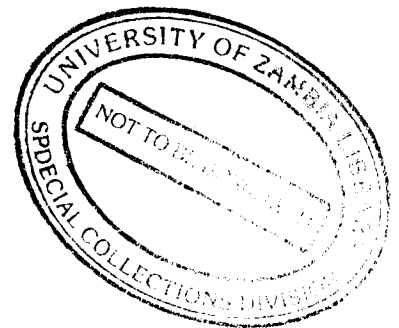


**PROCEDURAL ADHERENCE IN THE LEGAL SYSTEM: EFFECTS AND
LIMITATIONS**

**BY
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**An Obligatory Essay submitted to the school of Law of the University of Zambia in
partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws
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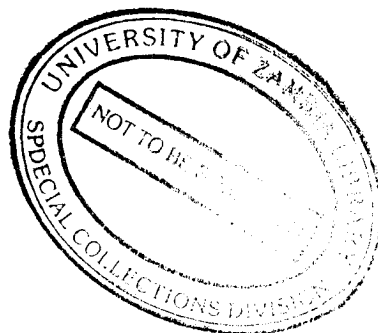


May 2012

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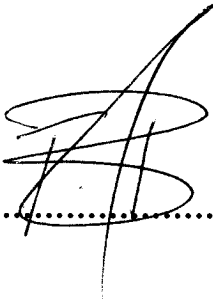
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ABSTRACT

This dissertation sets out to investigate the effect and limitations of strict adherence in the legal system. In establishing this, the essay examines first a few examples of the different forms of procedures that exist in the legal system, particularly in the courts. After identifying these procedures, the negative effects and limitations that they have on judges, lawyers and the ordinary citizens are discussed. Limitations on judges and lawyers are viewed as directly detrimental to the ordinary citizens.

This paper through research found that the legal system is not very user friendly and has numerous complexities that maybe attributed to lawyers or persons in the legal profession who choose to complicate the rules in order to secure their continued existence.

As such, this paper recommends that a well balanced middle ground must be found between the need for strict adherence to the legal system and the need to effect justice even if it goes against such procedure.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank God, my spiritual research partner without whom my dream would have been just that, a dream.

I would also like to thank my family, even with no legal knowledge you have greatly contributed with your never ending support and encouragement and criticism, you understand my paper more than most legal minds.

A lot of gratitude goes also to my supervisor Ms T. Banda for all the help and assistance rendered and teaching me how to make my dissertation my own.

Last but definitely not the least; I would like to thank all the people who helped make this paper worth the title thesis.

DEDICATION

To my father, Martin Mutale, mother, Annie Musopelo Mutale, my brother and sister, Chanda and Kasonde Mutale. You have taught me that I am the best even when the world does not think so. Also to my grandmother, Margarate Musopelo, you should have waited long enough to see what I have turned into.

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CHAPTER ONE

INTRODUCTION

1.1 GENERAL INTRODUCTION

This chapter covers the basic features of the research. These features being the introduction, statement of the problem, definition of concept, methodology and purpose of the study.

1.2 INTRODUCTION

Human beings as a race exist collectively in communities. Every individual is different and unique, this entails that their values, dreams, aspirations and general attitude in life will be different, and as a result conflicts may arise. In order to prevent chaos and mayhem, the legal system has been put in place to prevent such conflicts, and if they do happen, to orderly correct them. People depend on the legal system to maintain some level of order in society. They trust this legal system to effectively protect, guide and serve them.

This legal system has a structure and at the apex of this structure are the courts. These courts are the custodians of the law and dispense justice to the people. Of utmost importance is the fact that from time immemorial this legal system has been riddled with an enormous practice of procedure that has to be followed. There are millions of books, articles, reports and so on that have been written on what procedure to follow in the courts of law. Lawyers spend years in law school learning the proper procedure and conduct accepted in these courts.

It is argued that this austere and comprehensive system of procedure in a court of law is necessary to maintain order. With the development of the world in general and the complexities that come with such development, a great number of people experience certain

injustices, are exposed to certain circumstances that infringe on their rights and so they look to the courts for redress. In order to address these concerns, it is necessary to have rules that dictate the uniform manner in which the complaints may be brought and also to lessen the burden on judges as they adjudicate in these courts.

The system of having adjudicators in society is as old as the human race itself. In pre-scientific era, people could not explain certain natural phenomena. They attributed these unexplainable natural phenomena to the fact that there must be some force somewhere controlling these things.¹ This belief was adopted by Roman Empire theorists called the stoic philosophers who also believed in this natural force controlling natural phenomena. The stoic philosophers emphasised that the main source of natural law was the bible (Christian Holy Scriptures).² They emphasised that there ought to be one system of law in the world, that being the law of nature.³ In order to help implement this notion of natural law, the wisest people in the community would be selected to settle disputes ranging from theft to land issues. These people included Priests, and other church elders.⁴

With the fall of what was called the era of church rule came a school of thought called the positivists. This school of thought came about when science had developed significantly and every event could be accurately explained. All the natural happenings that could not be explained in the past could now be explained. Positivists tried to define law, not by its contents, but according to formal criteria. According to positivists, law is that which is laid down in the form of precedents and statutes.⁵ Positivists admit that issues of morality or ethics do influence law makers or judges, but it is only incorporation of these morals and

¹ Carlson Anyangwe, *An outline of the study of Jurisprudence* (Lusaka: UNZA Press, 2005), 78.

² Anyangwe, *An outline of the study of Jurisprudence*, 82.

³ Anyangwe, *An outline of the study of Jurisprudence*, 82.

⁴ Anyangwe, *An outline of the study of Jurisprudence*, 82.

⁵ Anyangwe, *An outline of the study of Jurisprudence*, 82.

ethics into precedents and statutes which gives them the quality of law.⁶ For positivists, an unjust law would be law nonetheless, as long as it has been given the stamp of validity through precedent and statute.⁷

For most, law has been seen as a way to reconcile individual interests and the interests of society. In this regard it is argued that individuals have to give up some of their rights and in return get some protection from society, this is termed the social contract.⁸ In order for individuals to co-exist, they have to follow the laws laid down to govern societies. Individuals can only obey these laws if they know exactly what they are, and what consequences, protection or rewards this law provides. A good legal system is thus one that is stable, constant and predictable.⁹

This can be said to be the basis for the need for strict adherence to the legal system. As a result of these attributes, ordinary citizens know what is law and all the procedures involved so that they can avoid violating the law or know what recourse they have and they are also of assistance to the courts as they simplify the work that they have to do by ensuring an orderly system of receipt of cases and the correspondence that goes with it.

One aim of law is to secure social order. Laws enable society to function peacefully, orderly, and efficiently. Judges are instituted to resolve conflicts in a rational way by applying the law. The practice of following what has already been laid down by law and other judges is a guarantee of security. It is based on the notion of parity of reasoning and upon the reasonable expectation without which social relations become anarchical, and judicial decisions become

⁶Anyangwe, *An outline of the study of Jurisprudence*, 83.

⁷Anyangwe, *An outline of the study of Jurisprudence*, 82.

⁸Anyangwe, *An outline of the study of Jurisprudence*, 82.

⁹ Margaret M. Munalula, *Legal Process: Cases and Materials* (Lusaka: UNZA Press, 2005), 23.

erratic and unpredictable.¹⁰ The proposed study is aimed at investigating the effects and limitations of adherence to the legal system.

