THE SMALL CLAIMS COURT: IS IT A PANACEA TO DECONGESTING THE JUSTICE DELIVERY SYSTEM IN ZAMBIA

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I recommend that this Directed Research Essay prepared under my supervision by Macdonald Mulongoti

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DEDICATION

I dedicate this research paper to my wife, Judy, who despite being senior counsel believed in my ability to accomplish the LLB programme independently. It has indeed been a hard journey from 2003 and I wish to thank my daughter, Ngabo, and my sons, Matabula and Kachilapo, for understanding whenever I requested for some time to do my "home work". I would also like to dedicate this research paper to all members of my family who believed in me and also all lecturers, friends, classmates, workmates (at the Zambia Revenue Authority), for the encouragement and criticism without which this programme would not have been accomplished.

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INTRODUCTION

Going to court in a civil case can be a very expensive undertaking, especially if the sums involved are small. It can cost much more to mount the case, than what one would ever get in return. It is for this reason that some jurisdictions have established Small Claims Courts. It is also the same reasoning behind the provision in the Zambian legal system for the establishment of a Small Claims Court. The rationale for a small claims court is that a claim would be heard by a judge, magistrate or a lay judge in chambers, with the parties presenting their cases in person. There is no requirement for legal representation in this procedure. The small claims court is used for claims such as unpaid bills, recovery of overdue rentals and such small claims. As a general rule, a person has a legitimate claim if someone owes them money and is refusing to pay-up. All a claimant requires is proof that the debt exists. A document or a witness would suffice. In most jurisdictions where this type of court has been established, a threshold has been set as to what constitutes a small claim. For example, in England persons are allowed to bring claims of up to a maximum of £5,000. It is thus evident from the foregoing that if such a system was established in Zambia, it would go a long way in removing

considerable number of small claims in the lower courts' cause lists. Currently, there is a significant number of claims that have to go through the whole court process for months, when such claims could be disposed off in days, if not minutes. It is common knowledge that our court system is congested with a myriad of civil claims, as well as criminal matters. One need only visit our prisons to notice that the congestion is endemic and hence the need to find means of decongesting our courts.

The congestion in the justice delivery system in Zambia is a source of concern to all who subscribe to the concept of 'justice delayed is justice denied'. It is evident that in Zambia, there are a number of claims that have dragged on in the court system for years without any hope of being disposed off in the foreseeable future. The quest to find an efficient system of justice delivery has dogged this country for a long time. It must be pointed out here that the existing justice delivery system was designed at a time when the population was very small and the social, political and economic environment was not as advanced as it is today. Social, political and economical sophistication, coupled with advancements in technology have reshaped the country in many significant ways not envisaged at the time the current system was

designed. Today, there are significantly many more people trying to access justice in one way or another than say 40 years ago. This has led to an increase in the volume of cases handled by our understaffed and underpaid judiciary. One must also bear in mind that ours is a system designed to accept all manner of claims. As a result, there is no limit set on the number of claims our courts can accept. This being the case, it therefore means that the volume keeps increasing daily, without any corresponding increase in the staffing levels of judicial officers. It is for the above mentioned and many more reasons that our legislators deemed it wise to provide for the establishment of the Small Claims Court in Zambia. The enactment of the Small Claims Courts Act[1] on 31st July 1992, heralded a ray of hope for many who believe that the congestion in the justice delivery system can be reduced to acceptable levels. Surprisingly, and unfortunately, the Small Claims Courts have not been established in Zambia since 1992, when Act No. 23 of 1992[2] was promulgated. This is most unsatisfactory because it is a notorious fact that the establishment of this court will go a long way in removing a significant volume of claims in our courts and hence help in decongesting the justice delivery system in Zambia.

[1] Chapter 47 of the Laws of Zambia
[2] Ibid

Delayed delivery of justice negatively affects the development of any given society. It is in light of all the foregoing that this study will focus on analysing the case for the establishment of the Small Claims Courts as a significant solution to decongesting the justice delivery system in Zambia.

CHAPTER ONE –THE EVOLUTION OF THE ZAMBIAN JUSTICE SYSTEM

1.1.0 THE EVOLUTION OF THE ZAMBIAN JUDICIARY

A brief account of how the Zambian judiciary has evolved is necessary to give meaning to this study as it will help in appreciating how we have arrived at the current state of affairs in our justice delivery system. An understanding of the Zambian judicial system as it exists today is dependent, in large measure, upon an understanding of its history[3]. Zambia's courts like most other state institutions are a product of their history. Almost every feature of the system today can be traced back to an historical origin dating from the arrival of the British South African Company (BSA Company) in 1889[4].

1. 0 The Judicial System Under the BSA Company

The system of judicial administration introduced by the British in Northern Rhodesia differentiated between Europeans and Africans. This is evidenced from the provision in Section 14 of the Royal Charter of October 29, 1889[5] entrusting the administration of Rhodesia to the BSA Company which provided thus:

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[3] Francis O. Spalding, Earl L. Hoover and John C. Piper, *"One Nation, One Judiciary": The Lower Courts Of Zambia*, (1970) Volume 2 No. 1 & 2, Zambia Law Journal at 4.
[4] Ibid
[5] Royal Charter of Incorporation of the British South Africa Company, October 29, 1889.

> *"In the administration of justice to the said peoples or inhabitants careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriages, divorces, legitimacy, and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof."*[6]

In actual practice, the BSA Company left the judicial administration of Africans to Africans. The British Courts, composed of BSA Company officers, were understaffed and ill-equipped from the outset. In practice very few cases were heard by these courts and this was compounded by the sheer size of the territory which meant that the administrators could only visit each tribe once or twice a year.[7]

Tribal chiefs were left in charge of administering customary law in tribal courts, with only occasional interference from the BSA Company officials. It must be noted however that these tribal

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[6] Ibid, Section 14.

