathomable that the indigent citizenry have no easily accessible and inexpensive access to the judicial system, especially since they form the vast majority of the population with the biggest voting power. Unfortunately these people need protection more than the

minority who have the financial means, which stem from a variety of reasons described in Chapter 3 below.

1.6 SCOPE AND LIMITATIONS OF THE STUDY

The research methodology employed was mainly desktop research. Information on the subject matter were readily available and various research projects were performed on the subject matter. However, these research projects focused mainly on access to justice as a whole, with no particular emphasis on the socio-economic impacts that such a lack of access to justice has on indigent people. Some of the research papers dealt with the subject matter mainly as a chapter in an overall research on jurisprudential developments in Namibia and around the world.

Furthermore, the last national census and country statistical reports dates back to the year 2001. These reports do not give a clear indication of the current demographics and country statistics. As such, the statistics discussed in Chapter 3 are rather outdated.

A further obstacle encountered was the lack of research projects pertaining to consumer rights. No official records are available on the status of consumer awareness and consumer related disputes in Namibia.

One of the positive outcomes of the research was that the Ministry of Justice already considered the establishment of a Small Claims Court in Namibia. This means that a need already existed and was identified as far back as 1997. The framework of the National Small Claims Court Draft Bill is sound and with a few amendments could be tabled to Parliament to be promulgated. The aim of this paper was however not to address the shortcomings of the Draft Bill and no recommendations will be made in this regard.

Last but not least, this research highlights a need for consumer awareness and education which surfaced as a general desire by the public, through complaints and reports made in the media. This indicates a step in the right direction.

CHAPTER 2: OVERVIEW OF THE SMALL CLAIMS COURT

2.1 THE EVOLUTION OF THE SMALL CLAIMS COURT

“The conception of simple, informal, lawyerless courts where ordinary people can settle their affairs amicably without expense, delay, technicality, or contentiousness has fascinated Americans since colonial times. This theme can be seen running through the movements to codify the law, simplify legal procedure, open the practice of law to Everyman, create conciliation courts; the creation of the Small Claims Courts and administrative tribunals; and attempts in the 1960s and 1970s to divert small matters out of the courts altogether and into Neighborhood Justice Centers and other informal dispute resolution mechanisms.”²⁸

The above quote highlights how and why the Small Claims Court exists today. It outlines the court’s purpose, illustrates how the need for this form or alternative dispute resolution mechanism is derived and how the need evolved into a forum which is generally accepted. The movement to establish Small Claims Courts began in the early 1960s, when US Justice of the Peace courts were established²⁹. These courts were increasingly being seen as obsolete and it was desirable to have a court which would allow litigants to represent themselves without legal counsel. In the State of New York, for example, the establishment of Small Claims Courts came in response to the 1958 findings of the then Governor, Thomas E. Dewey³⁰. The legislature formed the temporary Tweed Commission³¹ (named after its chairperson, lawyer Harrison Tweed) to conduct public and private hearings regard post-World

²⁸ Eric H. Steele. 1981. *The Historical Context of Small Claims Courts Law & Social Inquiry*. Volume 6 Issue 2. Pp 293-376.

²⁹ Eric H. Steele. 1981. *The Historical Context of Small Claims Courts Law & Social Inquiry*. Volume 6 Issue 2. Pp 293-376.

³⁰ Eric H. Steele. 1981. *The Historical Context of Small Claims Courts Law & Social Inquiry*. Volume 6 Issue 2. Pp 293-376.

³¹ The Harrison Tweed Award was created in 1956 to recognize the extraordinary achievements of state and local bar associations that develop or significantly expand projects or programs to increase access to civil legal services for poor persons or criminal defense services for indigents. This award is given annually by the American Bar Association's (ABA) Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid & Defender Association, is presented during the ABA Annual Meeting at a joint luncheon of the National Conference of Bar Presidents, National Association of Bar Executives and National Conference of Bar Foundations. The award is named for Harrison Tweed, past president of Sarah Lawrence College. (source: <http://www.hebrides-news.com/harris-tweed-award-19611.html>)

War II court situation, such as overall caseload volumes that had grown to the point where court delays were becoming a major problem and judicial reform was necessary. Since then, the movement to establish Small Claims Courts has led to the establishment of many a Small Claims Court in most US states³².

The neighbourhood justice centres or people's courts were created to serve as forums where disputes could be resolved speedily, at low cost, without formality, self-representation and an activist adjudicator in order for all citizens, regardless of their socio-economic status, to benefit from and have equal access to the law³³. This is what is today's Small Claims Court in most democratic countries where it exists today. The mission envisaged is the diversion of small matters out of the formal courts and into informal dispute resolution mechanisms, through an inquisitorial system of law.

2.2 THE PURPOSE AND FUNCTIONS OF THE SMALL CLAIMS COURT

The broad purpose of Small Claims Court is to provide judicial access for people with small financial or commercial disputes. Each country that establishes a Small Claims Court is at liberty to create or establish a Small Claims Court system that is specifically designed to resolve small disputes without the need to hire a lawyer and to set the maximum claim amount of such disputes.

In a Small Claims Court, a person may sue someone for small claims that will be too cumbersome and too expensive to sue for in the ordinary civil courts. Such cases may include, amongst others, small liquid claims, bad workmanship, sub-standard products, goods and services paid for but not delivered, damage to property, damage to a vehicle as a result of a motor vehicle accident, disputes between landlords and tenants as well as medical injuries. The Small Claims Court is more desirable under these circumstances since the procedures are simpler than in the ordinary civil

³² Eric H. Steele. 1981. *The Historical Context of Small Claims Courts Law & Social Inquiry*. Volume 6 Issue 2. Pp 293-376.

³³ Eric H. Steele. *Ibid*.

courts, which results in speedy and less cumbersome resolution of the dispute. Since legal representation is not allowed it is also a lot less expensive process.

A Small Claims Court will generally have a maximum limit to the amount of judgements it can award and by suing in a Small Claims Court, the plaintiff typically waives the right to claim more than the court can award. The plaintiff may or may not be allowed to reduce a claim to fit the requirements of this court and to bring the case to Small Claims Court, the plaintiff must prove that the actual damages were within the court's jurisdiction. Small Claims Courts usually encompass small private disputes in which large amounts of money are not at stake, a maximum of \$25,000 in Canada³⁴ and R12,000 in South Africa³⁵. The routine collection of small debts forms a large portion of the cases brought to Small Claims Courts, as well as evictions and other disputes between landlords and tenants, unless the jurisdiction is already covered by a tenancy board. Small Claims Courts further have limited jurisdiction to hear civil cases between private litigants and handle minor cases that involve small claims only. Courts authorized to try small claims may also have other judicial functions. Although it can perform other judicial functions, it has limited functions when it comes to handling civil cases involving private law practitioners.

Moreover, in a Small Claims Court, the rules of civil procedure, and sometimes evidence, are altered and simplified in order to ensure speedier resolution and to make the procedures more economical. Individuals can represent their own cases and represent themselves without having to obtain the representation of a lawyer. In some jurisdictions, corporations must still be represented by a lawyer in Small Claims Court. Expensive court procedures such as interrogatories and depositions are usually not allowed in Small Claims Court, and practically all matters filed in Small Claims Court are set for trial³⁶.

³⁴ Ministry of the Attorney General. 2010. *Small Claims Court: Ontario*. <http://www.attorneygeneral.jus.gov.on.ca/english/news/2011/20110105-civil-nr.asp> accessed on 12 October 2011.

³⁵ Department of Justice and Constitutional Development. 2011. *South African Courts*. <http://www.justice.gov.za/about/sa-courts.html> accessed on 4 October 2011.

³⁶ Law Society of Namibia. March 2011. *Access to justice: Small Claims Court*. Windhoek. Consumer News, p. 5.

Anyone, except juristic persons such as Companies, Close Corporations and Associations, may institute claims. Persons under 18 must accordingly be assisted by a parent or legal guardian. Claims may be instituted against any person, including juristic persons. No claims may be instituted against the State in this court³⁷.

2.3 ADVERSARIAL AND INQUISITORIAL EVIDENTIAL SYSTEM

Dispute resolution processes fall into two major categories³⁸:

1. Adjudicative processes, such as litigation or arbitration, in which an adjudicator, jury or arbitrator determines the outcome; and
2. Consensual processes, such as collaborative law, mediation, conciliation, or negotiation, in which the parties attempt to reach agreement.

