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LAW REFORM AND DEVELOPMENT COMMISSION

REPORT

on

SMALL CLAIMS COURTS

LRDC6

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LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

THE HONOURABLE MINISTER OF JUSTICE, DRE NTJIRIANGE

I have the honour to submit to you in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) the Commission's report on Small Claims Courts.

**MR U D NUJOMA
CHAIRPERSON
1997-12-23**

LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991).

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ANNEXURE: DRAFT SMALL CLAIMS COURTS BILL

1. INTRODUCTION

- 1.1 The Honourable Minister of Justice requested the Law Reform and Development Commission in April 1994 for recommendations on small claims courts. He pointed out that in view thereof that it may be quite difficult to determine the specific needs for such a new judicial forum at such an early stage, it may be advisable to start on an "experimental" basis and develop the initial legislation further through practical experience.
- 1.2 The Commission is aware that the Ministry of Justice has been approached by various persons and bodies to introduce small claims courts and also that the need therefor has been broached at various workshops and meetings.
- 1.3.1 The initial delay to finalize its recommendations can be mainly attributed to the two factors that generally hampered the Commission's work, viz. the long period during 1994 and 1995 when there were several vacancies on the Commission and the fact that the Secretariat had until 1996 only one legal officer who could do research on a full-time basis.
- 1.3.2 There has been a delay with two other pieces of legislation which the Commission regarded as very much related to the issue of small claim courts:
- 1.3.2.1 The Commission submitted recommendations for the long overdue increase of the civil jurisdiction of magistrates' courts to the Minister of Justice in November 1994. In the case of most actions the ceiling of this jurisdiction was only N\$5 000 which of course left very little scope for the introduction of a new judicial forum below that. The jurisdiction has only recently been raised to N\$25 000 in the case of most actions, viz. by the Magistrates' Courts Amendment Act, 1997 (Act 9 of 1997).
- 1.3.2.2 The Commission also gave its comments, on request, to the Minister of Justice on proposed Community Courts legislation in May 1994. This legislation is however apparently not finalized yet. The Commission could therefore not prepare its recommendations against the background of such a final text. Reference will again be made to this aspect under paragraph 5.2.10 below.

2. REFORM IN OTHER JURISDICTIONS AND RELATED REFORM

- 2.1.1 The Commission is aware of the developments in other countries on the general issues of alternative dispute resolution and making the legal process more accessible to the ordinary public. The Commission in particular had access to the reports of the law reform institutions of some Commonwealth countries on the issue of small claims courts (or by whatever other name it may be called).
- 2.1.2 However, in view of the indication by the Honourable Minister of Justice referred to in paragraph 1.1 above, with which the Commission agrees, the Commission made, in the preparation of a draft bill, mainly use of the legislation applicable in neighbouring countries having a similar legal system

to ours, namely South Africa and Zimbabwe. The acts of these two countries are very similar and most of the differences are only in the working and not substantive.

- 2.2 The Commission would like to emphasize that as far as the broader issues are concerned, considerable reform is still needed in Namibia. Small claims courts can only be the first step to improve the situation.
- 2.3 The Commission is aware that considerable attention is at present being given to these issues in South Africa and it will no doubt be advisable to study those developments in due course.

3. ADMINISTRATION AND REGULATIONS

- 3.1 The South African and Zimbabwean experiences have emphasized that the assistance given by the courts' clerks (i.e. as a first point of enquiry for citizens who have a civil problem) and the availability of information in a user-friendly format (i.e. manuals, pamphlets, forms with clear instructions, etc.) are extremely important for the success of small claims courts. This must be seen in view thereof that although one can do something to simplify the bill itself, one cannot really do enough there.
- 3.2 The Commission agrees that these matters are indeed very important. The Commission has however not prepared regulations and such pamphlets, etc. at this early stage as it seems more feasible that the Ministry of Justice must first consider the principles of the proposed bill and consider its means to implement it. Moreover, such detail must be developed with the full involvement of those officials who will eventually manage these courts. The Commission would however appreciate it if it could be consulted for its comments at appropriate stages in this regard.

4. JURISDICTION LEVEL

- 4.1 Various facets of the jurisdiction of the proposed small claims courts will be further discussed below. The monetary level needs special attention as it obviously has a very particular bearing on the existing magistrates' courts.
- 4.2 The Commission recommends N\$2 500 in view of the very informal process that is suggested.
- 4.3 In this regard it must be pointed out that it has been elsewhere experienced that the mere existence of an accessible forum where small disputes can be settled, motivates people to co-operate earlier in dispute settlement outside the courts.

5. DISCUSSION OF DRAFT BILL

- 5.1 The Commission herewith recommends the adoption of the bill attached hereto as an Annexure. The clauses of the bill which are not self-explanatory and which needs in the opinion of the Commission more explanation, are discussed below.

5.2.1 CLAUSE 2 - Establishment of small claims courts

This clause provides for the establishment of small claims courts, and related matters like the areas of and the seats of such courts. The purpose of the clause is to provide as much flexibility as possible with the creation of small claims courts and the area of jurisdiction of such courts.