1.3 DEFINITION OF CONCEPTS

Arbitration: A method of settling disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specifically nominated for the purpose, either instead of having recourse to an action at law, or by order of the Court, after such action has been commenced.¹¹

Adherence: To hold firmly an idea, belief or opinion.

Legal System: A legal system is a set of laws which are either enacted through legislature or statutory instruments.¹²

Precedent: A decided case that furnishes a basis for determining later cases involving similar facts or issues.¹³ The common law has in recent times watered down the meaning and development of the word precedent. An original precedent is one that creates and applies a new rule, a declaratory precedent is one that merely applies an existing rule, an authoritative precedent is one that is binding and must be followed and lastly, a persuasive precedent is one which does not necessarily have to be followed but can be considered in any related case.¹⁴

¹⁰ Anyangwe An outline of the study of Jurisprudence, 111.

¹¹ D.M. Lawrance, *A Treatise on the Law and Practise of Arbitrations and Awards* (London: The Estates Gazette Ltd, 1953), 1.

¹² Allen Carleton, *Law in the Making* (London: Oxford University Press, 1994), 58.

¹³ Black's Law Dictionary 7th ed. (St Paul Minnesota: West Publishing Co., 1999), 309.

¹⁴ Black's Law Dictionary 7th ed.309

Procedure: This is the mode or form of conducting judicial proceedings whether they are civil or criminal.¹⁵

Stare decisis: The principle of English law by which precedents are authoritative and binding, and must be followed.¹⁶

1.4 PURPOSE OF THE STUDY

The research problem in question came to light through direct observations whilst working as an intern for the National Legal Aid Clinic for Women. This topic is significant as in every population there is potential for disputes or misunderstandings and the need for the law to keep the peace. The practical value of this discourse would therefore be self evident because it must be to the advantage of every citizen. Most research that has been done on procedure in the legal system has been with regard to why it is necessary to have such rigid procedure; this study looks at the conflicting aspect and tries to examine the benefits of not having such rigid procedure when accessing the courts.

1.5 STATEMENT OF THE PROBLEM

Considerable literature has been written on the procedure to be followed in courts of law. In Zambia for example, each court has rules set out on mode of commencement, parties, amendments, adducing evidence, execution of judgment, appeals, documents to be filled into court to mention but a few.¹⁷ These rules of court are found attached to the various chapters of the laws as subsidiary legislation and provide a step by step method of laying out matters to be taken before court.

¹⁵ Mick Woodley, *Osborn's Concise Law Dictionary* (London: Sweet & Maxwell, 2005), 318.

¹⁶ Woodley, *Osborn's Concise Law Dictionary*, 318.

¹⁷ High Court Act, Chapter 27 of the Laws of Zambia.

When bringing a matter before a court, very close attention must be paid to procedural steps needed for successful litigation. This means that all motions and requests for evidence must be made in a timely manner. The art of litigation requires a very structural approach with one step occurring before the next. If one step within the process is missed, misconstrued, or untimely, the result could spell the end of litigation and the client's claim.¹⁸

The reason for such strict adherence to procedural steps is due to an effort to expedite an already heavily time-burdened legal system. The procedural steps facilitate quick and systematic approaches to litigation.

In as much as there seems to be a valid reason for strict procedural adherence to the legal system, the vital question is to what extent these rules should be followed. These rules are so numerous and to a layman so complex that more often than not a person genuinely entitled to having a case heard before the courts is denied access to justice because of certain procedures that have been put up to help with the “efficient” running of the courts. A person who thus relies on a system to protect and assist him is then denied justice by the same institution that he counted on for assistance. He is thus left to continue suffering because of a technical glitch.

From the foregoing it can be supposed that the numerous practices pertaining to procedure in the legal system have negative impacts on not only the complainants, but also the judges and to some extent the lawyers. Most people who have no idea what court process entails have their matters delayed or in extreme cases struck off the cause list because of failure to follow procedure. Judges are bound by precedent and so are also restricted to some extent in their dispensation of justice.

¹⁸Carleton, *Law in the Making*, 61.

This paper endeavours to investigate to what extent procedural adherence to the legal system affects the ordinary citizens, judges and lawyers. Further, what the effects and limitations of such adherence are on these participants.

1.6 RESEARCH OBJECTIVES

The ultimate objective of this study is to investigate the effects and limitations of the practice of strict adherence to the legal system. It is aimed at finding out how this practice affects and perhaps limits judges, lawyers and the ordinary citizens who wish to take their matters to court. It will also try to analyse why there are so many procedural practices and why there is such an insistence that these rules be followed almost to a point of absolute strictness. The following are the specific objectives of the study:

- i. To identify some of the procedures that have been set by courts regarding what is to be done before, during and after court process.
- ii. To assess the extent to which these procedures are expected to be followed.
- iii. To assess the effects and limitations of these procedures on judges in delivering judgements, as a money making venture for lawyers and finally the ordinary citizens who this legal system is designed to protect and serve.
- iv. To assess whether these rules on procedure are excessive to the extent that they prevent people in their quest to attain justice.
- v. Finally, to consider whether there is need to relax court rules on procedure so as to ensure adequate participation, protection and access to the legal system by the members of society.

1.7 RESEARCH METHODOLOGY

The research consisted mostly of desk research. Relevant works both published and unpublished were consulted. Case law and other legislation were also consulted. Conducting direct interviews with lawyers and judges however proved futile due to the somewhat sensitive nature of the topic.

1.8 CONCLUSION

This chapter set out to provide a general overview of the study. The topic was introduced with a brief background on the subject. Concepts were defined; the underlying purpose of the study was given followed by the statement of the problem. The importance and need to discuss this particular topic was here provided. Further the specific objects that are to be achieved at the end of this study and the research methodology used were also explained.

CHAPTER TWO

COURT PROCEDURE

2.1 INTRODUCTION

Maiese Michelle in her book *Procedural Justice*¹ writes of the unfortunate circumstances that saw a death row prisoner executed because he filed into court his last legally achievable appeal a day late and, on the motion of the prosecutor his appeal could not be entertained. This is an example of how strict procedure is in the courts of law, an error or delay may mean the difference between life and death.

While different people may interpret the story of the death row inmate differently, what should strike everyone is that procedure was not ignored even with the special circumstances of the case. One would think given the nature of sensitivity and the extreme consequences attached to such a matter, the need to follow procedure would not be so strictly emphasised or adhered to, it was after all only one day late. The fact that the prosecutor was allowed to proceed in raising the issue that the appeal was filed in a day late must give an idea on the exceptional importance attached to procedure in the legal system.

The practice of law is a combination of regard for both procedure and substance says William Nelson²; he goes on to say that Life is, in some respects, a constant battle between procedure and substance. It does not take an expert to know that a lawyer with brilliant substantive knowledge of the law and no idea on procedure is a losing lawyer. The substantive part of the law is expected to be presented to the court in a strictly standard manner. Failure to follow the

¹Maiese Michelle, *Procedural Justice: Beyond Intractability* (Denver: University of Colorado, 2004), 124.

²William Nelson, *Idea of Pure Procedural Justice* (Boston: Kent Publishing Co., 1980), 21.

standard procedure in drafting, filling or presentation may result in a matter not being heard by the court. In this regard, it does not matter whether the lawyer has accurately quoted the correct provisions of the law, failure to follow procedure will disadvantage him/her. However, following the correct procedure to the letter but with the wrong substantive law is also as disastrous to the lawyer. What this entails is that a lawyer must have superior knowledge in both substantive and procedural law as the legal system is as strict on procedure as it is on substance. One might however, argue that the courts are a little more tolerable to mishaps in substantive law as they easily correct lawyers and advise them to find the correct provision, procedural mistakes however usually lead to dismissal of the matters.