[7] Francis O. Spalding, Earl L. Hoover and John C. Piper, *"One Nation, One Judiciary": The Lower Courts of Zambia*, (1970) Volume 2 No. 1 & 2, Zambia Law Journal at 5.

courts were never officially recognised[8]. A more elaborate judicial system was established in Barotseland (North-Western Rhodesia), with the passing of the North-Western Rhodesia Order in Council of 1899. The 1899 Order in Council provided for the appointment of judges and magistrates, and English law was to apply except where otherwise stated in the Order[9].

The judicial structure and system however slightly improved in 1900 with the passing of the North-Eastern Rhodesia Order in Council of 1900. The 1900 Order in Council saw the creation of the High Court with civil and criminal jurisdiction over all cases in the territory[10]. Appeal to Her Majesty in Council could be taken in civil cases involving amounts over £500[11]. This simple judicial structure sufficed until the early 1920s, when it became too costly for the BSA Company to continue running the affairs of the territory which became known as Northern Rhodesia.

2.0 The Judicial System under Crown Administration

On February 20 1924, the British Crown assumed the responsibility for the administration of Northern Rhodesia[12]. A governor was

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[8] Ibid, at 6.
[9] Ibid.
[10] The North-Eastern Rhodesia Order in Council, 1900, Article 21.
[11] Ibid, Article 28.
[12] Northern Rhodesia Order in Council, 1924 enacted.

appointed for the territory and the High Court, Magistrates' Courts and native courts were retained as before.[13] The laws of England were to be applied so far as circumstances permitted:

> *"...Provided that no Act passed by the Parliament of the United Kingdom after the commencement of the Northern Rhodesia Order in Council, 1911, shall be deemed to apply to the said Territory, unless it shall have been applied thereto since the commencement of said Order, or shall hereafter be applied thereto, by any Law or Ordinance for the time being in force in the said Territory."*[14]

Recognition was not extended to tribal courts, but customary law was to be applied in civil cases between natives "... *so far as that law is applicable and is not repugnant to natural justice or morality, or to any Order made by His Majesty in Council, or to any law or Ordinance for the time being in force.*"[15] Thus, initially, under Crown administration, there was no more of a link than there had been under the BSA company between tribal courts and the official judicial structure.[16]

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[13] Ibid
[14] Ibid, Article 35.
[15] Francis O. Spalding, Earl L. Hoover and John C. Piper, *"One Nation, One Judiciary": The Lower Courts Of Zambia*, (1970) Volume 2 No. 1 & 2, Zambia Law Journal at 11.
[16] Ibid

The system left to the Crown by the BSA Company was being actively reviewed by the new administration. The question how to best manage native affairs in light of the limited administrative staff available was the subject of a conference of administrative officials held in 1928. Consequently, the Native Courts Ordinance of 1929, which extended official recognition to native courts was enacted.[17] The Ordinance did not, however, elaborate on the jurisdiction of these courts, nor did it establish a system of appeals from the native courts. However, the subordinate courts were entrusted with the power to see to the proper administration of justice in these courts through the exercise of a review and revisory jurisdiction over native court decisions.[18]

At the same time that the native courts were being established, the magistrates' courts were being expanded and a Penal Code was being developed for the territory. The High Court Ordinance of 1933, clarified the High Court's position vis-à-vis the Magistrates' Courts, extended its powers and jurisdiction to those of the High Court of Justice of England, and elaborated on the rules and

[17] Ibid at 12.
[18] Native Courts Ordinance, No. 33 of 1929, Section 6.

procedure to be followed by the court in cases involving customary law.[19]

During the late 1920's and early 1930's , new pressures , with which the existing judicial structure was not prepared to cope, were developing. In 1925, huge copper deposits were discovered in the area of the present day Copperbelt. Labour migrations began immediately the first shafts were sunk in 1927 and by 1929 a total of 22,341 African labourers were employed in the mines. Men from different tribes were, for the first time, concentrated in one area.[20] This state of affairs created a lot of difficulties in the administration of justice in native courts. Litigants were not keen to bring their cases before native courts in the newly created urban areas, because of the absence of their own chiefs capable of applying their own customary law. These native courts, unfamiliar with the customs of other tribes and inexperienced in dealing with conflict of laws problems, were also not anxious to hear such cases.[21]

Apart from the appointment of a native courts advisor in 1948, whose role was to supervise and review native court decisions, no major administrative changes to the judicial structure of Northern

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[19] Francis O. Spalding, Earl L. Hoover and John C. Piper, *"One Nation, One Judiciary": The Lower Courts Of Zambia*, (1970) Volume 2 No. 1 & 2, Zambia Law Journal at 12 &13.
[20] Ibid at 13.
[21] Ibid.

Rhodesia were undertaken in the period up to 1960.[22] The Magistrates' courts and High Court during the period to independence continued to administer the laws and procedures imported from England. The volume of cases in these courts showed an increase roughly parallel to that in the native courts. Such difficulties as these courts encountered were primarily centered on personnel.[23] Magistrates with long experience in Northern Rhodesia, were often posted to other colonies, while High Court judges were selected from other colonies, where they had often little or no experience in deciding civil cases.[24] Moreover, the demanding duties placed upon High Court appointees resulted in a rapid turnover of High Court judges.[25]

3.0 Independence and Post-Independence Era

The attainment of independence on October 24, 1964, brought a spate of changes in what was now the Zambian judicial system. The year 1964 saw many and far-reaching changes in the judicial system of the country. With the introduction of the new constitution in January 1964, there was established for the first time

[22] Ibid at 17 & 18.
[23] Ibid at 19
[24] Ibid
[25] Ibid at 20

a Court of Appeal, solely for the territory. The new constitution also provided for the establishment of a Judicial Service Commission under the chairmanship of the Chief Justice with important advisory and executive powers over judicial appointments.[26] The year 1964 also saw the start of the process of integrating the native courts into the judicial system and far-reaching changes were made in the native court system. From 1964 to the present day, very little has changed in terms of structure and administration of the Zambian Judiciary. Perhaps the only significant change has been the establishment of the Supreme Court[27] from the former Court of Appeal. If anything all the changes to the system have been designed to preserve much of what was in the original system introduced by the colonialists.