Procedural law comprises the rules by which a court hears and determines what happens in a civil lawsuit, criminal or administrative proceedings. The rules are designed to ensure a fair and consistent application of due process or fundamental justice, in countries that have the common law system, to all cases that come before a court. Procedural law gives practical meaning and effect to the rules of substantive law. Although different legal processes aim to resolve many kinds of legal disputes, the legal procedures share some common features³⁹. All legal procedure is concerned with due process. Absent very special conditions, a court cannot impose a penalty, civil or criminal, against an individual who has not received notice of a lawsuit being brought against them, or who has not received a fair opportunity to present evidence for themselves. The law of evidence further governs the proof of facts in a court of law and therefore forms part of the procedural machinery that makes substantive law effective⁴⁰.

³⁷ Law Society of Namibia. *Access to justice: Small Claims Court*. Windhoek. March 2011. Consumer News, p 5.

³⁸ Schwikkard, Van der Merwe. 2002. *Principles of Evidence*. Second Edition. Pretoria. Juta & Co, p 2.

³⁹ Schwikkard, Van der Merwe. 2002. *Principles of Evidence*. Second Edition. Pretoria. Juta & Co, p 2.

⁴⁰ Schwikkard, Van der Merwe. 2002. *Principles of Evidence*. Second Edition. Pretoria. Juta & Co, p 2.

2.3.1 Adversarial Trial Procedure

The adversarial trial procedure, also called the accusatorial trial procedure has three leading features, namely:

- a) The parties are responsible for the presentation of evidence in support of their respective cases.
- b) The adjudicator is required to play a passive role.
- c) Much emphasis is being placed on oral presentation of evidence and cross-examination of witnesses, performed by the lawyers.

The adversarial model proceeds from the premise that '*greater approximation of the truth*' is possible if litigants are allowed to present their own evidence⁴¹.

2.3.2 Inquisitorial Trial Procedure

On the other, the inquisitorial method is adjudicator or judge centered. It proceeds from the premise that a trial is not a contest between two opposing parties but is essentially an inquiry to establish the material truth. '*Judicial examination is considered to be the pivotal mechanism in the process of fact-finding*'⁴².

In England and Wales and other common law countries such as Namibia and the United States, criminal proceedings are operated on the basis of what is referred to as an adversarial system of justice. This differs from the inquisitorial system of justice which is employed in other legal jurisdictions including, in particular many continental European jurisdictions which apply a civil code⁴³.

⁴¹ Schwikkard, Van der Merwe. 2002. *Principles of Evidence*. Second Edition. Pretoria. Juta & Co, p 9.

⁴² Schwikkard, Van der Merwe. 2002. *Principles of Evidence*. Second Edition. Pretoria. Juta & Co, p 9.

⁴³ Hodgson, J. 2007. *Inquisitorial and Adversarial Procedure: Deriving Normative Consequences for the Trial*. Wiley Online Library. onlinelibrary.wiley.com/ accessed on 24 July 2011.

2.3.3 Inquisitorial versus Adversarial System of Law

In inquisitorial systems the adjudicator is involved in the investigation and in the preparation of evidence, and he or she is concerned as to how the various parties will ultimately present their case at trial⁴⁴. It is an inquisitorial adjudicator's role to lead the questioning of witnesses while prosecution and defence parties are entitled to ask supplementary questions. The influence of the adjudicator in the process has the effect of reducing the level of contest between the two opposing parties, something which is a defining characteristic of the adversarial process. It is submitted that allowing an expert neutral party to lead the examination in chief of witnesses would take a lot of the heat and posturing out of the current adversarial system and reduce the risk of intimidation and threat and the risk that one highly gifted lawyer could unfairly tilt the balance of the trial⁴⁵.

A key feature of the French inquisitorial system in criminal justice (and in other countries which operate on similar systems) is the function of the '*juge d'instruction*' (the investigating magistrate)⁴⁶. The '*juge d'instruction*' is an adjudicator given the responsibility for conducting investigations into serious crimes or complicated inquiries and is independent from the political power as well as the prosecution⁴⁷. An inquisitorial adjudicator examines suspects and witnesses, and is empowered to order searches or other investigations. The '*raison d'etre*' of the '*juge d'instruction*' is the finding of the truth, not the prosecution of a particular person⁴⁸. As such his duty is to look both for incriminatory and exculpatory evidence. Both the prosecution and the defence may request the adjudicator to take actions and the adjudicator's decisions can be appealed before a Court of Appeal⁴⁹.

Another strength of the inquisitorial system over the adversarial system is that as a consequence of the judicial enquiry and the possibility for judicial proceedings to be

⁴⁴ Hodgson, J. 2007. *Inquisitorial and Adversarial Procedure: Deriving Normative Consequences for the Trial*. Wiley Online Library. onlinelibrary.wiley.com/ accessed on 24 July 2011.

⁴⁵ Zweigert, K. & Kotz, H. 1995. *An introduction to Comparative Law*. Oxford. Clarendon Press, p 271.

⁴⁶ Hodgson, J. 2007. *Inquisitorial and Adversarial Procedure: Deriving Normative Consequences for the Trial*. Wiley Online Library. onlinelibrary.wiley.com/ accessed on 24 July 2011.

⁴⁷ Pakes, F. 2003. *Comparative Criminal Justice*. Abington, UK. Willan Publishing, p 139.

⁴⁸ Hodgson, J. *Ibid.*

⁴⁹ Hodgson, J. *ibid.*

cancelled on evidential or procedural grounds during the initial phase, cases in which procedure is suspect or the evidence is weak, tend not to proceed to the stage of trial. This eliminates the adversarial practice of plea bargaining (which is popular, for example, in the United States of America) in strong cases for the prosecution.

2.3.4 *The Inquisitorial Nature of the Small Claims Court*

The Small Claims Court procedure is inquisitorial in nature and thus eliminates a number of problems that are experienced in the civil procedural courts. The above discussions considered key aspects of the inquisitorial and adversarial systems. In the following submission, this paper wish to elaborate on the above discussions by arguing that the inquisitorial system offers a better and more effective mode of governance in civil procedural justice than the adversarial system currently employed in common law jurisdictions. A reform would represent a modernisation of the existing system and create a new legal order more in keeping with modern times and practices⁵⁰. In addition, the inquisitorial system will present a more adequate system of redress or compensation for indigent litigants. The fact that the Small Claims Court is based on the inquisitorial, rather than adversarial, system of law thus plays an important role in the determination of the right to access to justice. The inquisitorial nature of Small Claims Courts also inspire people to initiate and pursue justice procedure in addition to educating themselves, through representating themselves, on legal matters, legal protection and the remedies that they are entitled to.

⁵⁰ Pakes, F. 2003. *Comparative Criminal Justice*. Abingdon, UK. Willan Publishing, p 139.

CHAPTER 3: THE SMALL CLAIMS COURT AS AN INSTRUMENT OF ACCESS TO JUSTICE IN NAMIBIA

3.1 SMALL CLAIMS COURT VIS-À-VIS ACCESS TO JUSTICE

The Universal Declaration of Human Rights (UDHR)⁵¹ proclaimed a wide spectrum of human rights that every human being has, without discrimination. They include rights to education, to adequate housing and other economic, social and cultural rights, amongst others.

Economic, social and cultural rights are a broad category of human rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵² and other legally binding international and regional human rights treaties. Nearly every country in the world is party to a legally binding treaty that guarantees these rights⁵³. They include, amongst others:

- The right to adequate housing, including security of tenure, protection from forced eviction and access to affordable, habitable, well-located and culturally adequate housing.
- The right to food, including the right to freedom from hunger and access at all times to adequate nutritious food or the means to obtain it.

States bear the primary responsibility for making human rights a reality and they must protect peoples' rights by ensuring that other people or bodies do not abuse these rights⁵⁴. Most importantly, states must fulfill the rights of its citizens by making them

⁵¹ Adopted and proclaimed by the United Nations General Assembly resolution 217A(III) on 10 December 1948.

⁵² Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A(XXI) on 16 December 1966 and entered into force on 3 January 1976.

⁵³ Amnesty International. Amnesty International's Demand Dignity Campaign. *Economic, Social And Cultural Rights*. <http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr> accessed on 14 October 2011.

⁵⁴ Amnesty International. Amnesty International's Demand Dignity Campaign. *Economic, Social And Cultural Rights*. <http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr> accessed on 14 October 2011.

a reality in practice⁵⁵. Although states, especially transitional governments⁵⁶, may need time to realize economic, social and cultural rights, they have to take the necessary steps towards fulfilling them. As an initial step, they must prioritize ‘*minimum core obligations which are minimum essential levels of each of the rights*’⁵⁷. In line with this, states must not discriminate in their laws, policies or practices and must prioritize the needs of the most vulnerable of its citizens when allocating resources⁵⁸.