It is regarded that justice is justice according to the law. According to this form of justice, a person obtains justice if he/she gets whatever it is they are really entitled to under the law or conversely suffers whatever consequence the law provides for them.³ Justice according to the law is however a mere notion, the fact that the court has observed the procedure laid down does not entitle that the decision is just because a man may be innocent or a debt not due.⁴ The idea of justice according to the law may be comforting to judges who in good faith sentence an innocent man. This idea of justice according to the law is further complicated by the expression formal justice.⁵ This expression is used to enhance the meaning of justice according to law. It suggests that as long as the formal procedure has been adhered to, justice is the result.⁶ This is however not true on a number of levels as will be shown in the following chapters.

³A.W.B Simpson, *Invitation to law* (Great Britain: Marston Book Services Ltd, 1980), 53.

⁴Simpson, *Invitation to law*, 53.

⁵Simpson, *Invitation to law*, 53.

⁶Simpson, *Invitation to law*, 53.

Procedure in the courts of law is at different levels. It is at commencement of a trial, during the proceedings of the trial and also at the conclusion of the trial. Most times it is required that the procedure at all these levels is strictly adhered to.

2.2 BEFORE COMMENCEMENT

Before commencement of a trial, sometimes the issue of standing may come up. The issue of *locus standi* has constitutional connotation. The subject of standing can be addressed depending on whether the challenge is presented before the court by way of an application for judicial review under Order 53 of the Rules of Supreme Court, a statutory application to quash, a statutory appeal, habeas corpus or various forms of private law proceedings.⁷

Before the court agrees to hear any matter, it is imperative that a decision is made on whether the applicant so seeking to commence trial has sufficient interest in the matter. If it is found that an applicant is not sufficiently affected by a decision made by the person in authority, the applicant will then not be allowed to continue with this process as they will be considered not to have a right to proceed to court and the court will not have jurisdiction to hear such a matter.⁸ The million dollar question then is what institution is going to protect individuals who put their trust in the legal system which more often than not turns its back on them over mere technicalities?

It is difficult to envision a situation where a government organ would make a decision that would not affect in one way or another every single citizen in that country as most of these institutions are formed to serve the very public the courts claim do not have any interest or are not sufficiently affected by the decisions. This however is the nature of procedure; many

⁷ E.C.S Wade and A.W Bradley, *Constitutional and Administrative Law* (London: Essex England, 1993),27.

⁸ Wade and Bradley, *Constitutional and Administrative Law*, 23.

people have/are denied access to courts of law because they were/are not directly affected by the decision that has been made by the authorities. It would be assumed that by virtue of one being a citizen and the government being the will of the people, every citizen is affected by the decisions made by government.

In the case of *Maxwell Mwamba and Stora Solomon Mbuzi V The Attorney General*,⁹ the issue of standing was raised. The Applicants who were members of an opposition party challenged the appointment by the President of two members of his political party, who had previously been investigated for trafficking in drugs. The challenge was premised on Article 44 of the Constitution Chapter one of the Laws of Zambia which provides:

As the Head of State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of the executive functions of government, subject to the overriding terms of this Constitution and the Laws of Zambia which he is constitutionally obliged to protect, administer and execute.

The substance of the case was that by appointing the two members of Parliament to ministerial positions the President had acted contrary to the provisions of Article 44 of the Constitution by not acting reasonably. The four Judges of the Supreme Court (the majority) observed:

However, on the question of locus standi, we have to balance two aspects of the public interest, namely desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private "Attorney Generals" to move the Courts in matters that do not concern them.

⁹(1993) SCZ 10

In this case, the court was trying to say that it is possible for the President to make decisions such as appointing ministers but somehow other citizens would be more affected by this decision as compared to others. The applicants were not themselves directly affected by the appointments but one would think they had sufficient interest as they are Zambian citizens and who leads them in government sufficiently affects them. It would be argued that such decisions as appointing ministers affects all citizens and it is therefore erroneous for the courts to refuse to hear people on the premise that they do not have *locus standi*. It is the view of the author of this paper that every man has a right to be heard on national matters as they, by virtue of being national may be presumed to affect every national in one way or the other.

2.3PROCEDURE ON COMMENCEMENT AND DRAFTING

The mode of commencement in the courts of law follows a religious procedure in terms of strictness. There are rules that provide for mode of commencement and any mishap can result in a matter being thrown out and not heard by the courts. This naturally results in the denial of justice to deserving parties.

Order VI rule 1 of the High Court Rules¹⁰ deals with the mode of commencement and provides that;

Except for petitions under the Constitution and Matrimonial Causes Acts and applications for writs of habeas corpus, every action in the Court shall, notwithstanding the provisions of any other written law, be commenced by writ of summons endorsed with or accompanied by a full statement of claim.

¹⁰Chapter 27 of the Laws of Zambia

It is emphasised by the courts that rules of court are to be followed strictly and failure to do so may result in the matter being struck off or not being heard by the courts. This was illustrated in the case of *Newplast Industries V Commissioner of Lands and the Attorney General*¹¹ after the learned trial Judge considered the submissions on the preliminary issue he stated that a perusal of section 89 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia showed that the procedure for appeal to court in matters involving decisions of the Registrar of the lands and Deeds Registry is adequately provided for under the Act and that Section 87 of the Act was specific. It provided that, “any aggrieved party may appeal to the High Court following the procedure in appeals from the Subordinate Court to the High Court.” The court found that Judicial Review was a mode of commencing an action, while the procedure provided under the Lands and Deeds Registry Act is a mode of appeal. The court concluded that the appellant had adopted an erroneous and irregular procedure. The preliminary issue was upheld. The whole action was dismissed with costs. This case illustrates how strictly the courts of law intend procedure on commencement to be followed.

In addition to the mode of commencement, the way documents to be filled into court are drafted is also subject to a procedure so austere that any mishap in this case may also lead to a matter not being heard or dismissed by the courts. The rules of court contain subsidiary legislation where court forms such as summons, affidavits and orders are contained. These court forms are standard and are supposed to be complied with strictly.

Where one is suing by way of a writ of summons under Order VI of the High Court Rules¹², it is required that where one is suing in person, the Plaintiff must disclose their address in the said writ of summons. In an unreported case of *Charlene Koorbanally V International*

¹¹ (2001) SCZ 8

¹² Chapter 27 of the Laws of Zambia

*Gaming Africa Limited and Lusaka Royale Casino*¹³, the plaintiff failed to add her address on the writ of summons. For that reason the matter was dismissed and she was ordered to pay costs amounting to K11 000 000.00.

In yet another unreported case of *Grace NamwizyeSilavwe V IreenMundiaMombotwa and Douglas B. Mupeta*¹⁴, the appellant filed an appeal into the Supreme Court, when the said matter came up for trial, a point was raised by the Respondents that the Appellant had filed into court a notice of appeal without seeking leave to appeal from the High Court as is provided by the rules of court. It was on this issue decided that the matter could not be heard as proper procedure had not been followed.

In the unreported case of *Patjoe Investment v Continental Outdoor Media*¹⁵, the plaintiff who was not represented by a lawyer failed to apply for an adjournment on his own. His matter was then struck out for irregularities in the manner he drafted his documents on the application of counsel on the other side. He was further ordered to pay costs amounting to K25 000 000.00.