5.2.2 CLAUSE 3 - Nature of small claims courts and force of process

This clause provides that small claims courts shall not be courts of record in the sense that it is normally understood for other courts. This will relieve the presiding commissioner from the duty of having all the evidence recorded as that would place a heavy burden on the infrastructure of these courts. It however provides that apart from the judgment, award or order of the court, which must obviously be recorded, some other basic information shall also be recorded, viz. a summary of the proven facts of the case and the grounds for the judgment, award or order, as well as such other information as may be prescribed in the rules of the court to be made by the Minister. As a full record will not be kept, the judgments, awards or orders of these courts can only be reviewable and not appealable.

5.2.3 CLAUSE 4 - Courts open to the public

Small claims courts will, as other courts, be open courts. Provision is made for the exclusion of some persons if it is in the interest of justice, eg. persons who may influence a witness or who may listen to other evidence and later give evidence to fit in with previous evidence, and for the removal of disorderly persons from the court.

5.2.4 CLAUSE 5 - Language to be used at proceedings

The official language will be used and where necessary interpreters must be provided - or the presiding commissioner himself or herself can interpret. However, the use of any other language may be allowed by the presiding

commissioner if he or she knows that everybody participating in the hearing will be able to understand it.

5.2.5 CLAUSE 7 - Parties who may appear in court

Only natural persons may institute actions in small claims courts. Juristic persons (eg. companies, close corporations), partnerships and associations can only be defendants. This is in the spirit of what small claims courts are established for; it is for the ordinary people and should not be for the use of other bodies which have the ability to participate in the more costly processes.

For obvious reasons no representation by a legal practitioner is allowed in these courts. It should be borne in mind that because of the inquisitorial nature of the proceedings, the presiding officer has the duty to determine the facts and that it is therefore not so important how well a litigant presents his or her case.

An exception is however made in subclause (5) for minors and persons under curatorship to be represented by those who would in any event assist them up to that stage.

5.2.6 CLAUSES 8 AND 9 - Presiding officers and their appointment

The persons presiding at small claims courts will be called commissioners. It is envisaged that to a large extent presiding officers of small claims courts will be drawn from the ranks of legal practitioners. They must have more than three years experience. Provision is however also made that magistrates can be granted permission to act as commissioners. Although the procedure of small claims courts will be kept as simple as possible, they will not conduct voluntary arbitration and cases before it must of course still be adjudicated in accordance with the law of Namibia.

5.2.7 CLAUSE 10 - Procedure in case of absence or incapacity of commissioner

As small claims courts are not courts of record (see clause 3), such a court will have to start afresh if the commissioner cannot continue.

5.2.8 CLAUSE 14 - Jurisdiction in respect of persons

This clause lists the persons over whom small claims courts will have jurisdiction. The criteria given are the normal criteria for the jurisdiction of a court. In fact subclause (1) is almost identical to section 28(1) of the Magistrates' Courts Act, 1944 (Act 32 of 1944). This means that (except for interpleader proceedings) the jurisdiction as to persons is the same for

magistrates' courts and small claims courts as there is no logical reason to make a difference.

Subclause (2) however makes a difference. Small claims courts will not have jurisdiction to hear cases in which the State is the defendant. Such cases may raise different and difficult questions of law which are often outside the experience of ordinary legal practitioners. It will also be problematic for the State to identify who should represent it.

The purpose of subclause (3) is to prevent a person from ceding his claim to a legal representative and thereby circumventing the prohibition on legal representation.

5.2.9 CLAUSE 15 - Jurisdiction in respect of causes of action

The difference between the jurisdiction in this respect of magistrates' courts and small claims courts is mainly on the monetary level, viz. N\$2 500 for small claims courts whereas that of magistrates' courts has recently been increased from N\$5 000 to N\$25 000.

5.2.10 CLAUSE 16 - Matters beyond jurisdiction

Most of the matters excluded from the jurisdiction of small claims courts by this clause are also beyond the jurisdiction of magistrates' courts. The matters mentioned in paragraphs (g) and (h) are somewhat specialized and can create complex legal problems which might be disproportionate to the amount that can be recovered.

Questions of customary law is excluded by paragraph (b) - see also par. 1.3.2.2 above.

As the Labour Act, 1992 (Act 6 of 1992) has created special courts for labour disputes, it is advisable to keep these disputes out of the small claims courts.

5.2.11 CLAUSE 18 - Abandonment of part of claim

The purpose of this clause is to enable a plaintiff to make use of small claims courts by abandoning a part of his or her claim. The plaintiff is then prevented from claiming that part.

5.2.12 CLAUSE 22 - Jurisdiction by virtue of consent of parties

Provision is made that with the consent of the parties a small claims court can hear cases where the amount involved is up to five times the amount of its basic jurisdiction, i.e. up to N\$7 500. Such consent can however only be given once specific proceedings are being instituted, i.e. parties can eg. not give such consent beforehand in a contract.