1.2.0 CONCLUSION

It is plainly evident from the foregoing brief account of the evolution of the Zambian judicial system that the factors that have led us to the current congested system are traceable to the historical origin of our system. It is clear from the foregoing

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[26] Ibid

[27] The Supreme Court of Zambia was created under Article 107 of the One Party Constitution of Zambia of 1973. This was made operational through the passing of the Supreme Court of Zambia Act No. 41 of 1973.

paragraphs that the system was designed for a less sophisticated society than is the case at present. This factor is compounded by the fact that the British system of justice delivery was imposed on a population with a totally different concept of justice and without any meaningful modification. Illustratively, the understanding of customary law between the British settlers and the indigenous Africans was at variance and this was compounded by the neglect of the judicial system as it pertained to African communities. The Europeans simply let the judicial system in African communities to run on its own, with little remote regulation from the European administrators.

We find ourselves with the current endemic congestion in the system because over the years only cosmetic changes have been made to a system that has outlived the concept of its designers. While the volume of cases in our judicial system has been steadily increasing proportionate to the development of the territory, the judicial system has remained largely unchanged, save for a few cosmetic changes in its structure and administration.

While this chapter has brought out some of the factors that have led our system to its present state, an in depth analysis of factors that have contributed to the congestion in our justice delivery system will be the focus in Chapter Two.

CHAPTER TWO – AN OVERVIEW OF THE FACTORS THAT HAVE CONTRIBUTED TO CONGESTION IN THE ZAMBIAN JUSTICE DELIVERY SYSTEM

2.0.0 INTRODUCTION

This chapter takes an in-depth look at the factors that have contributed to the congestion in the Zambian justice delivery system. There are numerous types of factors and this chapter will not attempt to discuss all of them due to limitations of space. However, the prominent and significant factors will be discussed. This study has identified four factors that will be discussed in the following paragraphs.

2.1.0 COMPLICATED AND CUMBERSOME COURT PROCEDURES

Before any cause is brought before a court, there are specific procedures to be complied with and it is mandatory to comply otherwise the cause will not be heard by the court. These procedures in many jurisdictions have been codified into what are called court rules. In Zambia these rules are codified as subsidiary legislation to the Subordinate Courts Act (The Subordinate Courts

[Civil Jurisdiction] Rules)[28], the High Court Act (The High Court Rules)[29] and the Supreme Court of Zambia Act (Supreme Court Rules)[30]. It is the responsibility of the Chief Justice for Zambia to make these rules through statutory instruments and this is done even when there is need to amend or make additions to the rules. This study will not dwell on the details of the rules, but on the effect of the rules in the delivery of justice. It must be pointed out here that it is not the rules in themselves that are the problem, but the nature of the rules. It is for this simple reason that some jurisdictions revise these rules regularly.

From the onset it must be noted that these rules which are scattered in the various pieces of legislation have not been comprehensively revised from the time since they were first enacted. The legal community and some concerned members of the public have raised concerns about the timeliness, affordability and complexity of these rules, especially the civil court procedural rules. To the common person, the rules are written in complex, unclear language, repetitive, too long and are too scattered in various pieces of legislation. The question that is asked many a

[28] The Subordinate Courts Act, Chapter 28 of the Laws of Zambia
[29] The High Court Act, Chapter 27 of the Laws of Zambia
[30] The Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia

time, is why the rules cannot be codified in one statute or book for easy reference. The study discovered that even some judicial officers on the bench get confused and frustrated by these complex rules. According to Justice Peter Chitengi, the rules on many occasion act as a hindrance to the judiciary's main objective of efficient justice delivery[31]. Justice Chitengi further said that reforming the rules to reflect modern practice in other jurisdictions will facilitate the courts' present and future responsiveness to ongoing social, political, economical and technological change in Zambian society[32].

The following illustration of the procedure in civil matters will further buttress my contention that court rules are a major contributor to the congestion in the justice delivery system.

A civil case may be commenced by the issuance of a writ of summons or an originating summons. The learned Chief Justice Doyle, as he was then, elaborately and clearly explained these two procedures thus:[33]

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[31] Comments made by Supreme Court Judge Peter Chitengi in an interview on 2nd December, 2006 at his residence.
[32] Ibid
[33] In Chikuta v. Chipata Rural Council [1974] ZR 241(SC).

"The practice and procedure in the High Court is laid down in the High Court Rules, and where they are silent or not fully comprehensive, by the English White Book. Under Order 5 of the English Rules of the Supreme Court, rule 2 lays down what proceedings must be begun by writ; rule 3, the proceedings which must be begun by originating summons; rule 4, the proceedings which may be begun either by writ or originating summons; and rule 5, proceedings that may be begun by motion or petition. The Zambian Rules are much more rigid. Under Order 6, rule 1, every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the Rules may be disposed of in chambers shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers. Chamber matters are set out in Order 30 of the High Court Rules. Paragraph (j) of rule 11 of Order 30 does refer to "such other matters as a Judge may think fit to dispose of in chambers.""[34]

[34] Ibid

From the foregoing statement of the law it is clear that there is no room for commencing a civil action in any other way other than that elaborately expounded by the learned judge. It is worth noting that in the instant case, *Chikuta v. Chipata Rural Council*[35], the matter was actually dismissed both in the High Court and Supreme Court for having been brought before the courts using the wrong procedure.

