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The *Small Claims Courts Act*: Annotations and comments

1. Introduction

Small Claims Courts are a familiar feature of our legal environment. Foreign in conception, they have extended their roots widely and deeply in South African soil. Their presence here is easily affirmed.

The Small Claims Court is a lower Court, an important corollary of which is that it may do nothing which the law does not permit.[1] It is in every respect a creature of statute.[2]

Now, what for a wealthy person is a small sum of money may be quite a large amount for an indigent person. One should not be misled into thinking that because the Court at issue deals with "small claims," it is a court of trifles. It is an essential component of our judicial topography.

In parts of Australia, the Court is sometimes conceptualised as a consumer's court.[3] This is because it is seen as a forum for the resolution of disputes between consumers and traders.[4] Sue Geller does not mince her words: "[s]mall claims [also] involve … lousy consumer goods."[5]

2. The Act

The Act, as one might expect, commences with a definition clause.[6] Terms such as 'Commissioner', 'Court' and 'Minister' are given precise meaning (such as it may be) for purposes of the Act. There is always the saving clause to be availed of: "unless the context indicates otherwise."

Section 2 deals with the establishment of Small Claims Courts. This is accomplished with respect to any particular Court by way of Notice in the *Gazette*.

1 See Bredenkamp 1986:12: "[A]n inferior [lower] court such as a Small Claims Court may … do nothing which the law does not permit."
2 The Court was called into being by the *Small Claims Courts Act*, 61 of 1984 (as amended).
3 "Small Claims Tribunal" at http://www.courts.gld.gov.an/136.html: "The Small Claims Tribunal is sometimes called a *consumer's court* because it is generally concerned with disputes between consumers and traders."
4 "Small Claims Tribunal" at http://www.courts.gld.gov.an/136.html.
5 Sue Geller at http://www.worldlawdirect.com/arti-de/803/Small_claimns_court.html.
6 Section 1 of the *Small Claims Courts Act*, 61 of 1984 (as amended).

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Section 3, among its other stipulations, provides that the Court shall not be a Court of record.

Section 4 sets forth that proceedings of the Court are to take their course in open court, and provides for exceptions.

Section 5 embodies an anachronism presupposing that English and Afrikaans are the only two languages enjoying official status.[7] The section should accommodate all eleven official languages, and be amended accordingly.

Section 6 deals with the inspection and custody of documents, and section 7 with the parties who may appear in Court.

Whilst section 8 designates the presiding officer of the Court as a Commissioner for Small Claims, section 9 speaks to his or her appointment and related matters.

What is to be done in the absence or incapacity of commissioners is set out in section 10, and in section 11 we find an exposition of the functionaries of the Court.

Sections 12 and 13 treat of the area of jurisdiction, and the transfer of actions, respectively.

In section 14 we find a catalogue of the classes of persons in respect of whom the Court has jurisdiction. (It is headed "jurisdiction in respect of persons.") and in section 15, causes of action subject to the jurisdiction of the Court are set out in elaborate terms.

Section 16 is an enumeration of matters beyond the jurisdiction of the Court. For a large part, it would appear, the section excludes jurisdiction pertaining to personality.[8] Other matters are also excluded from the Court's jurisdiction.[9]

Incidental jurisdiction, abandonment of part of a claim, the deduction of an admitted debt, the disallowance of splitting of claims, cumulative jurisdiction, and lack of jurisdiction following upon the mere consent of the parties — these are matters based, respectively, upon sections 17, 18, 19, 20, 21 and 22.

Section 23 is interesting in that it makes provision for proceedings to be stayed and handed over to another Court should they be considered too complex in point of law or fact for the Court to adjudicate. Section 24 assures that the defendant not escape liability, as well as giving content to related matters.[10]

7 Section 5(1): "Either of the Languages of the Republic may be used at any stage of the proceedings of a court."
8 See section 16 (a), (c), (d), (e) and (f).
9 See section 16 (b) and (g).
10 See section 24 (1) and (2).