The cases and laws that have been cited here depict the many ways in which strict adherence to procedure in the legal system may result in the denial of justice to people who candidly deserve to be protected by the legal system but are prejudiced because of minor and mostly drafting errors.

¹³ (2011) H.P 750

¹⁴ (2010) SCZ 209

¹⁵ (2011) HP 472

2.4 DURING TRIAL

The issue of procedure does not end at commencement but goes on to trial. Common law provides that for a legal system to effectively serve society, it needs a set of attributes. Certainty and predictability are some of the attributes of a good legal system.¹⁶ For a legal system to be predictable it must have a written set of rules that people know and can obey.

This attribute also ensures that the lower courts follow the decisions of the higher courts. This is a doctrine called *stare decisis* and it entails that if a higher court passes judgment on a particular matter, the lower courts are then mandated to follow such judgment as it then becomes law. The cases so decided on become precedents. This procedure stunts the development of the law and may result in some form of injustice to people as a lower court cannot go against a higher court's decision, if the law on a particular subject that a higher court has decided is to be changed, the courts have to wait until such a time that the said court overturns such a decision.

It is imperative that while diligently following the doctrine of *stare decisis*, it is accepted that while certain jurisdictions may have the similar legal systems, such as Zambia and the United Kingdom (common law), these laws do not flourish in the same manner and the same law may furnish justice to a person in the United Kingdom but result in an injustice to someone in Zambia. This was expounded by Lord Denning in the case of *Nyali LD v Attorney-General*¹⁷ as was quoted in the Zambian case of *Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party*¹⁸, the learned Lord stated,

¹⁶ Munalula, *Legal Process: Cases and Materials*, 23.

¹⁷ [1956] ALL ER

¹⁸ (1978) Z.R 378

The next proviso provides, however, that the common law is to apply subject to such qualifications as local circumstances render necessary. This wise provision should, I think, be liberally construed. It is recognised that the common law cannot be applied in a foreign land without considerable qualification. As with an English oak, so it is with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour the entire world over, but it has also many refinements subtleties and technicalities which are not suited to other fold. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications.

During trial procedure is set for a number of processes such as calling witnesses, giving evidence to mention but a few. With regard to witnesses, the parties in a civil matter may call as many or as few witnesses able to give admissible evidence in the order which commends itself to them. In criminal cases however there is a restriction on the order in which defence witnesses maybe called and the judge may call a witness without the consent of the parties.¹⁹In *R V Morrison*²⁰, Lord Alverstone CJ said, “in all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call.” This rule of court has to be followed strictly as it is procedure set by court, failure to do so may lead to a mistrial and thus deny justice to a well deserving party or end in an acquittal.

The admission of evidence must also follow procedure as laid down by the courts. The evidence of a child must be corroborated by an adult or the sworn evidence of another child otherwise it will not be admissible in court. This was demonstrated in the case of *The*

¹⁹Colin Tapper, *Cross and Wilkins, Outlaw of the Law of Evidence* (London: Butterworths, 1986) ,243.

²⁰ [1911] 6 Cr App Rep 159

Director of Public Prosecution V Kilbourne.²¹ What this entails is that the evidence of a child is inadmissible if it is not corroborated even if it is true and is a vital piece of evidence during the trial. A criminal can be acquitted or an innocent man sentenced on this basis.

Auerbach summarises on the effects of rigid rules and procedure when it comes to giving evidence in court by stating;

The law of evidence is not about truth but about proof. Exclusion of hearsay evidence ensures that false evidence is not admitted. But it also results in rejection of eminently truthful testimony. The parole evidence rule, the rules of limitation, the mind boggling technicalities of procedure, have very little to do with justice. They also diminish respect for the legal system in the minds of litigants whose substantive case was clearly just but who got knocked out on mere technicalities.²²

Auerbach is here trying to show that the need for strict adherence to procedure when it comes to evidence will sometimes lead to injustices. Hearsay even though true will not be admitted into court because of the said rules.

2.5 CONCLUSION

“Too often the primary concern of the courts is on strict adherence to legal procedures that stifle the search for the truth.”²³

In conclusion it can be said that the numerous stages or levels that demand procedure to be adhered to in the legal process are often the reasons that most people are denied justice and people deserving to be punished go free. Many people believe that the judiciary is there to protect their right to life, liberty and to own property both by way of punishment and benefit.

²¹ [1973] AC 729

²² Jerold S. Auerbach, *Justice without Law* (Oxford: Oxford University Press, 1983), 3.

²³ Samuel Alito, “The role of the lawyer in the justice system,” *Legal Publications* 2 (1998): 32.

This should be the case in an ideal world but it seems the courts go through the legal motions to reach results that are legal but not equitable. The strict procedure and not the result seem to be the dominant concern for the courts.²⁴ A big fraction of ordinary citizens do not have any legal knowledge and they are unable to access justice because the procedure is too cumbersome and any mistake made in the commencement or drafting of documents could result in colossal costs on their behalf.

²⁴ Auerbach, *Justice without Law*, 3.

CHAPTER THREE

EFFECTS AND LIMITATIONS; ROLE OF DIFFERENT ACTORS

3.1 INTRODUCTION

The preceding chapter went to great length to demonstrate some of the numerous instances when strict adherence in the legal system is a cause for most unfortunate injustices. It has been shown that procedure in the legal system is required from the point of inception until a matter is concluded, be it by court process, arbitration, mediation or indeed any other amicable means. This religious standard of procedure makes the management of the legal system in particular, the administrative part systematic and orderly. It facilitates the control of the numerous matters that the general public take to the court for its consideration. It should be noted however, as has been shown in the previous chapter that these strict procedures also have limitations.

As procedure is a vital part of all things that affect the legal system, it therefore follows that all participants in this system are greatly affected by this strict adherence to procedure. These participants include but are not limited to judges, lawyers and the ordinary citizen seeking the courts assistance. Judges are affected in that they have to ensure that certain rules are followed throughout the court process from the time documents are filed into court until judgment is passed and the matter is concluded.

Lawyers are considered to be the officers of the court and expected to guide the court correctly.¹ By extension they are therefore expected to guide the people they are representing

¹Anyangwe, *An outline of the study of Jurisprudence*, 67.

adequately, this means complete adherence to the system so that the persons depending on their representation are not bigoted on a technicality and court procedure distorted.

Without much surprise, a great number of people in Zambia have no legal representation; they represent themselves for various reasons. Some have had bad experiences with lawyers that they paid to assist them with their matters. John□□for example paid a lawyer to help him in his court case not knowing that his lawyer had a deal with the other party (a large corporation) to stall the matter by late filing in of documents and unnecessary adjournments.² Given the economic situation in Zambia, most people do not have the money to pay lawyers who have exorbitant chargers and charge for every small act they perform on behalf of their clients. Most law firms will charge excessive amounts for miniature tasks. Other people will simply prefer representing themselves because they do not trust someone else handling their matter. All in all, judges, lawyers and ordinary citizens are greatly affected by issues of strict adherence to the legal system.

Procedural adherence has been a topic of discussion for most scholars. For most, the question is why the system is so complex and the need for strict adherence so significant. Most scholars ask if the system is complex because of the self interest of the lawyers, or because the modern governments in society are complicated and difficulty thus demanding a complicated and difficulty system, or is the law complex because life with the introduction of new innovations has moved from difficulty to complex.³ What seems to be the general viewamong scholars however is that the legal system is too complex and there is no truly valid reason for it to be so.⁴

²Disiplinary hearing proceedings report from the legal practitioners committee at Law Association of Zambia.