5.2.13 CLAUSE 24 - Defendants subject to jurisdiction of courts

The purpose of subclause (2) is to prevent businesses from putting clauses in contracts prohibiting people who are doing business with them from instituting actions in small claims courts. One of the areas where small claims courts can play an important role, is as a means to protect consumers against large companies.

5.2.14 CLAUSE 26 - Procedure

This is one of the core provisions of the bill. The provisions of this clause constitute the most basic difference from other courts (where the procedure is adversarial).

The approach adopted is to dispense with the strict rules and to entrust the presiding commissioner with the duty to ensure that justice is done in the sense that the truth is established insofar as it is possible with the available evidence.

Subclause (3) removes the right of cross-examination and places the duty on the presiding commissioner to proceed inquisitorially in order to ascertain the relevant facts. The reason for this provision is to prevent a party who may for some reason be skilled as a cross-examiner from gaining an unfair advantage.

5.2.15 CLAUSE 29 - Institution of actions

An action in a small claims court is started with a summons. A prerequisite for the issue of a summons is that a demand in the form prescribed by the rules must be sent to the defendant giving him or her an opportunity to comply therewith before he and she is sued in the court. The summons serves two purposes, viz.: to call upon the defendant to attend the proceedings and to state the case of the plaintiff and thereby inform the defendant what case to meet.

Legal assistants or the clerk of the court must help plaintiffs with the drawing up of the summons. Because of the help that these officials provide to prospective litigants, this formal requirement should not be too burdensome on litigants without legal representation.

The purpose with subclause (3) is to discourage people from using small claims court for the purpose of collecting the debts of their business or profession. The practical effect is that there cannot be more than one pending case from the same business or profession.

5.2.16 CLAUSE 35 - Judgment by default or by consent

The principles set out in this clause is a compromise between two pairs of conflicting legal values. The first pair is the *audi alteram partem* rule and the principle that a person should not be allowed to frustrate the legal process by his or her deliberate or negligent absence from court proceedings. The second pair of principles is that cases should be regarded as finalized after judgment to promote certainty, but on the other hand, the law cannot allow an unfair decision to stand. The principles in these clauses are basically the same as those applicable to magistrates' courts, except for the fact that small claims courts will only grant default judgments after it has established the liability of the defendant. Rescission, as provided for in clause 36, is important in the case of small claims courts, because there is no appeal from them.

5.2.17 CLAUSES 39, 40 AND 41 - Inquiry into financial position: Offer by judgment debtor after judgment; Manner of execution

These clauses provide for the enforcement of the judgments of small claims courts. It firstly makes provision for the granting of postponement of compliance with the judgment or for the making of an instalment order when the judgment debtor is unable to satisfy the judgment immediately. If no order has been made or if the judgment debtor does not pay the instalments, the judgment can be transferred to the magistrates' court for enforcement. If that has been done, a warrant for execution may be issued which may have the result that the property of the judgment debtor is sold to satisfy the order. Otherwise the judgment creditor may proceed with the procedures provided in the Magistrates' Courts Act for civil claims.

5.2.18 CLAUSES 43 AND 44 - Judgment or order final; Grounds for review

Review is a procedure for the setting aside of proceedings. In a review application, the reviewing body is not so much concerned with the merits of the decision as with the method used. This clause therefore provides a remedy for an aggrieved party in appropriate circumstances.

ANNEXURE

DRAFT BILL

To provide for small claims courts for the adjudication of small civil claims and for matters incidental thereto.

(Introduced by the Minister of Justice)

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BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

1. In this Act, unless the context indicates otherwise-

"commissioner" means a commissioner for a small claims court appointed under section 9;

"district" means a district created under section 2 (1) (a) of the Magistrates' Courts Act, 1944 (Act 32 of 1944);

"Minister" means the Minister of Justice;

"prescribed" means prescribed by the rules;

"small claims court" means a court established under section 2(1) for the adjudication of small civil claims in terms of this Act;

"the rules" means the rules made under section 25;

"this Act" includes the rules.

CHAPTER I
ESTABLISHMENT AND NATURE OF SMALL CLAIMS COURTS

Establishment of courts

2. (1) The Minister may by notice in the *Gazette*-
- (a) establish a court for the adjudication of claims in terms of this Act, called a small claims court;
 - (b) determine the seat of such a small claims court;
 - (c) alter or determine the area for which such a small claims court is established;
 - (d) determine one or more places in the area concerned for the holding of sessions of such a small claims court; and
 - (e) abolish a small claims court established in terms of this section.

(2) When the Minister determines an area under this section, he or she may determine such an area with reference to any district and in such a case (unless the context indicates otherwise) such an area will be defined with respect to such a district as its boundaries may be defined from time to time.

Nature of small claims courts and force of process

3. (1) Subject to the provisions of subsection (2), a small claims court shall not be a court of record.

(2) The presiding commissioner shall record or cause to be recorded -

(a) a summary of the principal facts proved;

(b) a brief statement of the legal principle on which the finding of the small claims court is based;

(c) any judgment, award or order of the small claims court and sign such judgment, award or order; and

(d) such other information as may be prescribed.

(3) Every process of a small claims court shall be of force throughout Namibia.