Section 25 confers authority upon the Minister to make rules regulating sundry matters, and sections 26 and 27 dispose summarily of the greater part of the law of procedure and evidence (or at any rate purport to do so).[11]

Evidence is given under oath or subject to affirmation. Such is the import of section 28.

The institution of actions and the withdrawal of claims are catered for, respectively, by sections 29 and 30, and the joinder of plaintiffs, the joinder of defendants, and the amendment of documents by sections 31, 32 and 33, in their respective order.

An entire chapter (Chapter VI), sections 34, 35, 36 and 37 of the Act, goes to the matter of judgment and costs, and a successive chapter (Chapter VII), sections 38, 39, 40,41,42,43 and 44, to the question of execution.

Section 45 states that no appeal from a judgment or order of the Court shall be entertained. Section 46 sets out grounds for review, which if established will result in the proceedings' being set aside.

Section 47 speaks of offences relating to execution, and section 48 of the offence of contempt of court.

Echoing the parallel formulation in the Constitution,[12] the Small Claims Court may not pronounce upon the validity of any legislation. As much is apparent from section 49 of the Act.

Section 50 is one of those provisions which appear to have become obsolete owing to the *dating effect*. Its purport is that a matter pending in another Court when the Act commenced was to be dealt with by that other Court, and not by the Small Claims Court. Now, the date of commencement is registered as 24 August 1985. Section 50 simply does not speak to the present.

Finally, section 51 gives the Act its short title. And sections 52, 53, 54, 55 and 56 concern themselves with amendments to the Act, with issues to which we have already attended in this part of the article.

That, then, is a survey of the *Small Claims Court Act*, as seen from a respectable distance.

11 The whole of Chapter V is concerned with Procedure and Evidence. We have also to look at sections 28-33. As to procedural matters, it is necessary also to attend to Chapter VI (Sections 34-37). Execution is dealt with in Chapter VII (sections 38-44). Chapter VIII (sections 45-46) deals with review, Chapter IX (sections 47-48) with Offences, and Chapter X (sections 49-51) with General and Supplementary Provisions.

12 Section 170 of the Constitution (1996). See also Devenish 2005:334: "[A] court of lower status than a High Court may not inquire into or rule on the constitutionality of any legislation or the conduct of the president".

3. Section 39 (2) of the Constitution

Section 39 (2) of the Constitution lays down that when construing legislation, every court, tribunal or forum is required to promote the spirit, purport and objects of the Bill of Rights.[13] Section 39(1) sets forth that in the construal of the Bill of Rights, every court, tribunal or forum is required to promote the values underlying an open and democratic society based on human dignity, equality and freedom.[14] So these are the values that underpin the interpretation of statutes.

The dispensation should pay heed to the *legitimate demands of the indigent*. The Court should have at the forefront of its concerns the needs and interests of the poor with respect to both its procedure and to its final disposition. In this way an "equality of arms" might be established on the most favourable of lines.

This having been said, it is also to be noted that the Court ought not to "pour out largesse from the horn of plenty at the defendant's expense".[15]

Moving on, the value of openness (in the context of this article) is to be found in transparency. The policy of "open court" (with derogations therefrom notwithstanding) is to be found in section 4 of the Act.

From first to last, we may reflect, human dignity, equality and freedom are to be upheld with respect to the Small Claims Court as well with process as with substance.

It is proposed that the Commissioner for Small Claims be designated as a Magistrate (and referred to as Your Worship). This may have the effect of *integrating the lower judiciary*.[16] And because Commissioners work part-time, officers of the type under consideration should have their status reflected by the term "*ad hoc* magistrates."[17]

One notices, at this point, Frame's proposition that Commissioners should exchange ideas among themselves upon a frequent basis (as a matter both of opportunity and duty) so as to harmonise in the greatest degree attainable the "methods" and "principles" they are in the habit of applying.[18] This should counter the deficiencies represented by an absence of law reports and journals that are the staple of the ordinary courts. All this is not to say that Commissioners will find themselves at a loss as to how to proceed in instances of difficulty.