After the commencement procedures are dispensed with then comes the filing of pleadings. Pleadings are intended to define precisely the matters in dispute in an action. Documents including a statement of claim, a defence and, occasionally, a reply are exchanged. The process of preparing, filing and exchanging pleadings is time consuming and expensive. Opposing parties may attack each other's pleadings in interlocutory hearings. The time and cost of these hearings may outweigh the significance of the issues involved.[36] In jurisdictions like Canada, systems of monitoring the progress of a case from its inception have been put in place. These case management systems take the form whereby judges or court officials supervise the progress of cases from inception to trial.[37] This process of monitoring is meant to enhance efficiency in the flow of cases to their time of conclusion

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[35] Ibid
[36] Alberta Law Reform Institute, *The Rules Project: Issues Paper for the Legal Community*, October 2001.
[37] Ibid

and also to provide a means of identifying areas that require intervention. If we had such a system in place in Zambia, probably the flow of cases would be better than is the case currently. After the process of pleadings, there comes the process of discovery. Discovery is the process in which each party to an action is obliged to provide the other party access to all records relevant to any issue in the case[38]. Discovery allows the parties to an action to learn the case they will have to meet and to assess the strength of their own case. The discovery of records takes place through a procedure which begins with the creation of a list of records verified by affidavit. In some complex cases, the production of the list and affidavit can be extremely time consuming and expensive. The last process in most civil proceedings is the trial stage. The trial of an action is a particularly time consuming and expensive feature of the civil justice system. After trial, a decision is rendered by the court. This does not, however, mean the end of the matter as the right to appeal to a higher court from an adverse decision is an established feature of our justice system. Appeals can significantly extend the time until there is a final resolution of a case. It is also a fact that appeals may be

[38] Ibid at Page 7

commenced even in cases where there is no realistic prospect of success.

It can be seen from the foregoing, that court rules play a major contributory role in the clogging up of the justice delivery system especially in Zambia. Some of the procedural rules are so time consuming that majority of civil matters take years to resolve. A good illustration is the Presidential Election Petition[39] which was commenced in January 2002, and was only concluded in February 2005. This case took nearly three years to conclude due to numerous procedural hitches and as a result a number of other cases requiring the attention of the Supreme Court were obviously delayed as a consequent. The long time it took to conclude this case was actually commented upon by the Supreme Court in its judgment. The court made the following observations:

> *"The trial and the determination of this Consolidated Presidential Election Petition of 2002 has seemingly taken a long period to complete and justifiably so, the delay caused a lot of anxiety in the nation and others. Yet, the number of the actual days, when the court sat and heard witnesses, arguments and submissions in support of various interlocutory applications, does not reflect the long*

[39] Mazoka & Others V. Mwanawasa & Others [2005] SCZ Unreported

duration the Petition has taken. The Court sat for 89 days in all to hear evidence, arguments and submissions. But in terms of duration, the petition commenced in January 2002 and judgment is being delivered today (16th February 2005), a period of three years and one month from the dates the separate Petitions were filed. The circumstances, some of which procedural, leading to the protracted trial, were, in most instances, unavoidable and beyond the control of the court. In fact, the court was all along desirous to complete the matter as quickly as possible."[40]

The observations in the dicta of the Supreme Court quoted above are illustrative of the difficulties that court procedural rules pause and also highlights the unavoidability of the procedural complications paused by the court rules. No judge or counsel is at liberty to jump or circumvent the rules. The procedures at each stage must be followed to the letter otherwise non-compliance could be a ground for further applications in future. The Supreme Court further explained the difficulties that court procedural rules pause thus:

"We have deliberately delved into (a) detailed history of this Petition in order to bring out two points. The first point is that the events leading to the long period it has taken to complete this matter were unavoidable and in the interest

[40] Mazoka & Others V. Mwanawasa & Others [2005] SCZ Unreported

of justice. The second point is that elections (petitions), be it Presidential or Parliamentary, by their nature of demanding a quick resolution, ought not and must not follow the course of the existing clogged court system which has very slow wheels of resolution because of the strict requirements of adherence to rules of pleadings, practice and procedure."[41]

It is evidently clear that this case had a direct contribution to the ever increasing congestion in the court system in Zambia.

This situation with the civil court system is further compounded by the situation in the criminal court system where cases drag on due to various procedural rules. Here the so called "Plunder Cases"[42] illustrate the point well. The Task Force on Corruption was established in early 2002 to prosecute suspected plunder of state funds by various government officers and Ministers in the previous administration of Frederick Chiluba. Majority of the cases, except for two which have been concluded, are still on-going from 2002 to this day. Though other factors may have contributed to this prolonged delay in disposing of these cases, it is a notorious fact

[41] Mazoka & Others V. Mwanawasa & Others [2005] SCZ Unreported

[42] Court cases brought to court by the Taskforce On Corruption, setup by the President of Zambia in 2002, have earned a common term of "Plunder Cases" as these cases are mainly aimed at prosecuting all persons suspected of having abused or benefited fraudulently personally from public funds. The public perception is that there was rampant plunder of public funds by persons entrusted with authority to administer these funds on behalf of the people of Zambia, hence the term "Plunder Cases".

that procedural rules have played a major role in the delays in concluding these matters. This could be the reason some quarters of our society have called for the establishment of fast track tribunals to specifically deal with these special cases.

2.2.0 INCREASED AWARENESS OF CITIZENS OF THEIR RIGHTS AND THE NEED TO LITIGATE

The words of retired Washington Supreme Court Judge, Robert F. Otter, summarize the importance of justice in a democracy thus:

> *"The vibrancy of our democracy depends upon our willingness to ensure that the fullest range of voices and interests is represented and heard. This is what the fight for equal justice is all about."*[43]

James A. Bamberger further stated the role of the judiciary in a democracy as follows:

> *"Allow me the liberty of stating the obvious: the business of our justice system is justice. Under our democratic form of government, primary responsibility for the resolution of civil, quasi-criminal and criminal disputes rests with the judicial branch.*

[43] Words quoted by James A. Bamberger, coordinator with Columbia Legal Services, Washington State, in a paper presented for the National Conference of Chief Justices in August 2001,entitled *Civil Equal Justice and the Judiciary: The Leadership Challenge.*

> *The judiciary performs two primary functions in this regard. First is exercise of the adjudicatory functions itself, and second is execution of the administration of justice. Central to the proper execution of its administrative role is the duty of the judiciary to make the machinery of justice open and meaningfully available to all."*[44]