Small claims courts open to public

4. (1) Subject to the provision to Article 12(1) (a) of the Namibian Constitution, the proceedings in a small claims court shall take place in open court.

(2) If any person present at the proceedings of a small claims court disturbs the order of the small claims court, the small claims court may order that such person be removed and detained in custody until the court adjourns.

(3) If, in the opinion of a small claims court, it is in the interest of justice that one or more persons are not present during the whole or a part of the proceedings before it, it may order that such person or persons shall not be present at such proceedings or part thereof.

Language to be used at proceedings

5. (1) The official language shall be used at every stage of the proceedings of a small claims court: Provided that the presiding commissioner may allow any witness to use any other language when giving evidence or may question a witness in any other language if he or she is of the opinion that all the parties are sufficiently conversant with that other language.

(2) If evidence is given in a language other than the official language or a language with which one of the parties is in the opinion of the presiding commissioner not sufficiently conversant, a competent interpreter shall be called by that presiding commissioner to interpret that evidence into the official language or into a language with which that party appears to be sufficiently conversant, as the case may be: Provided that if the presiding commissioner deems it expedient, he or she may act as interpreter.

Inspection of documents by public and custody thereof

6. (1) Subject to the prescribed conditions, the documents of a small claims court shall be available for inspection by the public under the supervision of the clerk of the small claims court at the prescribed times and upon payment of the prescribed fees, and those documents shall be preserved at the seat of the magistracy of the district in which the seat of that small claims court is situated for such period as the Permanent Secretary: Justice may determine.

(2) The Permanent Secretary: Justice may order that after the expiry of the period contemplated in subsection (1) the documents so preserved shall be removed to a specified place of custody.

(3) After the documents have been removed as contemplated in subsection (2) they shall be dealt with in accordance with the Archives Act, 1992 (ActJ2 of 1992).

Parties who may appear in small claims courts

7. (1) Only a natural person may institute an action in a small claims court and a juristic person, partnership or association of persons may become a party to an action in a small: claims court only as defendant.

(2) A party to an action shall appear in person before a small claims court and, subject to the provisions of subsection (4), shall not be represented by any person during the proceedings.

(3) Insofar as the provisions of subsection (2) might infringe upon the fundamental right guaranteed by Article 12(1) (e) of the Namibian Constitution, such infringement is justified by the provisions of Article 10(2) of the said Constitution.

(4) A juristic person, partnership or association of persons shall be represented in a small claims court by a duly nominated director, member or officer thereof.

(5) If a person under the age of 18 years or any person who is under curatorship, is a party to an action before a small claims court, a parent, the guardian or curator of that person shall attend the proceedings and render such assistance to that person as in the opinion of the presiding commissioner is necessary to do justice in that case: Provided that the presiding commissioner may hear and finalize a case in the absence of a parent, guardian or curator.

CHAPTER II
PRESIDING OFFICERS AND OFFICERS OF SMALL CLAIMS COURTS

Presiding officers

8. The officer presiding at a small claims court shall be called a commissioner for a small claims court and shall be appointed or permitted to act as such under section 9.

Appointment of commissioners

9. (1) Subject to the provisions of this section, the Minister may appoint one or more commissioners for any small claims court.

(2) Subject to the provisions of this section, the Minister may grant any magistrate permission to act as a commissioner for a small claims court.

(3) No person shall be appointed as a commissioner, unless he or she is a legal practitioner as defined in section (1) of the Legal Practitioners' Act, 1995 (Act 15 of 1995) and has for a total period of three years practiced as such legal practitioner.

(4) A commissioner who is not a magistrate, may resign by notice in writing to the Minister.

(5) The Minister may at any time withdraw the appointment of a commissioner or the permission to act as a commissioner, if in his or her opinion there is sufficient reason for doing so.

(6) A commissioner shall before commencing with his or her functions as a commissioner, take an oath or make an affirmation in the form set out below:

I, A.B., do hereby swear/solemnly and sincerely affirm and declare that whenever I may be

called upon to perform the functions of a commissioner in any small claims court I will administer justice to all persons alike without fear, favour or prejudice and, as the circumstances of a particular case may require, in accordance with the law and customs of Namibia.

(7) Such an oath or affirmation shall be taken or made in open court before any magistrate and that magistrate shall at the foot thereof make a note to the effect that it was taken or made before him or her, and of the date on which it was so taken or made, and append his or her signature thereto.

Procedure in case of absence or incapacity of commissioners

10. When by reason of absence or incapacity a commissioner is unable to complete the hearing of an action, that hearing shall be commenced *de novo* before another commissioner.

Officers of small claims courts

11. (1) The magistrate of the district in which the seat of a small claims court is situated, shall, subject to the laws governing the public service, appoint so many clerks and assistant clerks of the small claims court, interpreters and legal assistants for that small claims court as may be necessary for the performance of the prescribed functions.

(2) The magistrate of the district in which the seat of a small claims court is situated may designate any staff member employed at that magistrates' court to perform the functions of one or more of the officers referred to in subsection (1).