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13 Section 39(2) reads as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

14 Section 39(1) is as follows: "When interpreting the Bill of Rights, a Court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

15 The *dictum* is Holmes J's (as he then was) in *Pitt v. Economic Insurance Company Limited* 1957 (3) SA 284 (D) 287 E-F recently cited by Van Oosten J in *Schmidt v Road Accident Fund*. Case No 2005/4834 (Witwatersrand Local Division) at [42].

16 My emphasis.

17 This may also have the effect of according the Court the status it should enjoy in the public eye.

18 Frame 1990:73, 87.

They are most certainly not excluded from consulting the regular law reports, and other materials.

Another matter to be broached is found in section 31 of the Act. Like section 38 of the Constitution, it seems to resonate[19] with elements of the class action. It contemplates potentially at any rate, a plurality of plaintiffs.

A further matter. Section 22 of the Act provides that the parties to an action cannot increase the jurisdiction of the Court by virtue of consent. It seems that this section is problematic. If there is concurrent consent of the Magistrate (and Commissioner) and that of the parties, then it would appear to do no violence to fairness and equity to seek such consent. (Participation by the Magistrate and the Commissioner with regard to the consensus is essentially to save the parties from themselves.[20])

Legislation might be enacted, amending section 22, permitting the parties to increase the jurisdiction of the Court by tariffs expressed as percentages, for example, 2%, 5% and so on, set out in advance. If the Magistrate and the Commissioner deem it to serve the interests of justice, then, it may be permissible to modulate[21] the claim upwards in accordance with the tariff policy.

In South Dakota, the parties are encouraged to work out their differences before utilizing the machinery of the Small Claims Court.[22] Alternative Dispute Resolution (ADR) may be resorted to in this regard. Relocating ourselves to South Africa, recourse is to be had to procedures such as conciliation and mediation before going to Court. This is all in the spirit of "ubuntu."[23]

My suggestion that small claims court wherever possible remit cases to conciliation or mediation may be problematic. My colleague has pointed out to me that by the time a case has reached the small claims court, the parties are already so much at odds with each other that conciliation or mediation is out of the question. A minority of cases, however, may indicate such informal avenues of dispute resolution as viable.

Whelan's observations speak along something like these lines, but are more affirmative. In parts of the United Kingdom, very strenuous effort is vested in attempting conciliation before going on to more formal dispute resolution.

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19 Sections 31 of the Act reads that "[a]ny number of persons each of whom has a separate claim against the same defendant , may join as plaintiffs in one action if the right of each to relief depends upon the determination of some question of law or fact which, if separate actions were instituted, would arise in each action…."

20 It is hoped that I will not be upbraided too harshly for this flight of fancy, if such it be.

21 The Magistrate and Commissioner's decision, once again, would save the parties from themselves, if inclined they are to act precipitately.

22 *South Dakota Small Claims* at http://research.lawyers.com/ South-Dakota/South Dakota. Small Claims.html: "Before filing a small claims case, the parties are encouraged to try to resolve their differences." This would be in the spirit of *ubuntu* and (perhaps, also *batho pele*).

23 *South Dakota Small Claims* at http://research.lawyers.com/ South-Dakota/South Dakota.Small Claims.html.

Arbitrators attempt by all means to effect reconciliation between the parties, thereby seeking to avert arbitration.[24]

Kojima writes, with respect to Japan, that, as a matter of practice, debtors discharge their obligations before execution-and this in view of the voluntary character of conciliation as a dispute-resolution mechanism.[25]

Kojima continues that any civil dispute lending itself to resolution by way of agreement "may be submitted as suitable for conciliation."[26] The factual efficacy of conciliation,[27] based as it is upon "fairness" and "equity"[28] is reflected in statistics showing only "minor fluctuations" over the years.[29]