The Namibian Constitution makes provision for people from indigent groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the judicial system, for grievances in accordance with human rights principles and standards. The right to a fair public hearing in a dispute is constitutionally entrenched and also outlined in several international and regional treaties that were ratified by Namibia⁵⁹. The rights protected by the Constitution discussed in this paper are the following:

3.1.1 Respect for Human Dignity

Article 8⁶⁰ reads:

- “(1) *The dignity of all persons shall be inviolable.*
- (2) (a) *In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*

⁵⁵ Amnesty International. Amnesty International’s Demand Dignity Campaign. *Economic, Social And Cultural Rights*. <http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr> accessed 14 October 2011.

⁵⁶ As in Namibia’s case after independence in 1990.

⁵⁷ Amnesty International. Amnesty International’s Demand Dignity Campaign. *Economic, Social And Cultural Rights*. <http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr> accessed on 14 October 2011.

⁵⁸ Amnesty International. Amnesty International’s Demand Dignity Campaign. *Economic, Social And Cultural Rights*. <http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr> accessed on 14 October 2011.

⁵⁹ Nakuta, J and Chipepera, F. 2011. *The Justice Sector and the Rule of Law In Namibia*. Windhoek. HRDC and NID, p 31.

⁶⁰ The Constitution, *ibid*.

(b) *No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”*

According to this provision of the Constitution all persons are protected against inhumane and degrading treatment. The dignity of all persons are inviolable, without specific areas being mentioned. One could thus conclude that it relates to all aspects of a person’s everyday life, including their commercial dealings. In this regard, there is no protection of this right to dignity either through consumer rights legislation, housing and tenancy rights legislation or a forum through which inhuman treatment of these areas could be addressed. The only recourse a person whose right to human dignity in the commercial sphere has, is by lodging a complaint with the Office of the Ombudsman or with the Namibia Financial Institutions Supervisory Authority (NAMFISA). These avenues however do not present a forum for dispute resolution but merely for lodging of complaints.

Many people in Namibia face levels of deprivation which undermine the right to live with dignity. Hunger, homelessness and preventable diseases are not inevitable social problems or simply the result of natural disasters. They are a violation of people’s economic, social and cultural rights. Access to justice is an essential right which should be afforded to victims of all human rights violations, but many people who live in poverty and other marginalized groups, have their rights violated on a daily basis and are denied justice when they try to challenge these violations, be it through financial constraints or procedural requirements. Although these rights are constitutionally protected in Namibia⁶¹, existing remedies are ineffective in providing reparation, including compensation, rehabilitation and restitution to victims or the remedies are simply inadequately enforced.

3.1.2 Equality and Freedom from Discrimination

Equality and Freedom from Discrimination is protected under the Constitution through Article 10⁶². This article states that:

⁶¹ Article 8, *ibid.*

⁶² The Constitution, *ibid.*

- (1) *All persons shall be equal before the law.*
- (2) *No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'*

Furthermore, international law guarantees human rights to all without distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁶³. In line with international standards, states are obliged to take necessary measures to ensure the right of all to be free from discrimination. This is achieved through the repeal of discriminatory legislation which facilitates human rights abuses and denies equal access to justice.

The lack of access to justice for indigent citizens amounts to indirect discrimination. Indirect discrimination occurs when a practice, rule, requirement or condition appears to be neutral but impacts disproportionately upon particular individuals or groups, unless the particular practice, rule, requirement or condition is justified⁶⁴. Although Namibia has included the protection of this right under the Constitution, it should take account of the relevant differences between groups in Namibia in order to prevent indirect discrimination.

3.1.3 Fair Trial

Article 12⁶⁵ ensures fair trial for all persons by an '*independent, impartial and competent Court or Tribunal established by law*⁶⁶', which seeks to protect the rights of persons in criminal proceedings. No such rights are guaranteed for civil litigants, even though civil trials are generally conducted in a fair and reasonable manner. A civil trial presumably takes place amongst members of equal status and can thus be considered fair as per the rule of law. There is, however, a general consensus that legal professional services are not affordable to the average person in Namibia and

⁶³ Amnesty International. Amnesty International's Demand Dignity Campaign. *Discrimination*. <http://www.amnesty.org/en/discrimination> accessed on 14 October 2011.

⁶⁴ Amnesty International. Amnesty International's Demand Dignity Campaign. *Discrimination*. <http://www.amnesty.org/en/discrimination> accessed on 14 October 2011.

⁶⁵ The Constitution, *ibid*.

⁶⁶ Article 12 of the Constitution.

that civil litigation is reserved for the few privileged members of society. The major barrier to access to justice in Namibia remains the high costs of legal services, with a small proportion of the population being served by a high proportion of the trained legal professionals⁶⁷. Namibia's Gini Coefficient of 0.6 ranks it as one of the world's most unequal societies, where 5% of the population control 70% of Gross Domestic Product⁶⁸.

Based on the above, it can be deduced that although the right to a fair trial is constitutionally protected, it is not guaranteed for litigants in civil procedure and a Small Claims Court will contribute significantly towards guaranteeing this right to the majority of Namibians.

3.1.4 Property and Housing Rights

Property rights are protected by Article 16.⁶⁹ In addition, international law provides that every person has the right to live with dignity and not to be denied their rights to adequate housing, food, education and health care.

Article 16 provides that all persons shall have the right to acquire and dispose of their property in their own discretion. However, there is no protection guaranteed in terms of this right. Discriminatory policies, regulations and requirements may preclude indigent citizens from acquiring property. In addition, town councils and the commercial banks have a stringent list of requirements that preclude indigent citizens from acquiring property. Even if indigent citizens would be able to meet the stringent requirements, the law provides no protection to these subsequent owners. Since there is no housing board or committee or similar organisation for the protection of the rights of homeowners, these homeowners who, due to lack of financial resources (often brought about by job loss), might end up not being able to afford to keep up with monthly repayments with these institutions. This normally follows with these institutions, through the current civil litigation process, evict and repossess the

⁶⁷ Nakuta, J and Chipepera, F. 2011. *The Justice Sector and the Rule of Law In Namibia*. Windhoek, HRDC and NID, p 36.

⁶⁸ Nakuta, J and Chipepera, F. 2011. *The Justice Sector and the Rule of Law In Namibia*. Windhoek, HRDC and NID, p 36.

⁶⁹ The Constitution, Ibid.

property of these indigent citizens. The indigent homeowner will not be able to defend this under the current judicial system, due to lack of financial resources. The need for protection by society and the State under these circumstances is therefore not constitutionally guaranteed and Namibia lacks a forum to address these issues.

Furthermore, when Namibia attained independence in 1990, the Constitution⁷⁰ introduced the right to all Namibians to reside or settle in any part of the country. This guarantees all Namibians greater freedom of movement and life choices. The provision arguably contributed to an increased flow of people from rural areas into urban areas in search of better living and working conditions. In turn this migration contributed to the fact that thousands of low-income households today live in unplanned urban settlements, often without secure tenure and basic needs such as clean water and electricity⁷¹. To address the challenges facing informal settlers, the State developed new policies and structures to accommodate the increasing segment of the population living in informal settlements in a flexible and efficient manner⁷².

The focus of land reform efforts in urban areas has been to provide secure property rights to thousands of Namibians who were deliberately denied these rights under the apartheid regime, as well as the thousands of residents of informal settlements that have proliferated after independence⁷³. The policies and structures were to secure land tenure in order to grant freehold and leasehold titles to these urban settlers. Only secure land tenure in Namibia at present is freehold title and leasehold title, because both titles can be used as collateral but many Namibians cannot afford these costly titles⁷⁴. A first draft of the Flexible Land Tenure Bill was produced in 1999 and the final bill was completed in February 2004⁷⁵. However, to date, this Bill

⁷⁰ Article 21(1)(h)), *ibid*

⁷¹ Legal Assistance Centre. 2005. *A Place We Want To Call Our Own: A Study on Land Tenure Policy and Securing Housing Rights in Namibia*. Windhoek. John Meinert Printers, p 22.

⁷² Legal Assistance Centre. 2005. *A Place We Want To Call Our Own: A Study on Land Tenure Policy and Securing Housing Rights in Namibia*. Windhoek. John Meinert Printers, p 87.

⁷³ Jacobs R.N. and P. Egumbo. 1996. *Lessons in Urban Governance: A Case Study of Housing Policy and the Housing Situation in Namibia*. Windhoek. The Urban Trust of Namibia, p 65.

⁷⁴ Legal Assistance Centre. 2005. *A Place We Want To Call Our Own: A Study on Land Tenure Policy and Securing Housing Rights in Namibia*. Windhoek. John Meinert Printers, p 87.

⁷⁵ Jacobs R.N. and P. Egumbo. 1996. *Lessons in Urban Governance: A Case Study of Housing Policy and the Housing Situation in Namibia*. Windhoek. The Urban Trust of Namibia, p 65.

had not been promulgated and persons occupying these properties still do not hold title and thus are paying rent to the local authorities instead of owning the property.