(3) The messenger of the court appointed under the Magistrates' Courts Act, 1944 (Act 32 of 1944), for the magistrates' court of a district, shall act as messenger of the small claims court for that part of the said district falling within the area of jurisdiction of that small claims court.

(4) The State, a clerk of the small claims court, an assistant clerk of the small claims court or a legal assistant shall not be liable for any damage or loss resulting from assistance given in good faith by that clerk of the small claims court, assistant clerk of the small claims court or legal assistant to any party or prospective party to an action before a small claims court or to a judgment creditor relating to the enforcement of a judgment or order in terms of section 41 in the form of legal advice or the compilation or preparation of a summons, statement or other document.

CHAPTER III JURISDICTION

Area of jurisdiction

12. The area of jurisdiction of a small claims court shall be the area or district for which it was established.

Transfer of actions

13. An action may -

(a) with the consent of all the parties; or

(b) upon the application of one of the parties who satisfies a small claims court that the hearing of the action in that small claims court may result in undue expense or inconvenience to him or her, or that the hearing of the action will prejudice him or her in the conduct of his or her case,

be transferred by the small claims court concerned to any other small claims court, and in such a case the latter small claims court shall, notwithstanding anything to the contrary in this Act contained, have jurisdiction to hear that action.

Jurisdiction in respect of persons

14. (1) Subject to the provisions of subsection (2), a small claims court shall have jurisdiction in respect of-

- (a) any person who resides, carries on business or is employed within the area of jurisdiction of that small claims court;
- (b) any partnership which has business premises situated or any member of which resides within the area of jurisdiction of that small claims court;
- (c) any juristic person that has business premises situated within the area of jurisdiction of that small claims court;
- (d) any person in respect of any proceedings incidental to any action instituted in that small claims court by such person;
- (e) any person, whether or not he or she resides, carries on business or is employed within the area of jurisdiction of that small claims court, if the cause of action arose wholly within that area;
- (f) any defendant, whether in convention or reconvention, who appears and does not object to the jurisdiction of that small claims court;
- (g) any person who owns immovable property within the area of jurisdiction of that small claims court in actions in respect of such property or a mortgage bond thereon.

(2) No action shall be instituted in a small claims court against the State or any employee or officer of the State in respect of an act performed by him or her while acting within the cause and scope of his or her employment with the State.

(3) A small claims court shall not have jurisdiction in respect of any claim or counterclaim based in whole or in part upon a cession or assignment of rights.

Jurisdiction in respect of causes of action

15. Subject to the provisions of this Act, a small claims court shall have jurisdiction in respect of causes of action in-

- (a) actions for the delivery or transfer of any property, movable or immovable, not exceeding in value N\$2 500;
- (b) actions for ejection against the occupier of any premises or land within the area of jurisdiction of that court: Provided that where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier N\$2 500;
- (c) actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed N\$2 500;
- (d) actions based on or arising out of a credit agreement as defined in section 1 of the Credit Agreements Act, 1980 (Act No. 75 of 1980), where the claim or the value of the property in dispute does not exceed N\$2 500;
- (e) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed N\$2 500; and
- (f) actions for counterclaims not exceeding N\$2 500 in respect of any cause of action mentioned in paragraphs (a) to (e).

Matters beyond jurisdiction

16. A small claims court shall have no jurisdiction in matters-
- (a) in which the dissolution of any marriage is sought;
 - (b) in which any question of customary law is to be determined, or in which it is necessary to determine whether customary law is applicable;
 - (b) concerning the validity or interpretation of a will or other testamentary document;
 - (c) concerning the status of a person in respect of his or her mental capacity;
 - (d) in which is sought specific performance without an alternative claim for payment of damages, except in the case of-
 - (i) the rendering of an account in respect of which the claim does not exceed N\$2 500;
 - (ii) the delivery or transfer of any property, movable or immovable, not exceeding in the value N\$2 500₁
 - (e) in which is sought a decree of perpetual silence;
 - (f) in which is sought damages in respect of-
 - (i) defamation;
 - (ii) malicious prosecution;
 - (iii) wrongful imprisonment;

- (iv) wrongful arrest;
- (v) seduction;
- (vi) breach of promise to marry;
- (g) in which an interdict is sought;
- (i) falling within the jurisdiction of the Labour Court or a district labour court in terms of the Labour Act, 1992 (Act 6 of 1992).

Incidental jurisdiction

17. (1) In an action in which the sum claimed does not exceed the jurisdiction of a small claims court and is the balance of an account, the small claims court concerned may enquire into and hear evidence upon the whole account, even though that account relates to items and transactions exceeding the jurisdiction of a small claims court.

(2) Where the amount claimed or other relief sought does not exceed the jurisdiction of a small claims court, that small claims court shall not be deprived of jurisdiction merely because it is necessary for the small claims court, in order to arrive at a decision, to give a finding upon a matter beyond its jurisdiction.

(3) In determining whether a claim falls within the jurisdiction of a small claims court, no claim for interest on a principal sum claimed or for costs or for general or alternative relief shall be taken into account.