Conciliation does not alienate the parties from each other. They remain on friendly terms for the most part. In short, they have avoided confrontation.[30]

What has been said is in harmony with the Japanese mind-set.[31] Traditionally, "human sincerity and mutual confidence"[32] informs the assumptions on the basis of which negotiations proceed.[33]

If we visit Sweden and New Zealand, we shall find mediation playing a quite emphatic role in dispute resolution.[34] Mediation involves an attempt to bringing parties "to agree to a settlement."[35] Only upon failure of mediation is the dispute processed through the mechanism of adjudication.[36]

These remarks are highly relevant to this study. It is proposed that presiding officers in Small Claims Court proceedings try to get the parties to find themselves through conciliation and mediation before activating the machinery of adjudication. Although there are no provisions to such effect in the *Small Claims Courts Act*, the Court, it is submitted, might bring its resources to bear

24 Whelan 1990:120: "One of the most interesting features of the [small claims] scheme was the emphasis placed upon conciliation prior to arbitration. (my emphasis.) Even so, "[Arbitrators] were … expected to attempt conciliation and to encourage the parties …" (1990:121, my emphasis).
25 Kojima in Whelan 1990:183, 189.
26 Kojima in Whelan 1990:183, 189.
27 Kojima in Whelan 1990:189-190.
28 Kojima in Whelan 1990:192.
29 Kojima in Whelan 1990:189-190.
30 Kojima in Whelan 1990:189-190 "[A]micable relations between the parties are not impaired; conciliation does not mean confrontation"
31 Kojima speaks of the "Japanese frame of mind" (Kojima in Whelan 1990:199).
32 Kojima in Whelan 1990:199.
33 Kojima in Whelan 1990:199: "Given the usual Japanese frame of mind, the parties feel obliged to discuss the issues sincerely during negotiations. The focus is often on human sincerity and mutual confidence rather than on legal criteria or standards."
34 Whelan 1990:207, 226: In Sweden and New Zealand "mediation [is] a more central goal".
35 Whelan 1990:207, 226.
36 This is the position at least as regards New Zealand. Whelan 1990:207, 226: "[A] settlement … is the primary function of the small claims tribunal. It is, however, part of a single small claims procedure. Only if mediation fails does the case proceed to adjudication."

upon the dispute in an informal manner. And only upon failure of mediation and conciliation should the Court entertain the dispute through the (relatively) formal means provided for in the Act.

We have to deal with a pressing issue. As of the present, attorneys are not permitted in the Small Claims Court. Small claims are disposed of by a Commissioner, sitting alone as s/he makes sense of the dispute. In other countries, attorneys assist in this sort of proceeding. The question is, should we allow attorneys a right of appearance in these Courts?

Weller, Ruhnka and Martin expound the position in the United States. The authors claim it to be their conviction that it is undesirable to disallow the participation of attorneys outright.[37] Attorneys' representation should, however, be carefully monitored by presiding officers-and this is especially the case where one party has invoked the aid of an attorney and the other party not.[38]

There is no doubt that small claims courts expedite justice. If attorneys were permitted in these courts, this merit may be undermined. Their presence in court would increase expenses, and this would be a deterrent to the use of the small claims court.

Weller, Ruhnka and Martin speak of "the ideal of self-representation."[39] Small Claims Courts, in line with this ideal, should do everything in their power to make lawyerly representation "unnecessary at trial."[40] It seems that the authors are somewhat ambivalent with regard to the point at issue.

Ramsay asserts that presiding officers of Small Claims Courts have of late clamoured for more participation by lawyers in their processes.[41] This is the position in Canada, at all events.

