

SUBMISSION ON SMALL CLAIMS COURT MANUAL



LAW SOCIETY
OF SOUTH AFRICA

The Law Society of South Africa (LSSA) represents approximately 25 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

The LSSA appreciates the opportunity to submit the following comments for consideration.

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1. INTRODUCTION

The Small Claims Court Guidelines for Commissioners signed by the Minister and Deputy Minister of Justice and Constitutional Development on 18 May 2010 has no doubt been of great assistance to Clerks of the Court and Commissioners. The hard copy versions were presentable and the size made them easy to carry with to the Small Claims Court for quick reference. (The fact that electronic .pdf versions are available on-line, also probably make them accessible to litigants who do some research.)

The Guidelines contain a Commissioner's Code of Conduct, some definitions, and then deals with Chapters on:

- The form and nature of the Small Claims Court;
- Jurisdiction;
- The office of Commissioner;
- Filing a claim: Plaintiff's case;
- Defendant's case;
- Counterclaims;
- Applications;
- The hearing;
- Evaluation of evidence;
- Judgment and orders;
- Steps following judgment;
- Further proceedings;
- Appeal and Review;
- Miscellaneous issues (Clerks giving legal advice indemnified; State and Commissioner indemnities; Travelling expenses of Commissioners; Synopsis of Case Law.)
- Sources of reference (or further works to refer to.)

Without detracting from the value of the work, it is possible to review the guidelines in order to enhance the value to the "commissioners on the ground" who are at the coalface of dispensing justice. To this end, there are certain aspects which require updating and expanding. The following comments merely serve to highlight areas and approaches which can be considered in a process to increase the use and benefit of the guidelines. Such a process is ultimately in the interests of the public as the underlying philosophy is the function to shape better Commissioners.

The aspects set out below are not meant to be theoretical. The idea is to give practical solutions for problems that occur in Small Claims Court.

2. TIME HAS MOVED ON

The process leading to the drafting the Guidelines began more than a decade ago. Law is dynamic and much has changed in South African society over the past ten years. Case law has developed on many aspects of the substantive and procedural law that would affect Commissioners daily when they do their duty in the Small Claims Court.

The Synopsis of Case Law at the back of the manual could be updated with developments over the last years.

3. DRAW ON THE EXPERIENCE OF COLLEAGUES

The Guidelines could also be amplified with information on matters which ended under review. If we do not assist in this way, how will current and new Commissioners learn from past mistakes? Here is a golden opportunity to enhance access to quality justice by empowering Commissioners. There are also a plethora of stories of how practical problems arose in the Small Claims Court and of how they were addressed. Recording those aspects which often confront Commissioners with some practical solutions, will be of significant value.

It is important in this regard that current or past Commissioners should be very involved in the drafting of such aspects. This will prevent mere theoretical suggestions or discourses.

4. SOME AREAS WHERE COMMISSIONERS MIGHT REQUIRE MORE ASSISTANCE

One cannot in a short memo identify all the areas or examples, but here are a few examples where practical approach assistance could work (with proper consultation and discussion, the examples etc. can be amplified.):

Jurisdiction

Consider the following concepts:

- “carrying on business”: When does one carry on business in an area? Does the earthworks contractor who does certain minor works once in a year in the area of the Small Claims Court, carry on business in the area?
- “whole cause of action”: A contract determines that an amount should be paid by the defendant. The defendant does not pay and a letter of demand is issued. The contract was signed by the parties in the area of the Small Claims Court but the letter of demand was sent or received outside the area. When is such a letter part of the cause of action and when is it not? Is this relevant to the “whole case of action” requirement?

Code of Conduct

The current code consists of Do’s and Don’t’s. (or “Shall’s” and “Shall not’s”). The Manual could practically be amplified with:

- Examples of the acceptable conduct;
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- How to open Small Claims Court sessions (At the law society disciplinary processes there have been some examples of shocking statements made to the public about the Small Claims Court or the Commissioner); and
- Duty to assist the parties and not to ignore the core values of the Constitution.

Loan agreements

- When are they credit agreements and when not?
- If a loan is a credit agreement, when does the Credit Agreement legislation apply and when not?

- To what extent does the credit agreement fall under the Consumer Protection Act?

Developments in Lease Agreements

- What role do the two compulsory inspections play in the burden of proof when a tenant claims return of a rental deposit and the lessor claims for damages or some other breach?
- To which other aspects should Rental housing legislation be applied?
- When is the Rental (Housing) Tribunal a more suitable forum?

Motor vehicle or technical repairs

A while ago a Commissioner reportedly informed the Chair of her Small Claims Court that she refuses to hear matters about motor vehicle engine repairs as she understood nothing of engines. Another Commissioner said that she also does not understand engines, but advised that she relied on the experts brought to Small Claims Court by the parties. How can a Commissioner practically deal with such situations? When is it best to hold that the matter is too complicated for the Small Claims Court (without unnecessarily limiting access to justice)?

Motor vehicle collisions

- Who to believe when faced with two conflicting versions?
- The Evaluation of Evidence chapter consists of less than two pages. How can it be amplified to really assist Commissioners so that they use the inquisitorial framework that the Act provides to properly evaluate and adjudicate.
- What does the inquisitorial process allow and what not?
- The current manual (in Chapter 1) mentions that the process is “informal”.
 - What does this mean?
 - How can the informality be properly conveyed without compromising respect for the process?
 - More importantly, are there ways that the informality could be used to better evaluate the versions before Small Claims Court?

Electronic documents

- How are they proved?
- How does one know when they have been tampered with?
- What is an electronic signature?
- Can a non-variation clause in a contract be complied with in an e-mail between parties?

Financial enquiry

- How to conduct it Constitutionally?
- Enquiring into finances with dignity.

5. CONCLUSION

The purpose of the LSSA's comments and the list above are merely to assist with ideas and facilitate the discussion.