3.1.5 Tenancy Rights

The rights of tenants are not safeguarded by the Constitution or other legislation, except through the Prohibition of Racial Discrimination Act.⁷⁶ As properties have become increasingly expensive, mortgage loans from commercial banks increasingly unattainable and the cost of living increasing rapidly, less and less people qualify for mortgage loans to acquire a property of their own. The Bank of Namibia research department reported recently that 70% of Namibia's population cannot afford decent residential properties mainly due to issues of affordability⁷⁷. This situation led to the increase in renters in Namibia, which now requires a legal framework for the protection of the rights of tenants. The only legislation in Namibia that safeguards the rights of homeowners and tenants is the Racial Discrimination Prohibition Act.⁷⁸ This Act provides that no person may be discriminated against in property purchase or rental transactions on the basis of that person being from a particular racial group. This however only refers to discrimination and not to other types of disputes that might arise between the parties.

The National Estate Agents Board under the authority of the National Estate Agents Act 112 of 1976 regulates dealings related to tenants and landlord where an estate agent was involved in the transaction. This avenue in the past seemed to have been inadequate and since not all rental agreements are entered into with the involvement of an estate agent, this protection is limited to the scope of the Estate Agents Act. Moreover, the Estate Agents Board only has the mandate to regulate and control certain activities of estate agents in the public interest and does not pertain to issues directly between landlord and tenant. Since there is no legal framework for the protection of the rights of either the landlord or tenant, redress can only be sought

⁷⁶ Act 26 of 1991.

⁷⁷ Bank of Namibia. 3 October 2011. *Stop Foreigners from Buying Property, says BON*. Windhoek. The Namibian, p 11.

⁷⁸ Ibid.

through the ordinary civil procedures. Thus, the party with the necessary financial resources would ultimately get away with infringing the rights of the other party.

3.1.6 Legal Aid

The Legal Aid Act 27 of 1990⁷⁹ makes provision for legal assistance to indigent citizens in both criminal and civil cases. The discretion for the provision of legal aid in civil cases rests with the Director of the Legal Aid Department (as defined in Section 3 the Act⁸⁰). This means that the provision does not grant an absolute right to litigants in civil matters. It is statistically proven that if the director has to apply the discretion, that it is not exercised for litigants seeking legal aid in civil matters. The fact that the Director of the Legal Aid Directorate has a discretion as to whether or not grant legal aid to a civil litigant, as per the Act, defeats the purpose and establishment of the Directorate and, as a result, is a direct denial of the right and access to justice. This denial runs contrary to the ideal of the rule of law and that all persons are entitled to the equal protection of law.

The Legal Aid Act provides that legal representation be given to litigants in criminal cases. This provision is an inalienable and unequivocal right in the instance where the litigant has no resources to acquire legal representation of his own in criminal litigation. This right is not guaranteed to litigants seeking legal representation in civil matters. Furthermore, the Office of the Ombudsman has the mandate to investigate and report on matters pertaining to the infringement of rights of citizens, however this mandate does not include litigation and thus does not serve as a recourse to indigent citizens in civil matters.

⁷⁹ Act 27 of 1990

⁸⁰ Legal Aid Act 27 of 1990.

3.1.7 The Mandate of the Ombudsman

The meaning of the word ombudsman is derived from the Scandinavian languages which means 'representative'⁸¹. This refers to the Ombudsman as the representative of the people through investigating individual complaints which are lodged with the Ombudsman. The Office of the Ombudsman and the position of the Ombudsman were established in terms of the Ombudsman Act, 1990⁸² which spells out the key mandate areas and powers of the Ombudsman, pertaining to human rights violations, including the protection, promotion and enhancement of respect for human rights in the country⁸³.

The Ombudsman and his powers and functions are set out in Chapter 10 of the Constitution.⁸⁴ The functions and powers of the Ombudsman relate to investigations, negotiation and compromise in matters of injustice, violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment by an official in the employ of an organ of state, etc. Emphasis is placed on solving the problem rather than adopting legal approaches⁸⁵ and, as such, the Ombudsman's functions do not include adjudication, either judicial or quasi-judicial. If the Ombudsman's Office is not able to resolve a dispute reported by it, it would be referred to a court. The scope of the Ombudsman's function therefore does not include disputes in damages and as such does not include disputes of a civil nature.

The Ombudsman, Advocate John Walters, in a recent interview with a local newspaper⁸⁶ confirmed that most of the complaints filed with the Ombudsman's office relate to maladministration against Government ministries and other public institutions. Insofar as the delays in judgements in the judicial system are concerned,

⁸¹ Konrad Adenauer Stiftung. 2008. Walters, J., *The Protection and Promotion of Human Rights In Namibia: The Constitutional Mandate of the Ombudsman: In Human Rights and the Rule of Law in Namibia*. Windhoek. Macmillan at p. 121.

⁸² Act 7 of 1990.

⁸³ Konrad Adenauer Stiftung. 2008. Walters, J., *The Protection and Promotion of Human Rights In Namibia: The Constitutional Mandate of the Ombudsman: In Human Rights and the Rule of Law in Namibia*. Windhoek. Macmillan at p. 121.

⁸⁴ See Chapter 10 of the Constitution.

⁸⁵ Konrad Adenauer Stiftung. 2008. Walters, J., *The Protection and Promotion of Human Rights In Namibia: The Constitutional Mandate of the Ombudsman: In Human Rights and the Rule of Law in Namibia*. Windhoek. Macmillan at p. 121.

⁸⁶ Mboya, E. 14 October 2011. *Uphill Battle for Ombudsman*. Windhoek. Windhoek Observer, p 5.

he further stated that, although his office is also a human rights institution, they may not interfere with the functions of the judiciary. This means that complaints received regarding long delays in court cases cannot be addressed and settled by the Ombudsman's Office and are just referred back to the Ministry of Justice.

3.2 FACTORS OBSTRUCTING ACCESS TO JUSTICE

3.2.1 Overview

After independence in 1990, Namibia devised its development strategy by formulating and implementing consecutive development plans. The Plans set out short-term to medium-term objectives as well as strategies for realising the specific objectives. The development plans to date are the Transitional National Development Plan (TNDP), a three year plan that covered the period of 1991/92 to 1993/94⁸⁷, the First National Development Plan (NDP1)⁸⁸, a medium-term plan that covered the period of 1995/96 to 1999/2000 and the Second National Development Plan (NDP2)⁸⁹, another medium-term plan that covered the period of 2001/02 to 2005/06. NDP3⁹⁰ has been formulated to cover the period 2007/08 to 2011/12. Subsequently, a fifth long-term development plan named Vision 2030 has been formulated to capture the aspirations and commitments of Namibians to strive for achieving growth sufficient to reduce poverty and under-development and to ultimately attain the status of developed country by the year 2030. The first two development plans set four development objectives, which are to stimulate and sustain economic growth, creating employment and reducing inequalities in income distribution and poverty. However, this part of the research paper focuses on NDP3 and Vision 2030.

It is common knowledge that essential economic services and opportunities are unevenly distributed with some areas and indigent groups in Namibia being left behind⁹¹. This results in overall violation of the human, social and economic rights and has adverse effects on the development of these groups of people in a secular, democratic state. The current judicial system unfortunately is ineffective and

⁸⁷ Government of the Republic of Namibia, National Planning Commission. 1990. *Transitional National Development Plan (TNDP): Macroeconomic, Sectoral and Cross-sectional Policies Vol. 1*, Windhoek.

⁸⁸ Government of the Republic of Namibia, National Planning Commission. 1996. *First National Development Plan (NDP1). Vol. 1*, Windhoek.

⁸⁹ Government of the Republic of Namibia, National Planning Commission. 2002. *Second National Development Plan (NDP2). Vol. 1*, Windhoek.

⁹⁰ Government of the Republic of Namibia, National Planning Commission. 2008. *Third National Development Plan (NDP3). Vol. 1*, Windhoek.

⁹¹ Central Intelligence Agency (CIA). *Factbook: Namibia*. <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> accessed on 29 September 2011.

inaccessible to most citizens, excluding the poor and disadvantaged groups in Namibia. There are several reasons why these groups do not institute legal action in response to a legal issue. These include, amongst others, lack of available and affordable legal representation, lack of adequate legal aid systems, long delays in the process, abuse of authority and power, lack of adequate knowledge/education, lack of capacity, disempowerment or exclusion, gender bias and avoidance of the legal system⁹². Lack of adequate financial resources nevertheless by far exceeds all of these aforementioned reasons.

What is more is that most people think that seeking remedies through legal action are futile, that it would make no difference or make things worse, as they could be worse off financially. It is consequently argued that there is a complex relationship between a person's socio-economic position and the degree to which justice is initiated and pursued. As such, the likelihood of initiating and pursuing justice increases with income and educational levels. There is also the issue of overbearing, formalic legal procedures of civil litigation that most people are simply avoiding.