As for Australia, practising lawyers are only accorded a right of appearance if all parties are agreed to the arrangement, and if the officer presiding is happy that other parties will not be disadvantaged.[42]

Greer writes, with respect to Northern Ireland, that the juridical framework permits legal representation through the means of solicitor and barrister.[43] However, the whole design of small claims systems is such that parties can

37 Weller *et al* ??:5 12: "We … believe it undesirable to prohibit attorney representation of litigants in [the] small claims court."
38 Weller *et al* 1990:5 12.
39 Weller *et al* 1990:5 12.
40 Weller *et al* 1990:5 12.
41 Ramsay in Whelan 1990:25, 32: "In recent years there has been a plea, mainly by small claims court judges for greater participation by lawyers in the work of small claims courts".
42 Yin & Cranston in Whelan 1990:49, 59: "Lawyers who practise for fee or reward can only appear with the agreement of all parties and if the tribunal is satisfied that it will not unfairly disadvantage the others."
43 Greer in Whelan 1990:133, 154: "The Northern Ireland Scheme permits a party to be represented by a solicitor or barrister …"

present their own cases without formal representation.[44] Greer argues that banning lawyers from the Small Claims Court, for all this, would be a step without precedent, and arguably, "unconstitutional".[45]

In line with this reasoning, a right to appeal would virtually necessitate the presence of an attorney (and if one side has an attorney, the other side would want one, too). An injustice might result if one party were impecunious (and unable to afford representation).

Whelan points to the fact that Small Claims defendants acquire little in the way of in-court assistance. He goes on to say that they are unlikely to be sufficiently cognisant of legal technicalities to be able on their own to raise defences and counter-claims.[46]

Whelan fortifies his position by citing Weller, Martin and Ruhnka. These writers conclude that "to ensure a balance between plaintiffs and defendants, attorneys should be permitted at trial in small claims court, at least until the courts are able to provide better trial preparation assistance to defendants. Merely prohibiting attorneys for both sides at trial is not an equitable solution".[47] Inferences from these researchers (on the subject of the attorney representation) will be set out in the Conclusions.

Pending the resolution of the above contentions, one is called upon to venture certain remarks as to the calibre of our Commissioners. Obviously, we want the best and most experienced persons to fulfil this role. In a difficult case, a Bench (Panel) of two (2) or three (3) Commissioners may be desirable.

When expertise in a particular field is sought, we may look to Assessors (experts) to assist the Commissioner in coming to a just disposition.

Ramsay proposes that Small Claims Courts, as a matter of "conventional wisdom", are deemed to provide relatively cheap access to justice for persons embroiled in small claims where it is considered that engaging the services of a lawyer would be expensive to the point of hampering the course of justice.[48]

Ideas should be gleaned from studies of different jurisdictions to enhance the effectiveness of our Courts. The small claims process is extremely dynamic, and has the capacity to adapt to user needs. It would be folly to impose on that process a single model; we have to remain flexible always.[49]

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44 Greer in Whelan 1990:133, 154: "Small claims systems are designed so that a litigant can, or in some cases must, present his own case without a legal representative."

45 Greer in Whelan 1990:160.

46 Whelan 1990:207, 223.

47 This quotation is a word-for-word transposition of a passage in Whelan [*op cit*] as first set out in Weller *et al* (1983:66). *Ibid.* 223.

48 See Ramsay 1990:25 25: "It became a part of conventional wisdom that these courts ought to provide inexpensive access to justice for individuals for claims of a small amount where the services of a lawyer would be prohibitively expensive".

49 Weller *et al* 1990:22 22.

In the United States, Small Claims Courts made their first appearance in 1919.[50] Since then, a plethora of these Courts have been there for the finding in many countries.[51] One such country is South Arica. The model we choose, though it may embody foreign elements, should be home-grown as well (autochthonous). The model we settle upon should be malleable and capable of adjustment and accommodation.

Chin Nywk Yin and Ross Cranston, writing with Australia in mind, motion that small claims tribunals have demonstrated themselves to be successful.[52] The authors claim that the "mere existence" of such tribunals has been enough to assure compliance (less recalcitrance) on the part of business now that an action may be brought against them.[53] Further, "[t]housands of claims are lodged every year, consumers are at least partly successful in the majority, and most businesses comply with any order made against them."[54]

4. Conclusions

1. We note, to begin with, that the Court may be seen to some extent at any rate as a "consumer's Court". Businesses are induced to comply with their duties through the deterrent effect the Court is able to provide.