Concepts like the one quoted above became the cornerstone catchwords of the newly introduced democratic dispensation in Zambia. The introduction of a multiparty democratic political system in 1991, brought with it a lot of changes in the country. The democratization process brought with it its attendant processes of economic liberalisation, rule of law, free and fair elections, respect for human rights and the various freedoms that go with a democratic society. The reform process the country has undergone over the past 15 years has also brought about an increasing level of awareness among the citizens of their freedoms and rights. Even those citizens who were never expected to litigate over their rights are now free and able to litigate. The liberalization of the economy has brought a lot of private players in the economy and there is an increased number

[44] James A. Bamberger, coordinator with Columbia Legal Services, Washington State, in a paper presented for the National Conference of Chief Justices in August 2001,entitled *Civil Equal Justice and the Judiciary: The Leadership Challenge.*

of contracts being entered into at various levels. Attendant to these contracts is the failure to honour the contracts and consequently aggrieved parties have to litigate in order to enforce their rights. This has contributed to the congestion in our court system. It is worth noting that the majority of the claims brought before the courts involve small figures which amount to an abuse of court process when all the time and resources expended on resolving them are factored in. These are the type of cases that are fit for the Small Claims Court being advocated for in this paper.

2.3.0 POOR FUNDING OF JUDICIARY

It is a notorious fact that the Zambian judiciary is poorly funded year in year out. Consequently, the judiciary has been unable to attract qualified personnel so it can carry out its mandate of providing an efficient system of delivery of justice. The judiciary is understaffed not because of lack of qualified human resource, but because it cannot offer an attractive package to legal practitioners to join its ranks. Even at the level of High Court, the Judicial Service Commission has struggled to fill the vacancies that arise from time to time as most experienced and qualified lawyers prefer to be in private practice where they earn far much

more than they would earn sitting on the bench. Lack of qualified staff is not the only consequence of the poor funding, but also lack of funds to meet administrative and operational expenditure. Lack of stationery, fuel and even transport itself is the order of the day. All these issues contribute significantly to slowing down the judicial process and eventually contribute to the endemic congestion in the justice delivery system. A perusal through the Annual Budget Plans of the Judiciary revealed that annually the budgetary allocation by the Minister of Finance is 50% less than what is requested.[45] This in the end entails making cuts in some budget lines so that the judiciary can pull through the year. Over the years, the cumulative effect of this under-funding has had serious consequences for the effective operation of the judiciary. In the final analysis the judiciary is unable to deliver as expected. However, the litigating public is oblivious to these operational constraints and they keep on bringing more and more cases before the courts. This poor funding is therefore another major factor contributing to the congestion in the justice delivery system.

[45] A comparative analysis of the Annual Budget Estimates prepared by the Judiciary and the allocated funds in the Estimates of Expenditure (Yellow Book), as approved by Parliament, was undertaken here for the period 1998 to 2005.

2.4.0 POOR STAFFING OF THE JUDICIARY

This study discovered alarming levels of understaffing in nearly every wing of the Zambian judiciary. With the so many qualified legal practitioners in the country, it is hard to imagine why the judiciary is so alarmingly understaffed. An inquiry sent to the office of the Chief Justice as head of the judiciary was given the issue of poor funding and lack of an attractive remuneration package as the major reasons for the failure to fill the numerous vacancies over the years. It was pointed out that this is the main reason the positions of Chief Administrator of the Judiciary, as well as that of Registrar of the High Court have remained vacant for quite some time. It was emphasized that the envisaged total autonomy of the judiciary if coupled with adequate funding will resolve all these issues pertaining to staffing of the judiciary.

CHAPTER THREE – THE SMALL CLAIMS COURTS ACT AND ITS IMPLEMENTATION

3.0.0 INTRODUCTION

The enactment of the Small Claims Courts Act in 1992 was a culmination of the demands from various sectors of society for an improvement in the Zambian justice delivery system. The enactment of the Act was government's response to the cries of the people over the years and the Movement For Multi-Party Democracy (MMD) government, barely two years in government, responded to the rallying cries of many sectors of Zambian society and enacted Act No. 23 of 1992.

The Small Claims Courts Act is an interesting piece of legislation and an in-depth analysis of it brings out the intent as well as the mischief in the current justice delivery system that the legislators wanted to cure. While the Act aims at establishing a civil claims court system, some of its provisions can, to an untrained eye, appear to be aimed at establishing a criminal court system. However, it will be shown later in this paper that this was deliberately done by the drafters of the Act in order to make the provisions of the Act enforceable.

3.1.0 THE SMALL CLAIMS COURTS ACT ANALYSED

3.1.1 Establishment of Small Claims Courts

The Small Claims Courts Act provides the mode of establishment of Small Claims Courts as follows:

> *"3. There is hereby established small claims courts which shall be situated in such areas as the Chief Justice may consider necessary, having regard to the needs of a particular area."*[46]

A critical look at the provision above clearly shows that the Act has vested wide discretionary power in the Chief Justice to determine not only the number of small claims courts, but also the geographical areas where the said courts could be established. Thus, save for financial constraints, the Chief Justice could establish as many courts in as many areas as he deems necessary in his own estimation of the needs of each particular area. It is therefore difficult to appreciate why the Chief Justice has not put in place the necessary legal instruments for the establishment of the Small Claims Courts in various parts of Zambia since 1992, when the Act was enacted.

[46] Section 3 of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.

Section 4 of the Small Claims Courts Act provides that a single arbitrator sitting alone constitutes a small claims court. This provision is significant as it makes the job of setting up a small claims court much simpler. Though the Act provides that no person is to be appointed as an arbitrator unless that person is a legal practitioner with no less than five years experience[47], the large number of legal practitioners in Zambia would suggest that, with an attractive remuneration package, a good number of them would be willing to join the judiciary. The provision that the arbitrators are to serve on a part-time basis makes it even easier to attract very qualified and experienced lawyers in the service of the small claims courts[48]. A glance at the amount of sitting allowance provided in the Act per sitting for arbitrators seems to be attractive enough even for some highly paid practitioners.[49]

[47] Section 7 of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.

[48] Section 9 of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.