3.2.2 Cost of Litigation

In general, court fees, in contrast to practitioners' legal fees, do not hinder access to courts. In most courts there are procedures to apply for indigent rulings, which would exempt the party concerned from paying any court fees⁹³. Considering the cost of civil litigation and the lengthy, formal procedures followed during this process, most litigants choose not to take any legal action. Litigants are sometimes even deterred by legal practitioners from taking this route as it is such an expensive process. Since most Namibians cannot afford the costs involved in civil litigation, they are deprived their right to access to justice and as such deprived their right to stand up for their basic human rights.

⁹² United Nations Development Programme (UNDP). 2004. *Access to Justice Practice Note*. Accessed online at <http://europeandcis.undp.org/governance/hrj/show/D8C74305-F203-1EE9-B8B6C3C07F451806> on 22 September 2011, p.4.

⁹³ Nakuta, J and Chipepera, F. 2011. *The Justice Sector and the Rule of Law In Namibia*. Windhoek. HRDC and NID, p 35.

3.2.3 Population

The Namibia 2001 Population and Housing Census⁹⁴ showed the population to be 1.8 million with a growth rate of 2.6% per year, with 33% living in urban areas compared to 67% in rural areas⁹⁵. Estimations for 2010 show a population of 2.1 million⁹⁶. 52% of the population were female and 48% male and more than 60% were below the age of 24⁹⁷. The youth comprise approximately one-third of the total population. In Namibia access to justice is limited and virtually out of reach by both economic and geographic boundaries with nearly 67% of Namibians live in rural areas with only 33% based in urban areas,⁹⁸ with virtually all lawyers residing and practicing in the capital city and other urban centres. Thus access to legal assistance is not readily available to people in the rural areas.

3.2.4 Income

Namibia's population comprises of a diversity of cultures and languages spread across the 13 regions. The typical family structure is based on the extended family as the source of power and income as well as a safety net for the members. In rural Namibia, extended families, often with more than five family members and only one breadwinner, are bigger. It is estimated that almost a fifth of all families depend on social welfare as the sole source of income. According to the Namibia Population and Housing Census of 2001⁹⁹, 55% of the households had females as head of the household. The report also indicates that pensions constituted about 11% of total household income in Namibia¹⁰⁰. Grandparents sometimes take care of children whose parents are either working, infected with HIV/AIDS or deceased, often using

⁹⁴ Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek. NPC, p 4.

⁹⁵ Ibid.

⁹⁶ CIA, 'Factbook: Namibia'; <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> accessed on 29 September 2011.

⁹⁷ Ibid.

⁹⁸ Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek. NPC, p 4.

⁹⁹ Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek. NPC, p 4.

¹⁰⁰ Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek. NPC, p 49.

their monthly pensions to pay for the subsistence and education of their children. Given these facts, the cost of legal service makes it unattainable for the average Namibian, with an estimated 90%¹⁰¹ of people in Namibia unable to afford the services of a legal practitioner.

3.2.5 Poverty

The Namibia Household Income and Expenditure Surveys (NHIES)¹⁰² of 1993/94 and 2003/04 did a survey on poverty in Namibia. The results show that poverty relatively declined from about 38% in 1993/94 to about 28% in 2003/04 while extreme poverty has declined from around 9% to around 4% during the same period¹⁰³. There are significant differences in the incidence of poverty between rural and urban areas, between regions and among population groups. The Northern regions have the highest incidence of poverty, while the highly urbanised Khomas region has the lowest incidence¹⁰⁴. The poverty incidence is higher among female-headed households than among male-headed household. The UNDP's 2005 Human Development Report indicated that 34.9% of the population live on \$1 per day and 55.8% live on \$2 per day¹⁰⁵.

The recent global economic conditions have been at its worse since the 1930s and people of the middle and lower income groups have been negatively affected worldwide. In 2010 it was publicised that Namibia has an unemployment rate of 51.2%¹⁰⁶ which further contributed to poverty and which has as a result other societal evils, such as crime. The National Planning Commission is currently doing a census and poverty incidence in the whole of Namibia is expected to have increased since

¹⁰¹ CIA, 'Factbook: Namibia'; <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> accessed on 29 September 2011.

¹⁰² Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek.

NPC, p 4.

¹⁰³ Government of the Republic of Namibia, National Planning Commission. 2004. *Vision 2030*. Windhoek. NPC, p 102.

¹⁰⁴ Government of the Republic of Namibia, National Planning Commission. 2003. *Namibia Population and Housing Census*. Windhoek.

NPC, p 4.

¹⁰⁵ CIA, 'Factbook: Namibia'; <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> accessed on 29 September 2011.

¹⁰⁶ Central Intelligence Agency (CIA) *Factbook: Namibia* <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> accessed on 29 September 2011.

the last census. Given these facts, with an unofficial unemployment rate of 51.2% and 90% of the population living on \$2 or less, it is obvious that the majority of people in Namibia are unable to afford the services of a legal practitioner.

3.2.6 Education

In 2005, the adult literacy rate was recorded at 83% for women and 85% for men. The primary net enrolment rate was recorded at 92% and survival rate in primary schools at 77%¹⁰⁷. Despite these significant educational levels, the population is fairly uneducated when it comes to legal matters. Legal awareness is the foundation for fighting injustice and people do not seek remedies for injustice when they are unaware of their rights and entitlements are under the law. Information on the right to seek redress and the available remedies for injustice must be disseminated to the public. The information provided to the people should serve their practical purposes and should be understandable to them.

Several community awareness initiatives such as Consumer News and the Namibia Consumer Association are trying to educate through reporting on consumer activities and abuses. No official education programme pertaining to the various consumer rights exists in Namibia. NAMFISA introduced consumer education on various services provided by the non-banking financial sub-sector that the organisation regulates¹⁰⁸ which includes educating consumers the activities of microlenders, short term insurance, capital markets, medical aid funds, long term assurance and pension funds. This educational information is available on the website, but it is only accessible by a small percentage of consumers who have access to computers and internet. Other manners in which the information is disseminated, like brochures, are not known to the public.

¹⁰⁷ Konrad-Adenauer-Stiftung e.V. August 2010. *KAS Factbook: Namibia*. Windhoek. www.kas.de/ accessed on 29 September 2011.

¹⁰⁸ Namibian Financial Institutions Supervisory Authority (NAMFISA). 2010. *What is Namfisa's Consumer Education?* http://www.namfisa.com.na/consumer_ed.html accessed on 14 October 2011.

An article¹⁰⁹ in the Republikein newspaper recently addressed the need for consumer education in Namibia. The report stated: “*The importance of consumer education and protection is essential to foster the public’s confidence in the financial system which in turn will strengthen the systems stability and expand the market and financial inclusion frontiers, the Deputy Minister of Finance, Mr. Calle Schlettwein, said yesterday during the Insurance Institute of Namibia’s first annual conference held in Windhoek*”¹¹⁰.

Deputy Minister Schlettwein was further reported as stating that consumer protection is especially necessary in Namibia’s market environment whose defining features include most mostly “*low consumer sophistication, low income levels, limited access, high market concentration ratios, limited product range and relatively high product fees and cost structures*”¹¹¹. This indicates that the door is open to reform for consumer education and protection in Namibia.

¹⁰⁹ Le Roux, A. 27 September 2011. *Consumer Education, Protection Essential*. Windhoek. Die Republikein at p. 3.

¹¹⁰ Le Roux, A. *ibid.*

¹¹¹ Le Roux, A. *ibid.*

CHAPTER 4: SCOPE, JURISDICTION AND RATIONALE OF THE PROPOSED SMALL CLAIMS COURT

4.1 NAMIBIAN SMALL CLAIMS COURT DRAFT BILL 1997

The Namibian SCC Draft Bill is divided into nine (9) chapters and when the commission drafted this bill, the legislation took into account and compared it with the applicable laws in neighbouring countries with a similar legal system to Namibia, namely South Africa and Zimbabwe¹¹².

The Bill provides for the establishment and the nature of Small Claims Courts, presiding officers and officers of Small Claims Courts. It further outlines the jurisdiction of Small Claims Courts, sets out the procedure and evidence, judgement and costs and the enforcement of judgements by Small Claims Courts. The Bill also caters for the revision of judgements of Small Claims Courts on certain grounds. This means that decisions may only be reviewed and not appealed.

The following recommendations were made in the Bill, such as:

- The recommended amount of N\$2 500.
- The areas of and seats.
- The area of jurisdiction.
- Actions may be instituted by natural persons only.