Abandonment of part of claim

18. (1) In order to bring a claim or counterclaim within the jurisdiction of a small claims court, a party may in his or her summons or statement of defence, or at any time thereafter, explicitly abandon a part of that claim or counterclaim.

(2) That part of a claim or counterclaim so abandoned, shall thereby be extinguished: Provided that if the claim or counterclaim is granted in part only, the abandonment shall be deemed first to apply to that part of the claim or counterclaim which was not granted.

Deduction of admitted debt

19. In order to bring a claim or counterclaim within the jurisdiction of a small claims court a party may, in his or her summons or statement of defence or at any time thereafter, deduct from his or her claim or counterclaim, whether liquidated or unliquidated, any amount admitted by him or her to be due by him or her to the other party concerned.

Splitting of claims disallowed

20. A claim exceeding the jurisdiction of a small claims court and based on one and the same cause of action may not be split with the object of recovering it in more than one action, if the parties to those actions and the point in issue in those actions would be the same.

Cumulative jurisdiction

21. If two or more claims, each based upon a different cause of action, are combined in one summons, a small claims court shall have the same jurisdiction to adjudicate upon each claim as it would have had if each claim had formed the sole object of a separate action.

Jurisdiction by virtue of consent of parties

22. (1) Subject to subsection (2) a small claims court shall not have jurisdiction to hear an action which otherwise exceeds its jurisdiction, by virtue of the consent of the parties.

(2) If a case exceeds the jurisdiction of a small claims court by virtue of the provisions of section 15, but the relevant amount does not exceed five times the amount contemplated in the applicable paragraph of that section, a small claims court shall have jurisdiction if the defendant consents to such jurisdiction: Provided that no consent that is given in general or before specific proceedings are about to be instituted, shall be of any effect.

Cessation of action

23. (1) If a small claims court is of the opinion that -

- (a) a case contains difficult or complex questions of law or of fact which cannot adequately or fairly or should not be decided by it or;
- (b) a case requires a finding on the validity of any law,

it shall stop the proceedings.

(2) If the proceedings are stopped as contemplated in subsection (1), the plaintiff may institute a fresh action in another competent court of law.

Defendants subject to jurisdiction of courts

24. (1) No person shall be bound to institute an action in a small claims court in respect of a claim which may also be adjudicated upon in another court of law, but if an action is so instituted, the defendant shall be subject to the jurisdiction of the court in question.

(2) Any provision in an agreement to the effect that the jurisdiction of a small claims court shall be excluded, or that a party thereto shall not institute an action in a small claims court, other than a provision to the effect that a dispute arising from the agreement shall be resolved by arbitration, shall be void.

CHAPTER IV

RULES OF SMALL CLAIMS COURTS

Power of Minister to make rules

25. (1) The Minister may, after consultation with the Rules Board established by section 25 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), make rules regulating the following matters in respect of small claims courts:

- (a) The practice and procedure, including the procedure when proceedings are reviewed;
- (b) fees and costs;
- (c) the duties and powers of officers of the court;
- (d) any matter which may or shall be prescribed under any provision of this act;
- (d) any other matter which he or she may consider necessary or expedient to prescribe for carrying out the provisions of this Act or the attainment of its objects.

(2) Different rules may be made under subsection (1) with regard to different classes of cases..

(3) No rule relating to State revenue or State expenditure shall be made under sub- section (1), except with the concurrence of the Minister of Finance.

(4) No new rule and no amendment or repeal of a rule shall come into operation unless it has been published' in the Gazette at least 30 days before the day upon which it is expressed to come into operation.

CHAPTER V

PROCEDURE AND EVIDENCE

Procedure

26. (1) A small claims court shall not be bound by the strict rules of the law of evidence and it may ascertain any relevant fact in such manner as it may deem fit.

(2) Evidence to prove or disprove any fact in issue may be submitted in writing or orally.

(3) A party shall not question or cross-examine any other party to the proceedings in question or a witness called by the latter party, but the presiding commissioner shall proceed inquisitorially to ascertain the relevant facts, and to that end he or she may question any party or witness at any stage of the proceedings: Provided that the presiding commissioner may in his or her discretion permit any party to put a question to any other party or any witness.

Evidence

27. (1) Subject to the provisions of subsection (2), a party may call one or more witnesses to prove his or her claim, counterclaim or defence.

(2) The provisions of subsection (1) shall not affect the power of a small claims court to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.

Evidence to be given under oath

28. No person shall testify or be questioned in a small claims court unless the prescribed oath has been administered to him or her or the prescribed affirmation has been accepted from him or her by the presiding commissioner or by the clerk of the small claims court, or any person acting in his or her place, in the presence of that commissioner, or, if the person concerned is to give his or her evidence through an interpreter, by the commissioner through the interpreter.

. Institution of actions

29. (1) The plaintiff shall deliver a summons in the prescribed form personally or through his or her authorized representative to the clerk of the small claims court, together with a copy of a written demand which was on a prior occasion delivered to the defendant by the plaintiff by hand or by registered post and in which the defendant was, notwithstanding anything to the contrary in any law contained, allowed at least 14 days, calculated from the date of receipt of that demand by the defendant, to satisfy the plaintiffs claim.