[49] The Small Claims Courts Rules contained in Statutory Instrument 85 of 1994 in Part VI provides that an arbitrator is to be paid a sitting allowance equivalent to that paid to the Chairman of a Commission of Inquiry appointed under the Inquiries Act. According to information obtained from the Secretary to the immediate past Commission of Inquiry (the Mung'omba Constitution Review Commission) the Chairman was paid a sitting allowance of K750,000 per sitting. That amount of money is attractive at the prevailing economic standards in Zambia to attract a good number of legal practitioners to serve as arbitrators especially that service is on a part-time basis.

3.1.2 Proceedings in the Small Claims Court

Proceedings in a small claims court are to be held in open court and such proceedings are not to be bound by any rules of evidence as is the case with proceedings in other civil courts[50]. It is also worth noting that the Act provides in Section 13 that:

> *" 13. (1) No legal practitioner, other than a practitioner who is a party acting solely on his own behalf , may appear or act before a small claims court on behalf of any party to the proceedings."*[51]

This provision in Section 13 is fundamental to the rationale behind the establishment of the Small Claims Courts system. By this single provision, the small claims court can be made accessible to millions of litigants who can never afford to pay even the cheapest lawyer. The net effect of this provision is that parties to litigation appear before the small claims court as equals. This state of affairs seems to fall within the primary function of the small claims court to do substantial justice between the parties[52].

Section 15 provides that the business of the small claims court be conducted in English or in such other language that is convenient

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[50] Section 16 of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.
[51] Small Claims Courts Act, Cap 47 of the Laws of Zambia.
[52] Section 14 of the Small Claims Courts Act, Cap 47 of the Laws of Zambia provides that the primary function of a small claims court is to do substantial justice between the parties.

to the court and all the parties before the court[53]. In the same section, it is further provided that a party that is not conversant with any of the languages being used in court be availed the services of an interpreter[54]. These provisions in Section 15 appear to be in line with the primary function of the small claims court as espoused in Section 14 discussed above.

3.1.3 Powers of the Small Claims Court

The Small Claims Courts Act has conferred upon the Small Claims Courts wide powers to enable it be effective in its execution of its functions. Though Small Claims Courts are civil courts they have been conferred with powers similar to those conferred on a criminal court or tribunal. Illustratively, the Act provides for the issuance of summons to compel a defendant or a witness to a claim to appear before the court and further provides for the arrest of a defendant who willfully fails to present himself before the court upon being served with summons.[55] These provisions are clearly appropriate for a criminal court as witnesses are not supposed to be compelled to attend court in a civil matter. A case in point is that in which the Attorney General for Zambia has

[53] Section 15 (1) of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.
[54] Section 15 (2) of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.
[55] Section 18 of the Small Claims Courts Act, Cap 47 of the Laws of Zambia.

sued former president Frederick Chiluba and Five Others claiming US $2,249,872.60 allegedly stolen from the Zambian government through the intelligence bank account commonly referred to as the Zamtrop Account, in the London High Court.[56] Dr Chiluba and his co-defendants have refused to present themselves before the London High Court, claiming it has no jurisdiction over them.[57] Because this is a civil case purely aimed at recovering the allegedly stolen monies the London High Court of Justice has not issued summons to compel the defendants to appear before it as it has no such powers. However, the Small Claims Court Act has conferred such powers on the small claims court though it is a civil court. This is a strange state of affairs but a necessary provision if the Small Claims Court is to carry out its functions effectively and have its integrity protected.

The Small Claims Courts Act similarly provides for criminal sanctions in a number of instances in Section 25[58]:

> *"25. Any person who is subject to the jurisdiction of a small claims court and who, without reasonable excuse-*
>
> *(a) fails to obey any summons issued by the court;*

[56] Zambia Daily Mail, Wednesday, November 8, 2006, Volume 10 No. 266 at Page 1.
[57] Ibid
[58] Small Claims Court Act, Cap. 47 of the Laws of Zambia.

(b) threatens, intimidates or insults that court while sitting in that capacity;

(c) intentionally interrupts the proceedings of that court or otherwise behaves in a disorderly manner before that court;

(d) deliberately omits to deliver up any document or thing in accordance with an order of the court;

(e) refuses to answer any question asked by the court;

(f) while any proceedings are in progress in the court, makes use of any speech or writing misrepresenting any proceedings of that court in such a way as to prejudice the arbitrator in favour of, or against, any party to those proceedings;

(g) having the means to pay any sum awarded against him, or due from him, refuses or wilfully fails to make the payment after due notice; or

(h) wilfully disobeys or fails to comply with any other lawful order of that court;

shall be guilty of an offence and shall be liable, upon conviction to a fine not exceeding four hundred penalty units or to a term of imprisonment not exceeding six months, or to both."

The preceding offences give the small claims court wide powers to effectively carryout its mandate as well as protect its integrity. The sanctions for offenders of the court are excessive for a civil court and one may be excused for thinking these are meant for a criminal court. To imagine that even refusal to answer any

question asked by the court could land someone in prison for up to six months is beyond comprehension.[59]

As seen above in the analysis of the various sections of the Small Claims Court, the hallmark of the Small Claims Court is that it is inexpensive and easy to file a claim, and court procedures have been simplified. Section 13 of the Small Claims Courts Act expressly excludes lawyers from representing litigants in the Small Claims Court. The hearing before an arbitrator is designed to be done quickly and the decision is to be rendered upon conclusion of the hearing (There is no provision for adjournment of the decision to another sitting). Further, the amount a claimant can sue for is limited. A claimant may decide to use the Small Claims Court even if they are to realize less than what they are owed for the simple reason that money is saved by avoiding a lawyer and the enormous amount of time it takes when one uses a regular court.

[59] Section 25(e) of Small Claims Courts Act, Cap 47 of the Laws of Zambia.

3.1.4 Establishment of the Small Claims Court: What has been done so far.

It would be a misstatement of facts to claim that virtually nothing has been done towards the establishment and operationalisation of the Small Claims Court in Zambia. As already alluded to above, it is the responsibility of the Chief Justice to establish and ensure the operation of the Small Claims Court.