³Simpson, *Invitation to Law*, 165.

⁴Simpson, *Invitation to Law*, 165.

3.2 JUDGES

Long-established legal theory has always placed judges as the bearers of the law, some have even called them “high-priests” of the law.⁵ A judge is a central figure in the court, he plays many parts. He supervises the proceedings and makes sure that the rules are kept during court process.⁶ Their task has been described as declaratory where they are purely restricted to declaring the law as it is. It has been argued that judges are not law makers but simply interpreters’ of the law. They do not add anything new to the law but only declare unsullied applications of the rules or laws that have been established by the legislator.⁷ Judges are expected to conform to the rules and laws as they have been. Open ended rules or laws that require the Judge to do what is equitable, just or fair still necessitate that the Judge follows formal procedure so as to continue the tradition of treating like cases alike.⁸

Carlson Anyangwe in his book *The Outline of the Study of Jurisprudence* quotes G. Tarde who said, “Man has the tenacious habit of following the beaten path.” This imitative faculty in man is called the ‘laws of imitation,’ *‘les lois de l’imitation.’*⁹ Judges have to decide cases in accordance with the law; their decisions cannot simply be arbitrary or based on the emotions prevailing in that particular case. One long standing rule that judges have to adhere to is that of *stare decisis* which entails following judicial precedent as has been elucidated in the previous chapters. Judicial precedent has been said to be a guarantee of security and it is

⁵Anyangwe, *An outline of the study of Jurisprudence*, 83

□ Not his real name

⁶Simpson, *Invitation to Law*, 60.

⁷Simpson, *Invitation to Law*, 60.

⁸Simpson, *Invitation to Law*, 84.

⁹Simpson, *Invitation to Law*, 111.

based on the idea of reasonable expectations without which judicial decisions would be erratic and capricious.¹⁰

Anyangwe quotes in his book that,

In almost any form of organisation, precedents have to be established as guides to future conduct, and this applies not merely to legal systems but to all rule or norm-creating bodies, whether clubs, government departments, schools, business firms or churches. There is, however, an inevitable danger that this tendency to follow past precedents may lead to stereotyped procedures and stultify progress, and much of the working success of any organisation may depend on its ability to apply precedents creatively.¹¹

Most legal jurists support the doctrine of precedents and stare decisi, and while most believe it is a fire-proof doctrine and must be followed to the bone, some have accepted that an absolute adherence to this doctrine would have an adverse effect on judges as regards the judgments they pass and consequently the ordinary citizens who are the recipients of such judgments.

The doctrine of precedent and stare decisis limits judges in that they are bound by the earlier decisions of the higher courts, the higher courts are also themselves bound by their earlier decisions on similar matters until they decide to overturn such decisions. If a case is decided differently from an earlier case with similar facts, an aggrieved party can be allowed to appeal on that ground. Parties employ earlier decided cases with similar principles in their submissions knowing the court is expected to refer and use them and in the event that the court decides not to follow such cases, they are required to give a reasonable and logical explanation as to why they have not followed the particular judgment.¹²

¹⁰Simpson, *Invitation to Law*, 111.

¹¹Anyangwe, *An outline of the study of Jurisprudence*, 113.

¹²David Foskett, *The Law and Practice of Compromise* (London: Sweet and Maxwell, 1980), 165.

A strict adherence to the doctrine of precedent by judges in the legal system would result in an inflexible, unyielding and static law which would be highly unworkable as law is a dynamic instrument meant to regulate an ever changing society.¹³ It has been stated that to some extent, the doctrine of precedent curbs judicial creativity and activism.¹⁴ If the law is to be regarded as a tool for maintaining social order and society changes every day, judges are then limited by this doctrine in that they are not free to apply their experiences, particularly their personal experiences to their judgements. Very rarely do parties go to court on purely legal issues, the conflicts that arise in society stem from the conflicting interests between individuals and it would only be in order to allow some level of such experiences on the part of judges in the passing of judgements.¹⁵

Judges need to be given a leeway to some degree in order for them to apply their own reasoning unimpeded by strict rules. Anyangwe commented in his book¹⁶ that judicial activism has in the past led to the development of great rules and principles such as was the case in *Rylands v Fletcher*¹⁷ and *Donoghue v Stevenson*¹⁸.

Lower court judges are required to follow precedents even if they think that such precedent is wrong.¹⁹ In retaliation, Lord Denning commented;

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. All that I am against is its too rigid application, a rigidity that insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods: you must follow it certainly so as to reach your end, but you must not let the path become too overgrown, you must cut out the dead wood and trim off the side branches or else you will find yourself lost in thickets and

¹³Foskett, *The Law and Practice of Compromise*, 165.

¹⁴Foskett, *The Law and Practice of Compromise*, 165.

¹⁵Foskett, *The Law and Practice of Compromise*, 166.

¹⁶Anyangwe, *An outline of the study of Jurisprudence*, 119.

¹⁷[1868] LR 3 HL 330

¹⁸[1932] AC 562

¹⁹B.Marcel and D.Clare, *The Law Machine* (London: Clays Ltd, 1994), 89.

brambles. My plea is simply to keep the path of justice clear of obstructions which would impede it.²⁰

In addition on the same issue, Lord Edmund-Davies was of the view that,

Justice that pays no regard to precedent can be positively injustice. Precedents can however be grossly irritating and confining when they exist and prevent you from going the way you would prefer to go.²¹

The Zambian Supreme Court discussed the principle of stare decisis in the case of *Match Corporation Limited v Development Bank of Zambia and the Attorney General*²², the Court disagreed with counsel that it was bound by its previous decisions. In establishing this, the Court considered the case of *Paton v The Attorney General and Others*.²³ In this case the Court was of the view that the higher Courts of the land hold themselves free if they see it fit to do so not to follow their previous decisions. The House of Lords in England had abandoned its rigid adherence to the rule of stare decisis. The Zambian Judges on this basis held that the Court of Appeal (as it was then), being the ultimate Court in Zambia is not absolutely bound by its previous decisions. It can however only deviate from previous decisions for very compelling reasons and if the previous decision was wrong. The Court went on further to say that the relaxation of the rule was not abandonment and it should still be followed as failure to follow it would make the law an abyss of uncertainty.

Aside from the doctrine of precedent or stare decisis, judges are also faced with the problem of separation of powers. The doctrine of separation of powers has a negative effect on the

²⁰ Marcel and Clare, *The Law Machine*, 94-95.

²¹ Marcel and Clare, *The Law Machine*, 95.

²² (1999) SCZ 3

²³ (1968) Z.R.185

ability of judges to perform their duty uninhibited. This doctrine as strictly construed by Montesquieu is usually used by judges as a means of self restraint.²⁴ This point was illustrated in the case of *MohdYusofMohamad v Kercjaan Malaysia*²⁵, the learned judge said: "Any judicial interference, in matters where the executive had exclusive information and upon which it had acted, could be readily construed as judicial encroachment upon the independence of the executive."

It can here be seen that the courts will almost always follow their past decisions so as to maintain the certainty of the law. Only in very rare circumstances will this rule not be followed. In the *Paton's case*²⁶, it was stated that the court will not overturn its decision for the reason only that it is wrong. Courts are to stand by their decisions even if they are erroneous unless there is a sufficiently strong reason requiring that such decision should be overruled.

