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Via e-mail ChKemp@justice.gov.za

ATTENTION: MS KEMP

Mr Raj Daya
Deputy Chief State Law Adviser
Secretary to the Rules Board
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PRETORIA

Dear Mr Daya

SMALL CLAIMS COURTS ACT, 1984 (ACT NO. 61 OF 1984) AND RULES REGULATING MATTERS IN RESPECT OF SMALL CLAIMS COURTS

The LSSA appreciates the opportunity to provide comment on the Small Claims Court Act (the Act) and the Small Claims Court Rules (the Rules) for consideration by the Rules Board for Courts of law.

Appointment of Commissioners:

In terms of section 9 of the Act, the Minister of Justice and Correctional Services (the Minister) may appoint a Commissioner for any court, i.e. a specific jurisdiction. The LSSA is of the view that the appointment of a Commissioner should not be restricted to serve as a Commissioner within a particular jurisdiction and should be allowed, with the permission of the Magistrates' Court Manager, to also serve in other jurisdictions.

The reason for this recommendation is that in some jurisdictions there may be a limited number of Commissioners and it is sometimes necessary to obtain the services of a Commissioner from an adjacent jurisdiction to preside at a particular Court. Under present legislation this is unfortunately not possible.

Lack of simplified appeal/rehearing process:

The Act does not offer the parties a right to appeal against the Commissioner's decision. Section 46 of the Act makes provision for the proceedings of a small claims court to be taken

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

on review before a provincial or local division on the grounds listed in the Act. This process may however be a costly exercise for a matter that falls within the jurisdiction of the small claims court. It is accepted that: “*in a South African small claims court many of the litigants will be poor, ill-educated and unsophisticated people.*” (Chris v Commissioner- Small Claims Court- Butterworth and Others (774/2005) [2007] ZAECHC 114) Given this, it is unlikely that an aggrieved litigant will be in position to take a judgment that has been issued in a small claims court on review.

The LSSA recommends the inclusion of a *sui generis* type of appeal process whereby the decision of a Commissioner can be taken on appeal to a Tribunal consisting of two or three senior Commissioners who will then have the power to upset the decision of the first Commissioner and to replace it with a decision of its own, if necessary. The grounds for review are set out in section 46 of the Act and this can potentially remain unchanged. The implication is that litigants, who have approached the small claims court to resolve a dispute, will have a feasible option at their disposal to have a matter reviewed, if the grounds for review are present.

The appeal can result in the re-hearing of a matter. [New Zealand's Disputes Tribunal Act, 1988](#) introduces re-hearings as in addition to an appeal process. In essence, its Disputes Tribunal may in limited instances, upon the application of a party to any proceedings, order the rehearing of a claim, to be heard upon such terms as it thinks fit. Applications for re-hearings must be made within a specified period of the order having been made.

Service of documents:

The LSSA recommends that the Act be amended to specifically permit personal service of court documents. The Act should make provision for a party to the proceedings before the Court to serve any court document upon any person:

- (1) through personal delivery of the document; or
- (2) leaving the document at the person's ordinary place of residence with any person who is normally resident at that place and appears to be over the age of 18; and filing an affidavit confirming such, to the Clerk of the Court.

The Clerk of the Court should be empowered to direct, in writing, that a small claims court document be served on a party to the proceedings by any other means.

Power to call witnesses

The Act provides that a party in the small claims court may call one or more witnesses to prove his or her claim, counterclaim or defence. The Act does not provide an express mechanism to compel a witness to attend proceedings at the Court. The absence or presence of a witness may determine the outcome of proceedings and we are of the view that Commissioner should be granted the power, in his or her absolute discretion, to issue an order compelling a witness to attend a hearing.

This power can seemingly be granted through Ministerial rules made pursuant to section 25 of the Act which provides that the Minister may make rules regulating the practice and procedure and the duties and powers of officers of the Court. The LSSA will gladly assist the Rules Board to prepare a proposed amendment, should our recommendations be favourably considered.

Interface between the Act and Consumer Protection Act:

Section 69 of the Consumer Protection Act, No. 68 of 2008 (CPA) appears to restrict the ambit of the jurisdiction of the small claims court (with reference to consumer-related matters) as it requires a person contemplated in section 4 (1) of the CPA to seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

The remedies that are listed in section 69 (a) – (c) of the CPA, include (a) referring the matter directly to the Consumer Tribunal, (b) referring the matter to the applicable ombud with jurisdiction, (c) referring the matter to the applicable industry ombud, (d) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, (e) referring the matter to another alternative dispute resolution agent contemplated in section 70 of the CPA; or filing a complaint with the Commission in accordance with section 71.

The exhaustion of the remedies may simply result in the exhaustion of consumers comprising low-income communities and those who living in remote, isolated or low-density population areas if they are required to first approach centrally located (and seemingly over-burdened) forums to deal with small consumer claims that could have been dealt with by small claims courts.

The LSSA is of the firm belief that the small claims courts present an alternative to the ordinary courts of law and there seems to be ample justification to amend the CPA to allow for consumers to approach the small claims court without the exhaustion of remedies impediment as the balance of convenience and interests of justice so require. Given the CPA already makes an exception with regards to equality courts, a similar exception can be introduced with regards to small claims courts – whether under the Act or the CPA.

Yours faithfully



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