Going by this mandate, the Chief Justice did begin the process of establishing the Small Claims Court in Zambia. The following paragraphs will outline in chronological order the steps and activities that have been undertaken towards the realization of the objective of establishing the Small claims Court in Zambia.

In December, 1995 a team comprising some selected senior magistrates and the Deputy Registrar of the High Court was sent to Zimbabwe on a study tour of the Small Claims Courts in that country.[60] The tour was undertaken between 10th and 17th December, 1995 and presented its report on 4th January, 1996. The report of the tour basically stated that the system in place in Zimbabwe is similar in many respects to the one proposed for

[60] Used with permission from documents obtained from the Office of the Chief Justice.

Zambia. In Zimbabwe, the court had been established as a pilot project starting with the cities of Harare and Bulawayo. The only major difference observed by the study team was that unlike the proposed system in Zambia, the Zimbabwean system provides for the sitting of the court on weekends and the weekend courts to be presided over by private legal practitioners on pro-bono basis.[61]

Following the report of the team that was sent to Zimbabwe, the then Chief Justice Ngulube, directed on 29th January, 1996 that staff to man the Small Claims Court be trained immediately and that a selected number of professional magistrates and some private lawyers with no less than five years standing be recruited and equally trained. Justice Ngulube further directed that the court be operational within the year 1996.[62]

As per directive of the Chief Justice in January 1996, a list of 8 professional magistrates and 23 private senior legal practitioners was submitted and subsequently approved by the Judicial Service Commission between April and May 1996. Further, all necessary lists of stationery requirements as well as support staff

[61] Ibid
[62] Supra Note 51

were put in place by the end of May 1996. However, from June 1996 to May 1997, no tangible activities were undertaken on the establishment of the Small Claims Court. In an internal memo in May 1997, to the Deputy Registrar in charge of administration, the then Acting Chief Administrator of the Judiciary, Mr. Phillip Musonda, directed that the list of all the requirements be sent to his office so that the same could be purchased immediately to enable the courts start operating. There was a flurry of memos between the various administrative officers at the judiciary headquarters on the subject of funds to enable the court operational from May 1997, until August 1997, when eventually something seemed to be moving. In August 1997 court seals, date stamps and various types of court forms were procured. Other items like the printing of court registers were going through tender procedures. However, it would appear that this process of putting the necessary logistics to operationalize the Small Claims Court kept dragging on because as at September 2000 the matter was still under discussion between the various responsible officers at the judiciary headquarters.[63]

[63] Ibid

The frustration by the Chief Justice on the failure to have the Small Claims Court operational could be discerned from an internal memo written on 14th November 2001, to the Deputy Chief Justice thus:[64]

> *"You will recall that the legislation on the above was passed a long time ago; the Rules were developed and forms designed. The Judicial Service Commission even appointed the arbitrators. Each year, the treasury made money available under our budget.*
>
> *Regrettably efforts to get the Small Claims Courts up and functioning did not yield the desired results. Most of those who were entrusted with the task and who were instructed by me to operationalize these Courts have since died without the Small Claims Courts seeing the light of day. I enclose photocopies of the memos which passed between me and the offices of the Deputy Registrar and the Chief Administrator, the last being one dated 25th September, 2000, from the Chief Administrator.*
>
> *I would like you to take personal charge of this project and cause the Small Claims Courts to materialize and to start functioning."*

The foregoing makes sad reading in the sense that even the highest office in the judiciary seems hopeless in the situation. The

[64] Used with permission from documents obtained from the Office of the Chief Justice.

kind of bureaucratic inertia exhibited by various officers at the judiciary is frightening to say the least. Everyone knows that things move slowly in government, but not at the level exhibited at the judiciary with regard to the establishment of the Small Claims Court. To imagine that officers have been struggling with the procurement of stationery for over ten years is most unfortunate and inexcusable.

It is worth noting that while the judiciary had struggled for over 10 years to find funds to operationalize the Small Claims Court, funds were made available to send a team of four persons on a study tour of South Africa to appraise the operations of the Small Claims Court in that country. This study group toured South Africa from 1st August 2005 to 6th August 2005 and reported findings more or less similar to those reported by the team that was sent to Zimbabwe in December 1995 for the same purpose.

The tour of South Africa outlined above seems to be the last tangible activity undertaken towards the establishment of the Small Claims Court in Zambia. This study has come to the conclusion that the Small Claims Court may never see the light of day if no pressure is exerted upon the judiciary by the various interested parties.

3.1.5 Conclusion

In conclusion this paper turns to the words of James A. Bamberger[65], whose wisdom helps sum up the situation brought about by the failure to operationalize the Small Claims Court:

> *"If the business of the judicial system is justice, we are teetering on the brink of bankruptcy. Every day,....., in every locality, in virtually every courthouse, we stand witness to the systematic denial of justice for those in need of protection of the laws. These are the victims of domestic violence in need of physical protection; farm workers who weren't paid for their work or are unable to obtain workers' compensation though suffering from pesticide exposure; ..... And these are just a small sampling of the many thousands who need legal help but who, because they are poor, will never drink from the cup of justice."*[66]

The quote above clearly states the case for the Small Claims Court which is meant to deliver access to justice especially for the poor in our society. What is at stake in fact is the denial of justice to a significant portion of our society. A distinguished jurist in

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[65] James A. Bamberger, coordinator with Columbia Legal Services, Washington State.

[66] James A. Bamberger, coordinator with Columbia Legal Services, Washington State, in a paper presented for the National Conference of Chief Justices in August 2001,entitled *Civil Equal Justice and the Judiciary: The Leadership Challenge.*

America had this to say about the concept of access to justice for all in society:

> *"Law forms the fabric of our society, governing everything from economic relationships to the most personal and family matters. It defines codes of conduct and, in doing so, establishes standards and expectations that apply to all people in the nation. The law protects the individuals from excesses of government and the marketplace, and provides the means of vindicating rights that have been violated. For our laws to work, however, the system of its enforcement must be within the grasp of every citizen, not just those with wealth. In the absence of meaningful access to the machinery of justice, law becomes an unfulfilled promise. History teaches that social disharmony and upheaval is inevitable when a significant segment of society is unable to secure meaningful access to and protection under the laws."*[67]

It can be seen from the foregoing analysis of the Small Claims Courts Act that it was drafted in such a manner as to make the operations of the court effective. It therefore, makes sad reading to realize that the envisaged court backed with such a well

[67] McKay, John, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 Tennessee Law Review 101, 103 (2000).

drafted law has not been implemented almost 13 years from the date of enactment of the enabling Act.