3.3 LAWYERS

Lawyers are also greatly affected by the need for strict adherence to the legal process, particularly in the processes referred to in the preceding chapter such as drafting of documents, filing of documents into court and presentation. A lawyer has to ensure that strict procedure is followed during court proceedings. Any flaw in following the procedure laid down would result in penalties worth millions to their client as was illustrated in chapter two in the unreported case of *Charlene Koorbanally V International Gaming Africa Limited and Lusaka Royale Casino*²⁷, where the plaintiff failed to add her address on the writ of summons.

²⁴ Auerbach, *Justice without Law*, 3.

²⁵ [1999] 5 MLJ 286

²⁶ (1968) Z.R185

²⁷ (2011) HP 750

For that reason the matter was dismissed and she was ordered to pay costs amounting to K11 000 000.00.

Lawyers are under a great deal of pressure due to the procedures laid down in court in that their reputations as lawyers depend on how adequately they adapt to austere procedure. A lawyer who feels that his client maybe better served by one form of procedure instead of another, may, despite his good intentions, risk his client's matter being thrown out of court for failing to follow the proper procedure.

While the general public assumes lawyers mannerisms are an extension of their arrogant or pretentious nature , it is unknown to most that there are rules of conduct that govern the dress code for lawyers whilst in court and also how they are expected to address the court whilst in session and after. A lawyer who attends court in inappropriate attire or continuously addresses the judges incorrectly may be asked to leave the court room.²⁸ From this it can be seen that lawyers have extra procedures to concern themselves with in relation to all other parties in that not only do they have to be concerned about procedure in the court but also be on point with etiquette. While most careers only have the code of conduct drafted by the company's legal personal or such other person so qualified to regulate them, lawyers have the Legal Practitioners Act.²⁹ Lawyers are officers of the court³⁰, in this regard they are expected to completely comply with all the rules of the court. As officers of the court they are to guide the court correctly by providing and stating the correct law and following the correct procedure.

²⁸ Alito, "*Legal Publications*," 3. See also section 90 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia.

²⁹ Chapter 30 of the Laws of Zambia

³⁰ Section 85 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia.

Their loyalty first lies to the court and then their clients. They are to ensure that they do not at any time mislead the court. This position given to lawyers by the Act adds on to the pressure that strict adherence to procedure imposes on them.

Usually when there is a conflict to be dealt with in the courts of law, the three main participants are the judges, lawyers and affected clients. A client will normally just inform his lawyer on the facts and it is up to the lawyer who is expected to have skilled knowledge and legal expertise in the law to present the clients with well reasoned arguments in court before the judge. All the decisions that are made by judges during trial directly affect the parties, in addition all the procedures that adversely limit or affect judges and lawyers trickle down to the ordinary citizen. If there is a precedent on a similar matter as what the parties have brought before court, the judge is bound to follow such precedent even if he knows such a decision will prejudice either of the parties personally.

3.4 CONCLUSION

In conclusion, it can be pointed out that if the lawyer fails to timely file documents into court or misses any minor detail while drafting such documents, opposing counsel can rise that point in court and the matter will be adjourned so that the necessary corrections are made or the matter will simply be dismissed. This is detrimental to the lawyer only to the extent that it affects his reputation and the level of trust and respect that future clients will have for him.

When a judge feels that the current law is unjust in a particular, he is restrained from employing any just law because of the principle of stare decisis. The real victim it should never be forgotten is the ordinary citizen. The only obstacle between this citizen and what he

feels to be justice is the need for rigid adherence to the legal system which has proved to have a negative effect on all the participants.

CHAPTER FOUR

HOW PROCEDURE IMPEDES JUSTICE FOR THE ORDINARY CITIZEN

4.1 INTRODUCTION

The law is an instrument that has developed to protect the weak and vulnerable people in society. It is true that every society needs laws in order to exist in a logical and orderly manner.¹ Anyangwe² observes in his book that laws are necessary for “restraint, predictability, consistency, reciprocity and persistence in human behaviour.” It is clear from most legal writers that the law was made or designed for the people. It is therefore perplexing to learn that some of the laws that exist actually confine access to the legal system. Are these laws then not going against the very object that the law was established to achieve?

The complexity of the law and the unfathomable nature of the procedures and conventions it dictates make it inaccessible and perplexing to the ordinary citizen, this is especially true for court procedure.³ This complexity may be experienced or observed by anyone attending court and observing people attempting to represent themselves. These people are often confused with all the processes of standing up and sitting down, not knowing when to give evidence or when to cross examine. “Nervousness, lack of experience of the procedures and ignorance of the law combine to place such people in a very weak position.”⁴

The rules of court⁵ do not make such access any easier. As rules of court are enacted by the judges some of who may have personal interests in seeing the success of various lawyers and law firms, one would conclude that there is therefore a level of personal consideration that is

¹Anyangwe, *An outline of the study of Jurisprudence*, 61.

²Anyangwe, *An outline of the study of Jurisprudence*, 61.

³Simpson, *Invitation to law*, 162.

⁴Simpson, *Invitation to law*, 162.

⁵These rules are found in the subsidiary legislation of Chapter 27 and 28 of the Laws of Zambia.

employed in complicating these rules. Anyone who has had the opportunity to look at these rules of court will attest to the nature of their complexity. In Zambia it takes about four years of university and an additional eight months at the Zambia Institute of Advanced Legal Education (ZIALE) for one to fully be familiar with all rules and regulations related with the courts, and even then one does not really become an expert or fully familiar with all the legal rules.

We have seen from the two preceding chapter's examples of procedures and how the insistence on strict adherence of these procedures negatively affects the ordinary citizen. We looked at cases such as *Maxwell Mwamba and Stora Solomon Mbuzi v the Attorney*,⁶ where citizens were not heard by the court as they did not have sufficient interest or standing to take the matter to court, *Newplast Industries v Commissioner of Lands and the Attorney General*⁷ where the matter was said to have been improperly commenced and thus not heard even though the applicant had a better chance of attaining justice expeditiously and without difficulty going by way of judicial review.

In *Charlene Koorbanally v International Gaming Africa Limited and Lusaka Royale Casino*⁸, the plaintiff failed to add her address on the writ of summons. For that reason, the matter was dismissed and she was ordered to pay costs amounting to K11 000 000.00.

Further we saw in the unreported case of *Grace Namwizye Silavwe v Ireen Munda Mombotwa and Douglas B. Mupeta*⁹, an individual who represented themselves on an appeal to the Supreme but did not seek leave to appeal as is required by the rules of court had her matter dismissed when it was called for hearing and she had to commence fresh applications.

⁶(1993)SCZ 10

⁷(2001) SCZ 8

⁸(2011) HP 750

⁹(2010) SCZ 209

4.2 LAWYERS AS THE PERPETRATORS OF THE COMPLEX SYSTEM

Some scholars have argued that when it comes to strict procedure particularly with regard to the rules of court, lawyers are not victims of procedure but perpetrators instead. Lawyers as professionals are people who have practical skills and expertise in the field of law and sell this expertise to either individuals or organisations prepared to enlist their services.¹⁰ “Lawyers have always had bad press; they have been viewed by many as social parasites.”¹¹ What Wade means is that most of society thinks lawyers feed off the vulnerable in society in order to sustain themselves. The public views lawyers as accountable for the intricacy of the legal system therefore making their existence necessary.¹²

Wade comments on rather passionately on the role of lawyers as viewed by the public. He states,

They often pursue their own interests at the expense of their clients, they are not faithful. They are also greedy and charge excessive fees. They employ legal quibbles and distinctions which have no ethical merit, and obscure rather than illuminate the real issues involved, they pursue form rather than substance, succumbing therefore to intellectual corruption.¹³

Some believe that if lawyers were rendered unnecessary, the complex legal system would be simplified.¹⁴ It has been an issue of debate as to why lawyers are necessary. Some scholars have responded that for there to be lawyers, there must be a body of specialised knowledge to acquire and with that ways of acquiring such knowledge.