The Bill also envisaged a court to be established in which natural persons could institute actions against other natural persons or juristic person for amounts that would otherwise be too costly to sue for in the ordinary civil courts. This provides that persons may represent themselves in actions and no legal representation is allowed, except insofar as advise is concerned. Defendants may also not obtain legal representation in this court because this would have the result of tilting the balance of the proceedings to one side, as is the case in the ordinary civil courts. In addition, it

¹¹² Kaviua, R. 2008. *Small Claims Courts: The case study of Namibia*. Windhoek. University of Namibia, p 18.

provides that there would be no strict recordkeeping of cases and evidence, in an attempt to lift the burden of strict recordkeeping from the Small Claims Court. The summary of the case, decision and award of the presiding officer must be recorded, but not the evidentiary documents pertaining to cases. This thus ensures that the presiding officer has the duty of resolving the matter and ultimately ensuring justice, which lends an inquisitorial system of law to the Small Claims Court procedure as opposed to the current adversarial system of law currently prevailing in our law.

The Bill further provides that a judgement of the Small Claims Court can be enforced by the magistrates' court, if the judgement debtor does not perform according to the judgement. A warrant of execution will then be issued which may have the result that the property of the debtor is sold to satisfy the judgement. The option will however still be open for the judgment creditor to proceed with a claim in the Magistrates' Court.

4.2 CONSUMER PROTECTION

To date, Namibia has no consumer protection policy or legislation in place. Before Namibia's independence in 1990, most of South African laws were applied to Namibia. Some of these old South African laws that are still applicable to Namibia but are rather product specific, are not applied to the general protection of consumers but are mainly regulating credit. To do away with unfair and outdated laws, South Africa has promulgated the Consumer Rights Protection Act, Act 68 of 2008. Its preamble reads as follows:

“The people of South Africa recognise—

That apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality;

That it is necessary to develop and employ innovative means to—

(a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;

(b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and

(c) to give effect to internationally recognised customer rights¹¹³.”

Despite the fact that Namibia shares the same history, Namibia is yet to follow suit in promulgating legislation that encompass the ideals set out in the above preamble.

There are however some social awareness initiatives aimed at protecting consumers. The Namibia Consumer Lobby (NCL) that was established in 1988, for example, has its main goal of protecting the consumer from possible exploitative practices by firms, as well as producing better understanding between producers and consumers¹¹⁴. The NCL has a good vision, but struggled to make a significant impact, mainly due to limited human resources and because it is little known in the country¹¹⁵.

In addition, NAMFISA provides consumer education on various services provided by the non-banking financial sub-sector that it regulates. This includes educating consumers on the activities of micro-lenders, short term insurance companies, capital markets, medical aid fund, long term assurance and pension funds. This educational information is available via brochures or on the website and is thus mostly available to those with computers and access the internet.

At the same time, there are a number of civil society initiatives to establish a consumer group for Namibia is taking some shape, with the emergence of Namibia Consumers Association (NCA), a consumer organisation recently formed that appeared in the media criticising high bank charges in the country¹¹⁶. Other initiatives such as the Consumer Watch Group, the Consumer News and The Republikein newspaper's Consumer News page are some of the other forums to address consumer issues.

¹¹³ South African Consumer Protection Act 68 of 2008, at p 1.

¹¹⁴ Shilimela, R. August 2006. *Competition Scenario in Namibia*. Windhoek, NEPRU, p 36.

¹¹⁵ Shilimela, R. August 2006. *Competition Scenario in Namibia*. Windhoek, NEPRU, p 36.

¹¹⁶ Shilimela, R. August 2006. *Competition Scenario in Namibia*. Windhoek, NEPRU, p 37.

However, since the necessary legislative framework is lacking, none of these organisations are in a position to take action against transgressors. The Small Claims Court would serve as a forum where consumers may institute claims to enforce their rights as well as being educated on their rights and the procedures for seeking legal redress.

4.3 HOMEOWNERS AND TENANTS

The Small Claims Court could solve the problem of the lack of a housing committee/board/ombudsman to protect the constitutional rights of homeowners and tenants.

The only legislation in Namibia that caters for landlord and tenants rights is the Racial Discrimination Prohibition Act of 1991¹¹⁷ which provides that no person may be discriminated against in property purchase or rental transactions on the basis of that person being from a particular racial group. It however, does not protect landlords against losses incurred as a result of tenants nor does it protect tenants against unfair treatment from a landlord. In the event that there are damages suffered by either landlord or tenant, the only way to exercise the right to compensation is via the civil court system. If damages are suffered by the landlord, the landlord could obtain a summons, through which the Messenger of the Court, would attach the immoveables of the tenant to secure the debt¹¹⁸. This is usually obtained when there are rental amounts in arrear and is usually coupled with an eviction order. In the event that the tenant does not defend the action, a summary judgement could be obtained, resulting in the tenant being evicted as well as losing their immoveables which would be sold at auction to reimburse the landlord for damages suffered.

In the same scenario, considering there were no arrears and the attachment and eviction was brought about by personal reasons, for example racial issues, difference in opinion, etc., the landlord could still obtain a summons and at the same time evict the tenant. The only recourse the tenant would have would be to defend the action,

¹¹⁷ Act 26 of 1991.

¹¹⁸ Erasmus, H.J. et al, 1993. *Workbook for Civil Procedure*. Pretoria. Digma, Butterworths.

which would require the assistance of a legal practitioner. Should the tenant not be in a position to obtain legal representation, he would lose his immovable property as the summary judgement will be issued and the writ of execution will be expedited.

A Small Claims Court would be instrumental in ensuring that the rights of both parties are protected and that both parties have equal representation and thus equality before the law.

4.4 PERSONAL INJURY

Suing for personal injuries, to body or dignity, Namibians currently have to use the civil court process under the law of delict. Unfortunately, many possible litigants do not institute action because of the formalistic and expensive legal procedures involved.

These personal injury claims under the proposed Small Claims Court could include, amongst others:

- physical injury, disease or illness;
- psychological injury or illness;
- death of a loved one;
- injury at work, a psychological illness caused by stress at work;
- injury caused in a traffic accident;
- injury received as a result of faulty goods or services;
- injury caused from tripping over paving stones;
- psychological illness suffered as a result of abuse as a child;
- injury caused by errors in hospital treatment or by vaccinations;
- physical or psychological injury sustained by a victim in the course of a crime; or
- psychological illness caused by discrimination or harassment at the work-place.

Claims not exceeding the limits of the Small Claims Court will ensure compensation for personal injuries to indigent litigants.

CHAPTER 5: COMPARATIVE STUDY

The comparative study reviews the existing Small Claims Courts in South Africa and Canada and what it entails in order to compare with the needs of the Namibian judicial system as well as tabling the successes of the Small Claims Court in these two countries.

5.1 SOUTH AFRICA

Small Claims Courts in South Africa¹¹⁹ have jurisdiction to hear any civil matter involving less than R 12 000, unless both the person suing and the person being sued agree to limit the claim to less R12 000. However some of the cases cannot be taken to this court. These are:¹²⁰

- divorce
- matters concerning a will
- malicious prosecution
- wrongful imprisonment
- seduction
- breach of promise to marry.

There is no magistrate or judge in this court, but the presiding officer is a Commissioner, normally a practicing advocate or an attorney who acts as a commissioner free of charge¹²¹. The presiding officer listens to both sides of the case, he asks all the questions and then makes a ruling based on the facts presented by the parties.

No appeal may be filed against the judgment or order but the court proceedings may however be referred to the High Court for review on three grounds, which are:

1. absence of jurisdiction by the court;
2. interest in the cause, bias, malice; or

¹¹⁹Department of Justice and Constitutional Development. 2011. *Small Claims Court*. <http://www.justice.gov.za/about/sa-courts.html> accessed on 4 October 2011.

¹²⁰ Ibid.

¹²¹ Ibid.

3. corruption on the part of the commissioner and gross irregularity with regard to the proceedings.

The Small Claims Court has been established in terms of the Small Claims Court Act, 1984 (Act 61 of 1984), to adjudicate small civil claims. They are created to eliminate the time-consuming adversary procedures before and during the trial of these claims. The limit of cases involving civil claims in these courts is R7 000¹²².

The Department of Justice and Constitutional Development even went further by developing a national programme to re-engineer Small Claims Courts in 2010¹²³. The strategic objectives, inter alia, include to provide access for all, especially the poor and the vulnerable, to the judicial system, establish systems and rules of court that are accessible and easy to understand. According to this programme, the improvement of the functioning of the Small Claims Courts is a key priority area¹²⁴.

By May 2010, there were 206 Small Claims Courts with an additional 60 aimed to be established by the end of the 2010/11 financial year and a further 60 by the end of the 2011/12 financial year¹²⁵.