2. Section 5 of the Small Claims Courts Act needs to be reworded. As it stands, the section yet contemplates bilingualism (English and Afrikaans) — under a dispensation of multilingualism (pointing at it does to the use of all eleven official languages).

3. A great deal of the rest of the Act elaborates "an abridged version of civil procedure", if such it may be called, in order to take care of processual matters. Issues such as "area of jurisdiction", "abandonment of part of a claim", "cumulative jurisdiction" as well as a host of other matters are dealt with in meaningful, if necessarily superficial, terms.

   As to the competence of the lower courts to change a rule of common law, there is some debate. Speaking from the writer's point of view, and in consideration of the fact that lower courts do not establish precedent, it is proposed that small claims courts should not have the power to alter the common law. We should meet with an avalanche of case law if it were otherwise held.

   It is proposed here that there is nothing wrong with *interpreting* a rule of common law. Such, it is submitted, should be allowed. But it would be misguided for a lower court to change the character of the common law.[55]

50 See Whelan in Whelan 1990:2.
51 Whelan 1990:1.
52 Yin & Cranston in Whelan 1990:49, 64.
53 Yin & Cranston in Whelan 1990:49, 64.
54 Yin & Cranston in Whelan 1990:49, 64.
55 De Vos 1997:444-446.

4. The Small Claims Court is lower in status than a High Court. It is, therefore, in virtue of section 170 of the Constitution, unable to pronounce upon the constitutionality of any statute. It has to proceed upon the assumption that all legislation is valid as being constitutional.

5. It is submitted that the Court is in a position to import constitutional values into its adjudicative process, however. The Long Title of the Act should therefore read: "To provide for courts for the adjudication of small civil claims and for matters connected therewith, *in the light of constitutional values and in the context of constitutionalism*".

   In the period immediately preceding constitutionalism in this country, De Vos pressed for the acknowledgment of *civil procedural rights* in South Africa. (The focus at the time was almost exclusively on criminal procedural rights.)

   In England parts of the European Convention on Human Rights found their embodiment in the Human Rights Act of 1998. Among the provisions adopted is the right to a *fair trial* (equality of arms).[56, 57]

   Section 34 of the Constitution provides for the right to a fair hearing, among other things. A cognate right, the right to appeal, which would require legal representation, is generally conceded in the higher courts and magistrates' courts. As of the present, the small claims court does not allow for appeal.[58] (It is proposed that the right of appeal should not, in the event, be allowed.)

6. Section 50 of the Act should be deleted as being obsolete. This is a matter to which the legislature has not yet addressed itself, and its deletion will remove the embarrassment.

7. The presiding officer should have the *needs of the poor* in mind at all times. This may be seen as a constitutional imperative. Both as regards process and with respect to result, the Court should focus on the plight of the indigent.

   So far as the indigent are concerned, it is submitted that the thrust of constitutionalism would entail a special vigilance as to the needs of the persons in question. The impecunious litigant would not always win the case. However, the commissioner should throughout remain sensitive to the needs of such litigant, giving his or her case a special consideration. Others may disagree with me, but such is my position.

   I submit that such an attitude will also help bring about an "equality of arms". Such is of the essence of a fair trial.

8. Transparency is to be fostered in court proceedings. This is the principle of "open court". It is only in exceptional circumstances that the Court may close is doors to the public.

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56 In this regard, see De Vos 1995:34-41.

57 See De Vos 2002:435-443: "… England moved closer to the continental approach by incorporating the provisions of the ECHR into its domestic law …".

58 However, see De Vos 1997:461. For more on this see De Vos 1991:353-369.

9. We should have an "integrated judiciary." Small Claims Courts and Magistrates' Courts should be seen to promote the same purposes, and to function in parallel, cohesively.