¹⁰ Wade Mansell, *A Critical Introduction to Law* (Great Britain: Glass House Publishing Ltd, 1995), 137.

¹¹ Mansell, *A Critical Introduction to Law*, 141.

¹² Mansell, *A Critical Introduction to Law*, 141.

¹³ Mansell, *A Critical Introduction to Law*, 143.

¹⁴ Mansell, *A Critical Introduction to Law*, 143.

For that reason lawyers subsist only as connoisseurs. With the advancement of law as a body of expert knowledge came the evolution of the establishment of lawyers into specialist groupings. These groups it is strongly argued have adopted the law itself as a means to protract, maintain and support themselves.¹⁵ Lawyers are therefore viewed as the drivers of the legal complexities that constrain ordinary members of the public to access the courts of law. In order to protect their profession, they choose to complicate rules that make them indispensable and leave the layman so confused that at any one time he does not know what exactly is happening during his own trial. Even when judgment is delivered it is almost impossible for a layman to understand whether judgment is in his favour or not, whether he has been ordered to pay costs and such similar matters without assistance from his lawyer.

The fact that the legal system has been made very complex and individuals have a very high chance of losing if they attempt to represent themselves automatically means that one will need a lawyer if they are to take a matter to court with increased chances of success. It is common knowledge that most lawyers charge excessive fees and if one cannot afford to hire, it is almost definite that they will experience some injustice or complication either with procedure, drafting or general court process. Such individuals will thus be denied justice because they failed or did not know what procedure to follow in the courts of law.

In the unreported case of *Patjoe Investment v Continental Outdoor Media*¹⁶, with no concrete defence except that the plaintiff had irregularities in the way he drafted his documents, a lawyer was able to have the matter struck off and costs of up to K25 000 000.00 ordered.

¹⁵ Mansell, *A Critical Introduction to Law*, 145.

¹⁶(2011) HP 472

4.3 LIMITATIONS ON JUDGES AS LIMITATIONS ON ORDINARY CITIZENS

Another way in which procedure impedes attainment of justice by the ordinary citizen is by limiting the decisions judges can make due to the doctrine of precedent and also by some of the rules of the court. The doctrine of precedent was discussed at length in the previous chapter. A judge is required by law to follow decisions passed by the higher courts on similar matters in any given case. This is so even though he feels or is of the view that such precedent is wrong or will result in an injustice been occasioned to one of the parties.¹⁷

When a judge strictly follows this doctrine of precedent, an individual may be unfairly treated and this would be all in the name of procedure. A tremendous example illustrating decisions that make bad precedents and affect negatively all participants, these being judges, lawyers and the parties to a matter was in *Ruth Kumbi v Robinson Kaleb Zulu*¹⁸, the Supreme Court held that before section 2 of the English Law (Extent of Application) Act¹⁹, was amended, the Rules of the Supreme Court only filled gaps in our practice and procedure, with the insertion of (e) in section 2, the whole of the 1999 Edition of the White Book has been incorporated in our rules and procedure and by statute Zambian courts are bound to follow the entire provisions of the White Book, 1999 Edition. This is inclusive of decided cases which are also binding on Zambian courts.

Because the *Ruth Kumbi* case was a Supreme Court decision, the lower courts by virtue of the doctrine of precedent and stare decisis had to follow this new decision. What this decision meant however, was that English Law was no longer there only for the purpose of filling gaps

¹⁷ Marcel and Clare, *The Law Machine*, 89.

¹⁸(2009) SCZ 19

¹⁹Chapter 11 of the Laws of Zambia

when they existed in our own legal system, as was the case before the insertion of (e) in section 2. The English Law was now to be employed by judges at all times. This kind of interpretation by the Supreme Court would have lead to chaos and various injustices as it was a free ticket allowing forum shopping. Where one was not happy with the provisions of the domestic laws, they could simply use the white book and this would have been lawful as provided for by this case. Fortunately the Supreme Court overturned this decision reverting back to the old law where the English Law was only applicable to fill lacunas in our own Zambian laws.

4.4 CONCLUSION

In making a lucid critique, the author would like to emphasise that what is being attacked here is not the whole system of procedure in the legal system. It is accepted that the legal system would crumble without any form of procedure. The courts would spend more time sorting out documents and placing cases in the appropriate categories. There would be a waste of both the courts time and resources. What is in issue here are specific procedures that have in the recent past resulted in some form of injustices. These procedures mostly include the standard ways documents are suppose to be drafted. Laymen might have a very good idea on how to draft these documents but do not know the exact way and a small mistake would amount to penalties or a delay in the matter with dismissals. It is also not logical regardless of procedure to follow past decisions that are unfair or wrong.

If it is true that the law is meant for the society, it should then not be so complicated as to keep out the very people it is proposed to serve in spite of the numerous professions it sustains. To many people the essence of the legal process is the promise of justice and if they

cannot approach the courts they will have no choice but to resort to justice of the streets, this being mob justice.

CHAPTER 5

RECOMMENDATIONS

5.1 INTRODUCTION

This study set out to establish the various ways in which the need for strict adherence to procedure in the legal system may lead to injustice for the ordinary citizen. A number of examples regarding provisions and practices in the law that may lead to injustices have been discussed in the preceding chapters.

For every system that deals in complex matters to succeed, a form of established set of procedure must be in place. This ensures the smooth running and operation of any such system. In as much as adherence to procedure in this study has been painted as the root of most injustices in the legal system, it is important to emphasise that procedure is essential and utterly relevant. If not for procedure, the entire legal system would be characterised by chaos and uncertainties. Imagine a legal system with no rules as regards service of documents, computation of time, standard forms or documents, to mention but a few? Not adhering to procedure would lead to the collapse of the legal system as we know it. The already congested courts would become ineffective, delays would be the order of the day as the court would have to spend more time deciphering the various applications and trying to familiarise themselves with the different drafting techniques that different parties would use.

It is imperative to note that the author of this paper is not against procedures to be followed in the legal system but rather against the emphasis to strictly follow such procedure even when it is evident that it might result in a grave injustice to a party to the proceedings. All procedures in the legal system are highly relevant and necessary. Most of these procedures try to organise and manage the numerous cases in a very

systematic way. When a party files documents into court, the other party knows how much time they have before they have to respond. This allows for an orderly way to run things as sometimes one matter may have up to a hundred parties and the correspondence and all the necessary events that are connected to such matter are made available due to the procedural system that is in place.

It should also be emphasised that in some instances judges have actually gone against the rigid application of the procedure required by the legal system. As has been discussed earlier, the strict adherence to the doctrine of precedent or stare decisis may lead to certain injustices where the earlier decision was unjust. Judges have decided not to strictly follow this as was shown in *Paton v The Attorney General and Others*¹ where the Court was of the view that the higher Courts of the land hold themselves free if they see it fit to not follow their previous decisions.