In a speech delivered by Mr Andries Nel, Deputy Minister of Justice and Constitutional Development at the opening of yet another Small Claims Court in South Africa, in Alexandra, Johannesburg on 25 May 2010 he said:

“Former Chief Justice Pius Langa, a long serving community activist and pro bono practitioner repeatedly emphasised the necessity of access to justice in making Constitutional rights a reality. He stressed that access to justice is key to our Constitutional democracy, and that it, ‘becomes an empty gesture and makes a mockery of the Constitution, if it is not backed by mechanisms that are adequate for the enforcement of the right.’

¹²² Department of Justice and Constitutional Development. 2011. *Small Claims Court*. <http://www.justice.gov.za/about/sa-courts.html> accessed on 4 October 2011.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

The consequence of access to justice would be to facilitate the enjoyment of other fundamental human rights by the greatest number of people in our country. “

This country evidently takes access to justice and human rights very seriously. The number of cases decided on in the Small Claims Courts of South Africa are impressive and is a clear indication of what Namibia needs, considering that the socio-economic conditions and cost of living in Namibia and South Africa are similar and these two countries share a similar political history and similar legal system.

5.2 CANADA

The Small Claims Court in Canada which this researched compared with is the Ontario Small Claims Court. According to this court in Ontario, the Small Claims Court is a branch of the Superior Court of Justice. It deals with civil disputes of a monetary value of up to Canadian \$25,000¹²⁶.

Examples of claims that can be filed in the Small Claims Court include:

1. claims for money owed under an agreement, such as unpaid accounts for goods or services sold and delivered, unpaid loans, unpaid rent and unpaid cheques; and
2. claims for damages, which include property damage, clothes damaged by a dry cleaner, personal injuries and breach of contract.

Many litigants in Small Claims Court represent themselves. However, a party may also be represented in Small Claims Court by a lawyer or by a person such as a law student or a paralegal¹²⁷. In 2010, their Superior Court of Justice dealt with 11,652 fewer civil actions, a 17 per cent decrease from 2009, and the Small Claims Court dealt with 6,337 more actions, which represents an 11% increase from 2009¹²⁸. Over

¹²⁶ Ministry of the Attorney General. 2011. *Resolving Lawsuits Faster And More Affordably: McGuinty Government Reforming Civil Justice For Ontarians*, Ontario, Canada <http://www.attorneygeneral.jus.gov.on.ca/english/news/2011/20110105-civil-nr.asp> accessed on 12 October 2011.

¹²⁷ Ibid.

¹²⁸ Ibid.

27,000 Small Claims Court forms have been accessed through the new Online Court Forms Assistant¹²⁹.

The following quotes are from some of the role players in the judicial system of Ontario:¹³⁰

*“ A faster, more affordable civil justice system is resulting from the improvements we are making. Our changes are saving Ontarians time and money.”*¹³¹

*‘I am happy to see that the implementation of the recommendations of the Civil Justice Reform Project has led to generally positive results.’*¹³²

*‘The Civil Justice Reform Project has been an important and significant step forward in access to justice. We applaud the Attorney General for initiating long-needed reforms and look forward to working with him on future initiatives.’*¹³³

*‘Making the civil justice system more affordable and accessible is no small task, but the progress we have seen under the 2010 civil justice reforms has proven that this goal is achievable. We look forward to continuing to work with government as further improvements roll out in the year ahead.’*¹³⁴

In 2005-2006, 75,041 new proceedings were commenced in the Small Claims Court. By comparison, in the same time frame 63,251 new proceedings were started in the Superior Court of Justice¹³⁵. In 2005-06, approximately 14,179 new cases were started but only 2,026 cases were added to the trial list in that year.¹³⁶ Accordingly, it

¹²⁹ Ibid.

¹³⁰ Ministry of the Attorney General. 2010. *Small Claims Court: News*. Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/news/2011/20110105-civil-nr.asp> accessed on 12 October 2011.

¹³¹ Chris Bentley, Attorney General of Canada.

¹³² Coulter Osborne, former Associate Chief Justice. Ontario, Canada.

¹³³ Peter Griffin, 2nd Vice President, The Advocates' Society. Ontario, Canada.

¹³⁴ R. Lee Akazaki, President, Ontario Bar Association. Ontario, Canada.

¹³⁵ Ministry of the Attorney General. 2007. *Civil Justice Reform Project*. Ontario, Canada. <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/300> accessed on 12 October 2011.

¹³⁶ Ibid.

would appear that about 85% settled before being set down for trial, and many more likely settled before trial¹³⁷.

Considering these information, quotes and statistics, it can be concluded that the Small Claims Court system in Canada is highly effective. In spite of the fact that the socio-economic and socio-political situation in Canada is a far cry from the realities of Namibia, it is nevertheless successful and promoting access to justice to considerably more advantaged persons if compared to the majority of Namibians.

5.3 REMARKS

To further illustrate the success of the Small Claims Court in South Africa and Canada, this research reviewed statistics on small claims cases in these countries and civil cases in Namibia. From the Namibian cases it is apparent that about 90% of claims are filed by companies, close corporations and other business rather and the rest by individuals. It is thus clear that organisations and individuals with financial resources have access to this court. This is in contrast with the small claims cases in South Africa and Canada.

¹³⁷ Ibid.

CHAPTER 6: CONCLUSIONS

6.1 OVERVIEW

To establish a Small Claims Court, Namibia can learn from other countries' experiences, however not imitating those models because the situation and type of problems and crimes differ from country to country.

6.2 COMPARATIVE STUDY

Having regard to the comparative study of this research and because of the developments that have taken place in particular in jurisdictions similar to Namibia, these are very significant. In light of this, this paper recommends the establishment of a Small Claims Courts to be put back to the Law Reform and Development Commission of the Ministry of Justice.

6.3 LAW REFORM AND DEVELOPMENT COMMISSION

The Ministry of Justice has the final responsibility to promote and protect human rights on behalf of the government. In practice, most work on human rights education has been carried out by NGOs.

In an interview with Mr. T. Namiseb, Director of the Law Reform and Development Commission in 2008¹³⁸, he indicated that the National Small Claims Court Bill still needs to be reviewed in view of the fact that various changes had taken place from the time when the Bill was drafted. He further stated that the Commission is looking into ways to a successful implementation of the Small Claims Courts in Namibia¹³⁹.

¹³⁸ Razikua Kaviua. 2008. *Small Claims Courts: the case study of Namibia*. University of Namibia, Windhoek at page 28.

¹³⁹ Razikua Kaviua. 2008. *Small Claims Courts: the case study of Namibia*. University of Namibia, Windhoek at page 28.

He also highlighted financial constraints faced by the Ministry of Justice as one of the obstacles to implementing the Small Claims Court in Namibia¹⁴⁰.

6.4 COST OF LITIGATION

Cost of litigation, as already mentioned above, is very high. Since this research highlighted the affordability levels of ordinary Namibians, placing a heavy 90% of the population within the 'indigent' bracket, it is an undeniable fact that ordinary Namibians do not have access to the civil courts as a result of not being able to afford private legal representation. This percentage alone should instigate a motivation for a Small Claims Court in Namibia.

6.5 LEGAL AID

To expect the Legal Aid Department to provide aid to qualifying civil litigants, would be a heavy financial burden on the Government. The establishment of a Small Claims Court would be more economical in the long run than to provide legal aid to all litigants, including civil litigants.

6.6 ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative dispute resolution methods, such as mediation or arbitration, is not an ideal form of solving disputes of a commercial nature as the findings are not judgements enforceable by summons and, in the case of arbitration, the finding of the presiding officer cannot be appealed. This thus puts the Small Claims Court as an ideal ADR mechanism.

6.7 JOB CREATION

In South Africa, the Legal Aid Department encourages those of its employees who qualify, to serve as Small Claims Court Commissioners on a pro bono basis¹⁴¹. A

¹⁴⁰ Razikua Kaviua. 2008. *Small Claims Courts: the case study of Namibia*. University of Namibia, Windhoek at page 28.

number of the 377 practitioners employed by Legal Aid South Africa, who qualify, have already been appointed as commissioners by 2010¹⁴².

The number of legal practitioners in Namibia is skyrocketing within a very small market. This would lead to qualified law graduates being without jobs and ultimately moving into different areas of trade. A Small Claims Court system would create a number of jobs as well as making legal advice and courts accessible to the 90% of the indigent citizens, especially those living in the rural areas.

6.8 SOCIO-POLITICAL IMPLICATIONS

As far as socio-political implications are concerned, the lack of access to justice are one of the reasons for political uprising. Over the past year, the world watched as the north African empires, in Egypt, Tunisia and Lybia dissolved decades of oppression. The people had endured years of oppression and poverty which resulted in the revolution as we have witnessed in North Africa.