10. Commissioners should meet up with one another upon a regular basis. They should know what "methods" and "principles" are applied by their colleagues. There ought to be a consensus as to how to dispose of difficult cases.

    It may be difficult for small claims courts' commissioners to self-regulate in this way. But social events may be organized to bring them together. It is important that they should not act in isolation of one another, and upon a divergence of principle. Having said this, the situatedness of individual commissioners should be kept in mind.

11. Section 22 of the Act should be amended to allow parties to enhance the jurisdiction of the Court by way of consent. Any such exercise should be very carefully scrutinized, as I have said, to save the parties from themselves. And when the Magistrate and Commissioner deem it just, they should be able to modulate the claim upwards by only a minimal percentage, say, 2%, 3% or 5%.

    I argue that the monetary limit to jurisdiction should be raised at the instance of both parties. The submission would fly in the face of the very reason of the court. However, maxima, if stipulated, may conduce to a just disposition.

12. Coming now to a different matter, the Commissioner should attempt to conciliate the parties or mediate the differences between them before passing to the (relatively) more formal process represented by a trial and adjudication.

    Having decided that the parties are not to be conciliated, or that their differences are refractory to resolution, the Commissioner may be constrained to proceed along the lines of a trial and judicial settlement.

    The point here is that alternative dispute resolution (ADR) should be a part of the function of the Court. This is no doubt a controversial suggestion. But ADR, if professionally undertaken, may permit of less acrimonious relations in future between the parties.

13. Here comes a wild proposition. It pertains to the right of appearance in Court of attorneys and other legal representatives. We have seen that attorneys are permitted in Small Claims Courts in other jurisdictions.

    We have also seen that some jurisdictions strive for self-representation as an ideal. The byword is informal, inexpensive and expeditious justice.[59]

    Some countries, we have been given to see, regard legal representation as a moral right to which litigants in the Small Claims Courts are entitled.

    These courts were conceived as courts of first and final instance. But an aggrieved litigant may feel badly done by. This may be just one of those things. However, in exceptional circumstances resort to an appeal process would be

59 See Erasmus 1999:3, 17, 18.

the precisely indicated avenue of recourse. This may require participation by legal experts (attorneys or advocates). Legal juggling may be necessitated in pursuit of justice.

If we decide to allow attorneys in Small Claims Courts, then perhaps we will disable the very institution in the area for which it was conceived. An argument could be raised that justice will be promoted by having legal representation in our Small Claims Courts, though.

If we have attorneys in our Courts, then we have to undertake precautions. What do we do when only one party is represented? This could undercut the principle of equality-of-arms. The Commissioner would have to be very skilled to ensure that the scales of justice are appropriately poised at all times.

It is submitted that we retain our dispensation in this regard as it is. That is, we should allow parties to represent themselves.

It is therefore submitted that attorneys not be permitted in the small claims court (and that no appeal be permitted from its decisions).

If the legislature considers otherwise and allows for legal representation for one party or for both, it will be necessary for our Commissioners to be among the most astute and sensitive lawyers in the profession.

The legislature may set out a procedure for the appointment of Special Commissioners if it is elected to have attorneys present in the courtroom. These Special Commissioners would have to be persons of singular talent and signal responsibility.

This writer, for one, would acquiesce in the circumstance obtaining-namely that attorneys not be allowed in court. But I appreciate that there is another side to the story.

5. Epilogue

Our Small Claims Courts reflect institutions found in many countries around the world. It is obvious that they serve important functions.

Our *Small Claims Courts Act* is for the most part well-conceived and competently drafted. It is not meant to propose that it be revoked. It is suggested, however, that it be amended in certain places so as to capture the insights noted in this study.

Constitutionalism, for example, has made it necessary to amend the long title of the Act (An appropriate emendation has been suggested.)

Certain parts of the Act may require additions — such as provisions for Alternative Dispute Resolution (ADR). Also, if it decided that attorneys should appear in Court, it will be required to make provision for their participation.

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