Lawyers have also been highlighted in this paper as predators in the legal system. This is not entirely so. As a profession, there are issues of misconduct with lawyers as is the case with all other professions such as accountancy or engineering. The Legal Practitioners Act² was enacted to deal with matters relating and incidental to lawyers and their profession. It covers a wide range of issues but most importantly it provides for conduct that lawyers should follow and the consequences of misconduct. This is a very serious issue and has been used repeatedly to make lawyers found wanting liable. An illustration of the Act and how strict it is on offending lawyers can be found in the case of *Bernard Mbaalala Munungu*.³ In this case a legal practitioner was disbarred for misappropriation of client money. On appeal and with very convincing evidence that he

¹ (1968) Z.R185

² Chapter 30 of the Laws of Zambia

³ (1983) ZR 48

was a repented man, the court refused to reinstate him for the sake of the profession and also to serve as an example and deterrent to other members.

From the foregoing, it can be argued that the issue of procedural adherence is a two edged sword, its rigid application may lead to injustices and its non application may lead to unprecedented chaos. The essential point here is to find a middle ground or exceptions that will not lean more on either side; rigid or non application. It is the view of the author of this paper that equity must find a permanent and wide abode in the legal system. Where it is unreasonable to follow strict procedure and an injustice seems eminent, the courts must be allowed to make equitable judgements or decisions while emphasising that relaxing of the rules is not abandoning of the rules.

5.2 RECOMMENDATIONS

Relax procedural rules when dealing with laymen

It is a fact that most people who seek the assistance or protection of the legal system are not vested with extensive legal knowledge. This is not shocking as it takes years to learn most of what is required in the law, it is a career, an art. It is for this reason that the legal system, in particular the courts must exercise leniency when dealing with matters where both or one of the parties is not represented. Errors concerning drafting for example should not be a basis for allowing an injustice to occur as was the case in the unreported case of *Charlene Koobanally V International Gaming Africa Limited and Lusaka Royale Casino*.⁴ It cannot be expected that every person will fully be able to draft documents exactly as the courts require. Attention must also be given to those parties

⁴ (2011) HP 750

who are illiterate and are unable to draft documents and cannot afford the services of a lawyer.

Introduce administrative personnel to draft court rules

The subsidiary legislation that is found in the High Court and Supreme Court Acts⁵ containing the court rules is the work of judges. Judges have been assigned the task of coming up with these rules in order to help the smooth running and administration of the judiciary as an institution. From the foregoing it has been established that some scholars are of the view that lawyers themselves have a hand in how these rules are couched and complicate the said rules to ensure their continued existence as a profession and a means for their livelihood. In order to circumvent this, an independent administrative body must be established to draft such rules. This is to ensure that the rules are relevant and not unnecessarily complex as such personnel will not have any vested interest in the terms or complexities of these rules.

Recruit independent persons to run the Law Association of Zambia Disciplinary Committee

Currently the Law Association of Zambia is the association that regulates lawyers in Zambia. This association has different committees that look to different issues such as the Women's Rights Committee and the Disciplinary Committee. When a lawyer misapplies or unfairly handles a client's money or matter in court or breaches expected conduct in any way, they are summoned before the Disciplinary Committee which is headed by their fellow lawyers. It can be assumed that because of the nature of the

⁵ Chapter 27 and 28 of the Laws of Zambia.

composition of the members of the Disciplinary Committee, lawyers who appear before this committee may be let off easily. It is important that there is here a perception of impartiality. It is proposed that if there is going to be a cry for strict adherence to procedure, the weaker parties, who are the ordinary citizens must be protected from the greedy jaws of some lawyers whose only interest is accumulating wealth at the expense of the vulnerable in society. Independent persons must thus be appointed to this committee so as to ensure that justice prevails. The level of misconduct will no doubt be drastically reduced as they will be fear of being suspended or even disbarred at the hands of these strangers and the public will view this committee as impartial.

Introduce harsh punishment for misconduct by lawyers:

In order to deter members in the legal profession from acting contrary to the required manner or engage in grave acts of misconduct, harsh punishment must be imposed on erring members. The law in the case of *Bernard Mbaalala Munungu*⁶ cited earlier must be emulated strictly. Such a harsh judgement has deterred most members for acting inappropriately as it reflects the gravity and seriousness with which such matters are handled. It is important to keep the same level of consequences or even increase the same in an attempt to preserve the dignity of the profession.

Client friendly courts:

Client friendly courts must be introduced. These courts must have fully qualified judges who will pass sound judgements and not raise the need for numerous appeals as is the case with the local courts currently. These courts must have relaxed rules of procedure

⁶ (1983) Z.R 48

allowing for the many citizens who cannot afford the legal fees demanded by lawyers.

This relaxed procedure will also entail the expediency of cases as the rules regarding filing or time will not be strict and matters will not be dismissed or adjourned for lack of addresses or failure to follow the drafting formats religiously.

Basic Education

Legal studies and drafting must be introduced in schools so as to impart basic knowledge of drafting and legal studies. Most people at any one time in their lives find themselves before the law either seeking its protection or avoiding its wrath. If their matter will be decided even on a basis as minor as drafting errors, it is imperative that they are given the chance to fairly attempt to do this correctly. Most people do not even have any idea what an affidavit or summons are or their purpose. To lawyers these are the most basic of documents. If everyone has some basic legal knowledge and understand the importance of a stable and systematic operating mechanism of the legal system, there will be no need for the excessive need for strict adherence and thus allow for the relaxation of certain procedures.

Legal Education

All law students must be well vested in the area of ethics. They must understand the law as a tool used for the smooth operation of the society and not an instrument for accumulation of wealth or personal gain. Everyone studying law should be critical and not accept everything as gospel truth. They must question the merits of the system and critically look at its weak points so as to help develop laws that will better serve societies. In this regard it can be agreed with the many interested parties who have

suggested that law must only be allowed to be studied as a second degree after one has already obtained a first degree and has had a chance to interact with people in society and is able to relate to the problems faced by society on a personal level as they have had a chance to experience some of the challenges first hand.

Ensure that the institutions established to decongest the legal system are not usurped by lawyers

Arbitration and mediation have been introduced as means to decongest the courts and provide for the expedite disposition of cases. These institutions have relaxed procedures when it comes to evidence, drafting and the general proceeding of the matters presented. It is important that lawyers are sternly couched to treat these institutions as they are and not like they are courts of law also. However, the need for lawyers in this setting is not very necessary as experts in the field in dispute are sufficient. One lawyer would suffice to give the legal position on the questions or facts in issue, however recently it seems some lawyers have been relentlessly working towards imbedding the notion that one has a better chance at success if they are represented by a lawyer. It is thus imperative that it is made clear that these institutions were established to prevent the very thing that some lawyers are attempting to promote.

5.3 CONCLUSION

This paper has shown that there is indeed a danger in insisting on strictly following all the procedures laid down in the legal system. There are different actors who are affected by this need for strict adherence, these being Judges, lawyers and the ordinary citizens. The most negatively affected as has been established throughout the paper are the ordinary citizens. This is because they are the ones seeking justice, seeking help from a

system that was established to serve them, and are the ones affected by whatever decisions are passed. For lawyers and judges, these are just jobs, for the ordinary citizen it is the difference between justice and injustice or life and death.

A middle ground must be found where procedure will be followed but at the same time the need to follow procedure will not result in injustices. Granted the legal system cannot operate without set out rules of procedure, however, where non adherence to such rules does not result in any injustice on the other party, the courts must be open to overlooking such glitches and not allow lawyers to make millions of kwachas and consequently result in injustices on mere technicalities.

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