(2) On receipt of the summons and a copy of the written demand referred to in subsection (1) together with the prescribed proof of delivery thereof, the clerk of the small claims court shall set a date and time for the hearing of the action and issue the summons if he or she is satisfied that-

(a) the plaintiff is a natural person;

(a) the issue of the summons is not prohibited by subsection (3); and

(b) that the summons complies with the prescribed requirements.

(3) If a plaintiff has instituted a claim arising from a business or profession, no summons referred to in subsection (1) shall be issued in respect of any further claim arising from that business or profession, until judgment has been given in respect of the former claim.

(4) After a summons has been issued, the clerk of the small claims court shall hand it to the plaintiff or his or her authorized representative, who shall personally serve it on the defendant, or deliver it to the messenger of the small claims court for service on the defendant.

(5) A summons shall be served on the defendant in the prescribed manner and the prescribed proof of service shall be delivered to the clerk of the small claims court.

(6) Apart from the summons no pleadings shall be required of the parties, but the defendant may at any time before the hearing lodge with the clerk of the small claims court a written statement setting forth the nature of his or her defence and particulars of the grounds on which it is based, and a copy of that statement shall be furnished to the plaintiff by the defendant.

Withdrawal of claims

30. (1) A plaintiff may at any time, whether before or during the hearing of his or her action, withdraw his or her claim with the consent of the small claims court and on such conditions as the court may determine, whereupon the proceedings shall be ceased.

(2) If proceedings are ceased as contemplated in subsection (1), the plaintiff may bring a fresh action with the consent of the small claims court.

Joinder of plaintiffs

31. (1.) Any number of persons each of whom has a separate claim against the same defendant, may join as plaintiffs in one action if the right of each to relief depends upon the determination of some question of law or fact which, if separate actions were instituted, would arise in each action: Provided that if such a joint action is instituted the defendant may apply to the small claims court that separate trials be held, and the small claims court may in its discretion make such order s it may deem just and expedient.

(2) In a joint action judgment may be granted for one or more of the plaintiffs.

Joinder of defendants

32. Two or more defendants may be sued in the alternative or both in the alternative and jointly in one action, if the plaintiff alleges that he or she is uncertain which of the defendants is liable for his or her claim: Provided that on application by one or more of the defendants the small claims court may in its discretion order that separate trials be held, or make such other order as it may deem just and expedient.

Amendment of documents

33. (1) A small claims court may at any time before judgment amend any summons or other document in connection with a case: Provided that no amendment shall be made if any party other than the party applying for the amendment may be prejudiced thereby in his or her case.

(2) The amendment may be made upon such conditions as the small claims court may deem reasonable.

(3) In documents before the small claims court the name of any person or place as commonly known may be used, and the small claims court may, on application, at any time before or after judgment substitute the correct name for that name.

CHAPTER VI
JUDGMENT AND COSTS

Judgment

- 34.** A small claims court may, after the hearing of an action, grant-
- (a) judgment for the plaintiff in respect of his or her claim in so far as it has been proved;
 - (b) judgment for the defendant in respect of his or her defence or counterclaim in so far as it has been proved;
 - (c) absolution from the instance, if the small claims court is of the opinion that the evidence does not enable it to give judgment for either party;
 - (d) such judgment as to costs referred to in section 37 as may be just;
 - (e) an order, on such conditions as the small claims small claims court may deem fit, against the party for whom judgment has been granted, deferring wholly or in part further proceedings upon the judgment for a specified period pending arrangements by the other party for the satisfaction of the judgment.

Judgment by default or by consent

- 35.** (1) If a defendant, upon a summons having been served on him or her in terms of section 29-
- (a) admits liability and consents to judgment in writing; or

- (b) fails to appear before the small claims court on the trial date or on any date to which the proceedings have been postponed,

that small claims court may, on application by the plaintiff, grant judgment for the plaintiff in so far as he or she has proved the defendant's liability and the amount of the claim to the satisfaction of the small claims court, and the small claims court may dismiss any counterclaim by the defendant.

(2) If a plaintiff fails to appear before the small claims court on the trial date or on any other date to which the proceedings have been postponed, the small claims court may, on application by the defendant -

- (a) dismiss the plaintiff's claim: Provided that the plaintiff may again institute an action for that claim with the consent of the small claims court; and
- (b) with regard to a counterclaim, grant judgment for the defendant in so far as he or she has proved the plaintiff's liability and the amount of the counterclaim to the satisfaction of the small claims court.

Rescission of certain judgments

36. The small claims court may, upon application by any person affected thereby or, in a case contemplated in paragraph (c) also *suo moto*-

- (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted: Provided the application for set down for hearing is made on a date within six weeks after the applicant first had knowledge of the judgment;

- (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or as a result of a mistake common to the parties: Provided the application is made not later than one year after the applicant first had knowledge of the voidness, fraud or mistake;
- (c) correct patent errors in any judgment: Provided that, in the case of an application, the application is made not later than one year after the applicant first had knowledge of any errors: Provided that if a correction is made *suo moto*, all the parties shall be informed in the prescribed manner and shall be given an opportunity to express their views on the correction concerned.