Having looked critically at the contents of the Act this study has come to one conclusion. The failure to implement the Act is as a result of incompetence on the part of the office vested with the power to operationalise the Small Claims Court. The failure by the office of the Chief Justice to have the Act implemented can not be excused any more. There are clearly no hindrances or obstacles observed in the Act for one to fail to implement the contents of the Act. The incompetence and inertia revealed by this study in the officers at the judiciary headquarters needs to be investigated and people made answerable. Justice is being denied to millions of citizens by the very organ of government that is supposed to be the fountain of justice.

CHAPTER FOUR – CONCLUSIONS AND RECOMMENDATIONS

By enacting the Small Claims Court Act, Parliament took an important step in the quest for enhancing the justice delivery system in Zambia. However, as this study has shown, our justice delivery system is congested. This study has highlighted the factors leading to this state of affairs. Further, this paper has highlighted the failure by the office of the Chief Justice to have the Small Claims Court operational.

4.1.0 CONCLUSIONS

It is plainly evident that the Chief Justice has lamentably failed to have the Small Claims Court up and running over the past 13 years and no tenable reasons have been advanced for this failure.

However, this study has discovered that the failure to implement the Small Claims Court Act cannot be entirely blamed on the office of the Chief Justice, but on other interest groups as well. It is shocking that this researcher discovered that a questionnaire sent to the office of the Chief Justice was the first ever time that any person had made an inquiry as to what was happening to the Small Claims Court Act. In fact the inquiry put the Chief Justice on

alert and immediately sent an internal memorandum to the committee responsible for the operationalization of the Small Claims Court. This just goes to show that interest groups like the Law Association of Zambia, Human Rights Commission, political parties like the Movement for Multi-Party Democracy (being the party that enacted the Small Claims Court Act), and other justice advocacy groups have not been involved in the last 13 years in trying to have the court up and running. This study failed to locate any single paper, academic or otherwise, that has been written on this subject in Zambia either on the internet or in various libraries where a search was conducted.

It is evident from what has been discussed in this paper that the Small Claims Court is a necessary institution in Zambia. It is also clear from the preceding chapters that the Small Claims Court will act as a practical solution to the problem of congestion in our justice delivery system. Analysis of the Small Claims Court Act reveals that the main objective of establishing the Small Claims Court is to deliver substantial justice between litigants. In essence this objective translates into enabling as many people as possible to have access to a fair and efficient justice system. The present situation is not offering many people access to justice. As

discussed in the preceding chapters, the current justice system is tilted in favour of the elite in our society who can afford to hire lawyers at great expense. The court processes in the current civil courts are so cumbersome such that a litigant without legal counsel is at the mercy of the other party to the dispute. Some potential litigants have no choice but to sit on their rights due to the fact that they are so poor that they cannot hire a lawyer. The legal aid provided by the government is so overwhelmed by criminal cases, that there is no attention given to small claims litigants. Delays in disposing of cases, whether criminal or civil, affects both the fairness and the efficiency of the judicial system which, in turn, weakens democracy, the rule of law, and the ability to enforce human rights[68].

For the proposed Small Claims Court to fulfill its mandate once operational, adequate funding will be a prerequisite. The level of lack of funding that this study has revealed does not give hope that the court once set up will function effectively. For the judiciary to have struggled for over ten years to find funds to operationalize the court is an indicator of serious funding problems once the court is operational. The lack of funding for the

[68] Paying for Justice, Asian Development Bank Review, May 2005 accessed at http://www.adb.org/Documents/Periodicals.

Small Claims Court despite yearly budgetary allocation is indicative of the lack of political will on the part of government to ensure that the court is operational. With the envisaged huge public demand for its services, once operational, the Small Claims Court should ideally be set up to sit daily. However, for the court to sit daily it would require huge injection of funds to meet operational expenses, as well as remuneration for arbitrators. With hindsight of what has happened over the past 13 years this seems not feasible and the court may never be established at all.

4.2.0 RECOMMENDATIONS

The proposed Small Claims Court is an important institution that will do much more than dispense the much delayed justice to many people. It is a potential practical means of decongesting our justice delivery system. Its establishment will go along way in restoring public confidence in the judicial process. With reference to the various issues discussed in the preceding chapters, the following are the recommendations arising out of this study.

1. The Chief Justice should immediately set an implementation date for the commencement of the

operations of the Small Claims Court in selected cities and towns. Any further delays in the implementation of the Small Claims Court Act, will be viewed as an abrogation of the clear mandate placed upon the office of the Chief Justice in Section 3 of the Small Claims Court Act.

2. The Minister of Justice should set up a mechanism of ensuring that Acts of Parliament are implemented within a reasonable timeframe. Delays in implementing laws, like is the case with the Small Claims Court Act, need to be investigated. It will not do to have Parliament pass laws after serious deliberations only to gather dust in some civil service office. What has happened to the Small Claims Court Act is just a tip of the iceberg. There are surely a good number of laws on our statute books which may have suffered a similar fate to that of the Small Claims Court Act.

3. Government must show its commitment to ensuring justice is availed to all at minimum cost by providing the necessary funding to the judiciary, especially for

the operations of institutions clearly meant for the poor like the Small Claims Court.

4. The Small Claims Court should be provided for in the proposed new Republican Constitution just like is the case with the other courts.

5. Conditions of service as well as remuneration packages should be raised to levels obtaining in other countries in the Southern African region in order to attract highly qualified and experienced people into the service of the judiciary.

6. Civil society and other interest groups like the Law Association of Zambia should take an active role in ensuring that the long awaited Small Claims Court is constituted.

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