On the home front, we recently read in shock about the people living off the Kupferberg dumping site.¹⁴³ We read and heard numerous media reports about strikes in the country. All of these are signs of an impoverished nation and social inequality. Mr. Herbert Jauch of the Labour Research and Resources Institute (LARRI) recently expressed that the strikes in Namibia is due to social and income inequality between the rich and the poor.¹⁴⁴ If his situation persists in Namibia, a revolution could soon be expected which could have far-reaching social impacts than the relief that could be brought about through the granting of justice to the people. Various newspaper articles are attached to support the expression of the Namibian population on the matters of socio-economic concern.

¹⁴¹ Nel A., Deputy Minister of Justice and Constitutional Development. 25 May 2010. *Small Claims Court in South Africa*. www.moj.sa Alexandra, Johannesburg accessed on 24 March 2011.

¹⁴² Ibid.

¹⁴³ Smith, J-M. 5 August 2011 *City's Dirty Secret*. Windhoek. The Namibian, p 1.

¹⁴⁴ Sasman, C. 26 September 2011. *Strikes due to Social Inequality – Experts*. Windhoek. The Namibian, p 1.

6.9 TRADITIONAL AUTHORITIES AND COMMUNITY COURTS

In some societies, the disadvantaged and other marginalized groups prefer the traditional justice system over the formal one. In the rural areas of Namibia, this is in fact true, where the community courts are preferred for their conciliatory approach and the perception that they preserve social cohesion and accommodate cultural freedom. Formal institutions, on the other hand, are seen to be remote, alien and intimidating.¹⁴⁵

Traditional courts are lower courts in terms of the Constitution¹⁴⁶. The Community Courts Act, Act 10 of 2003 has adopted a uniform structure that conform to the Constitutional provisions. Unfortunately this Court has not been implemented yet¹⁴⁷ and the establishment poses a challenge for most traditional authorities and the State. Because of the challenges posed, the Small Claims Court would be a better option and easier to establish as it would have general application within the existing judicial system.

6.10 FURTHER REMARKS

A quotation from a speech by Hon. Minister Mrs. P livula-Ithana, Minister of Justice, in her keynote address at the launch of the National Criminal Justice Forum of Namibia held on 5 August 2010 at the Safari Conference Centre in Windhoek¹⁴⁸:

"I am particularly happy that by creating such a forum, Namibia will be at par with other justice systems in the world where such institutions have been established for

¹⁴⁵ United Nations Development Programme (UNDP). 2004. *Access to Justice Practice Note*. Online at http://www.beta.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf. Accessed on 22 September 2011, p 8.

¹⁴⁶ Konrad Adenauer Stiftung. 2008. *Hinz, M.O.: Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective: In Human Rights and the Rule of Law in Namibia*. Windhoek. Macmillan at p. 66.

¹⁴⁷ Konrad Adenauer Stiftung. 2008. *Hinz, M.O.: Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective: In Human Rights and the Rule of Law in Namibia*. Windhoek. Macmillan at p. 66.

¹⁴⁸ The Law Society of Namibia. 2010. *Speech by Hon. Minister Mrs. P livula-Ithana at the Criminal Justice Forum: News and Press Conference*. Windhoek. The Law Society of Namibia. http://www.lawsocietynamibia.org/index.php?option=com_content&view=article&id=70&Itemid=117 accessed on 24 September 2011.

example the National Criminal Justice Board in the United Kingdom, the National Joint Committee in Canada, and the Integrated Justice System for South Africa.

When we talk of judicial transformation and access to justice, we are talking about three issues in particular. We want to ensure that even the poorest of the poor do enjoy access to justice. Our people need to have access to a high standard of justice that is attained without undue delay. The people of Namibia have been struggling for a just society where human rights and the rule of law, which are the fundamental pillars of a Constitutional democracy is observed at all cost.

This can only be achieved if we have an improved access to justice system that addresses inter alia, procedures and processes. This should include physical access to courts, and the provision of some form of legal aid to ensure that lack of financial resources does not hamper access to the justice system.”

These words say it all, straight from the proverbial 'horse's mouth'. The Honorable Minister went as far as comparing our legal system with those of Canada and South Africa to put Namibia's legal system in line with the standards in those countries. However, in Namibia these words are only true insofar as it relates to criminal justice whereas it should relate to justice as a whole.

CHAPTER 7: RECOMMENDATIONS AND THE WAY FORWARD

7.1 ACCESS TO JUSTICE

The establishment of Small Claims Courts in Namibia will be a measure through which the Ministry of Justice, and the Government as a whole, could ensure access to justice for all Namibians. Namibia's existing courts are an important part of the judicial system but there are situations where other options to resolve a dispute will be faster, cheaper and more suitable given the circumstances. Without a credible platform for disputes to be resolved faster, people resort to take the law into their own hands, which will create even more problems. The Small Claims Court will empower the poor and disadvantaged to seek remedies for injustice and at the same time boost their confidence in the Namibian judicial system.

7.2 COMPARATIVE STUDY

Considering the success of the Small Claims Court in South Africa, which shares the same socio-political history as Namibia and who shares similar socio-economic conditions as well as a similar legal system as Namibia, I would recommend the revision and promulgation of the Small Claims Bill of 1997 and that a Small Claims Court be implemented in Namibia.

7.3 HOUSING-, TENANCY- AND CONSUMER RIGHTS AND INJURY CLAIMS

It is my recommendation that the current Draft National Small Claims Court Bill be revised to include issues pertaining to housing and tenancy rights, consumer rights as well as claims for injury. The Small Claims Court Act could be the forum for addressing issues pertaining to housing and tenancy rights, consumer rights and injury claims, instead of individual forums to address remedies for infringement of these individual rights.

7.4 INDIGENT LITIGANTS

Based on the national statistics on the percentage of the population that falls within the bracket of 'indigent litigants', having regard to the current legal framework and the discriminatory past of Namibia, Law Reform and Development Commission of the Ministry of Justice should address the socio-economic and political conditions prevailing by implementing the Small Claims Court. The proposed Act should identify the concerns of the poor and the marginalised groups in the country.

7.5 PROMULGATION AND IMPLEMENTATION OF LEGISLATION

It is the wish of the writer that the Ministry of Justice would realise that judicial reform should include reform in the civil justice sector as well and not only to the criminal justice, and take the necessary steps to implement a Small Claims Court. The rights of indigent citizens can further be enhanced by implementing relevant legislation to ensure access to justice. Since independence Namibia has faced the challenge of developing and adapting our law to bring it in line with our Constitution but the fundamental rights enshrined in the Constitution would mean nothing if we could not enforce them. In this regard the role of Small Claims Courts would be crucial as a powerful mechanism to provide access to justice, especially to the poor and disadvantaged. The writer hereof therefore recommends that the Law Reform and Development Commission research these areas further in order to support the recommendation for a Small Claims Court.

7.6 ADJUDICATION AND INQUISITORIAL SYSTEM OF LAW

The current civil litigation system does not allow for speedy and inexpensive litigation, thus crippling litigants of small claims and delaying justice for these litigants. It is too expensive in that the costs often exceed the value of the claim. It is too slow in bringing cases to a conclusion and too unequal in that there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is also too uncertain in the sense that there is the difficulty of forecasting what litigation will cost and how long it will last.

The civil litigation system should be more comprehensible and more inquisitorial in nature and should move away from the adversarial system of law which causes the problems faced with in the current civil courts. The ideal judicial system would be one where the law is accessible for all, is more transparent, understandable, less cumbersome, less expensive and based on equal representation. This is the ideal of justice for all and it is within the reach of each and every Namibian, especially the indigent Namibian, with the promotion, protection and guidance of the Law Reform and Development Commission to make this dream a reality.

7.7 LEGAL AWARENESS/EDUCATION

Awareness of legal rights and remedies through dissemination of information to the public is essential in assuring access to justice. The poor and disadvantaged would only seek redress, enforce their rights and start legal procedures if they are educated on their legal rights. A legal awareness campaign is thus recommended.

7.8 LEGAL AID

Legal aid should be made available to indigent litigants in civil litigation, pending the establishment of the Small Claims Court, to ensure access to justice for all Namibians.

7.9 CIVIL SOCIETY AWARENESS

The Ministry of Justice should consider working with civil society awareness groups to develop watchdog and monitoring organisations for the protection of the rights of indigent Namibians. This would undoubtedly strengthen accountability and transparency within the judicial system.

The writer is positive that the Ministry of Justice will follow through on the Draft Bill to ensure the establishment of a Small Claims Court in Namibia. The framework of the

National Small Claims Court Draft Bill is sound and with a few amendments should be tabled to Parliament to be promulgated.

In light of this, Namibia is in dire need of a Small Claims Court to give effect to the constitutional rights to dignity and respect, justice for all and equality before the law.

The Law Reform and Development Commission as well as the Namibian lawmakers should look into this as a matter of urgency.

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