Costs

- 37.** Costs awarded by a small claims court may only include-
- (a) court fees;
 - (b) the prescribed amount for the issue of the summons;
 - (c) the fees and travelling expenses of the messenger of the court.

CHAPTER VII ENFORCEMENT OF JUDGMENTS

Money to be paid direct to judgment creditor

- 38.** Money payable in terms of a judgment or order of a small claims court, shall be paid by the judgment debtor direct to the judgment creditor.

Inquiry into financial position

39. (1) When a small claims court grants judgment for the payment of a sum of money, the small claims court shall thereupon enquire from the judgment debtor whether he or she is able to comply with the judgment without delay, and if he or she indicates that he is unable to do so, the court may, *in camera*, conduct an inquiry into the financial position of the judgment debtor and into his or her ability to pay the judgment debt and costs.

- (2) After such an inquiry the small claims court may-
- (a) order the judgment debtor to pay the judgment debt and costs in specified installments or otherwise;
 - (b) suspend the order under paragraph (a) either wholly or in part on such conditions as to security or otherwise as the small claims court may determine.

Offer by judgment debtor after judgment

40. If no order has been made in terms of section 39(2), the judgment debtor may within 10 days after the small claims court has granted judgment for the payment of a sum of money, make a written offer to the judgment creditor to pay the judgment debt and costs in specified instalments or otherwise, and if such an offer is accepted by the judgment creditor, the clerk of the small claims court shall, at the written request of the judgment creditor, accompanied by the offer, order the judgment debtor to pay the judgment debt and costs in accordance with his or her offer, and such an order shall be deemed to be an order of the small claims court in terms of section 39(2).

Manner of execution

41. (1) If-

- (a) a judgment of a small claims court has remained unfulfilled for a period of 10 days from the date on which it must be complied with and an order has not been made in terms of section 39(2); or
- (b) an instalment payable under an order in terms of section 39(2) has remained unpaid for a period of 10 days from the date on which it has become due,

that judgment or order may be transferred to a magistrates' court in the manner provided for in this section.

(2) The clerk of the small claims court shall, upon the written application of the judgment creditor accompanied by an affidavit specifying the amount and the costs still owing under the judgment or order and how that amount is arrived at, transmit that affidavit, together with a certified copy of that judgment or order reflecting the nature of the cause of action, to the clerk of the magistrates' court of the district in which the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is a juristic person, of the district in which its registered office or main place of business is situated.

(3) Upon receipt of the documents referred to in subsection (2) the clerk of the magistrates' court concerned shall record the details of the judgment or order concerned and the amount owing mentioned in the affidavit in his or her registers.

(4) If a judgment contemplated in subsection (1) (a) is transmitted in terms of this section to a magistrates' court, such judgment shall for all purposes have the same effect as a civil judgment granted by that magistrates' court.

(5) If an order contemplated in subsection (1)(b) is transferred to a magistrates' court in terms of this section, that order shall for all purposes be regarded as an order given by that magistrates' court under section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944).

Notice of change of address by judgment debtor

42. Any person against whom a small claims court has granted judgment or made any order and who has not satisfied in full that judgment or order, and paid all costs for which he or she is liable in connection therewith, shall, if he or she has changed his place of residence, business or employment, within 14 days from the date of every such change notify the judgment creditor fully and correctly in writing of his or her new place of residence, business or employment.

**CHAPTER VIII
REVIEW**

Judgment or order final

43. A judgment or order of a small claims court shall be final and no appeal shall lie from it.

Grounds for review

44. The grounds upon which the proceedings of a small claims court may be taken on review before the High Court are -

- (a) absence of jurisdiction on the part of the small claims court;
- (b) interest in the cause, bias, malice or corruption on the part of the commissioner; and
- (c) gross irregularity with regard to the proceedings.

CHAPTER IX
GENERAL PROVISIONS

Offences

- 45.** Any person who-
- (a) obstructs a messenger of the court in the execution of his or her duties under this Act;
 - (b) fails to give notice of change of address in terms of section 42,

shall be guilty of an offence and liable upon conviction to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding six months.

Contempt of court

46. (1) Any person who wilfully insults a commissioner during the session of his or her court, or a clerk or messenger or other officer present at that session, or who wilfully interrupts the proceedings of a court or otherwise misbehaves himself or herself in the place where the session of a court is held, shall be guilty of an offence and shall, without prejudice to the provisions of section 4(2), be liable to be sentenced (summarily or by another court after having been tried and found guilty) to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding six months.

(2) When a commissioner sentences any person under this section, he or she shall without delay transmit to the registrar of the High Court for consideration and review by a judge in chambers, a statement, certified by him or her to be true and correct, of the grounds and reasons for the action taken by him or her, and shall also furnish to the person sentenced a copy of that statement.

Short title and commencement

47. (1) This Act shall be called the Small Claims Courts Act, 1996, and shall come into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.