

ENHANCING THE EFFECTIVENESS OF ZAMBIA'S SMALL CLAIMS COURT

NUMBER 8, DECEMBER 2024

POLICY BRIEF

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KEY FINDINGS

- The cost and complexity of formal litigation disincentivizes small claim litigants from seeking legal recourse:
- The economic impact of unrecovered small claims is disproportionately felt by the indigent and working poor.
- Small Claims Courts are an important innovation used to bridge the justice gap for litigants with small monetary claims. However, when poorly designed, these courts can reinforce the power asymmetries they seek to correct.
- Users of the Small Claims Court must be legally empowered to successfully prosecute and defend cases.
- Disseminating the justice benefits of the Small Claims Court to a greater number of Zambians requires the extension of the geographical reach of the court.

POLICY IMPLICATIONS:

To enhance the effectiveness and efficiency of the Small Claims Court, policy makers may consider:

- Developing legal assistance solutions to litigants appearing before the Small Claims Court
- Extending the geographical reach of the Small Claims Court by recruiting full-time commissioners

INTRODUCTION

The complexity of the court system, the shortage of lawyers, and the high cost of legal services means that most Zambians with small claims are unable to litigate their cases in the ordinary court system. While Small Claim Courts have been a feature in some jurisdictions for well over a century, in Zambia, these courts are a relatively new development.

This policy brief traces the genesis of Small Claims Courts in Zambia, examining their rationale, operative framework, and recent legal developments that aim to enhance their effectiveness. The brief suggests that while the Small Claims Courts are an innovative and justice enhancing forum, certain structural deficits undermine their effectiveness. To this end, the brief puts forward a set of practical, policy, reform proposals to enhance the effectiveness of these courts as justice delivery mechanisms.

The article proceeds in four parts; In Part I, **the what, why, and how** of Small Claims Courts (SCC) are explained. Here, the brief explains what a SCC is designed to do, why SCCs exist, and how SCCs operate. In Part II, the brief examines SCCs in Zambia. Here, the genesis of Zambia's SCC is traced, and the salient features of the SCC legal framework are shared. In Part III, the brief highlights two constraints to service delivery by the SCC, and then advances policy proposals to address these constraints.

PART I: THE WHAT, WHY AND HOW OF SMALL CLAIMS COURTS.

What are Small Claims Courts: SCCs are dispute resolution forums where relatively small, monetary claims can be decided in an expeditious, informal, and inexpensive manner. These courts are established and operated by the state as simplified (and cheaper) alternatives to the formal court system.

Why do Small Claims Courts Exist: SCCs are used to bridge the justice gap for litigants with small monetary claims.

The complexity of the formal court system means that successfully prosecuting a case often requires legal representation. Legal services are universally high and out of reach for many litigants. The high costs of litigation and legal representation shut most small monetary claimants from the legal system. SCCs, therefore, provide relief/recourse to a class of litigants who, due to the small size of their claims and/or other barriers that restrict their access to court (e.g. complex and lengthy court processes), opt out of the formal justice system.

How do Small Claims Court Operate: SCC processes vary from jurisdiction to jurisdiction but at their core, all SCCs have these two defining features; first, they prohibit legal representation and second, they adopt simplified processes and procedures. These two features distinguish SCCs from formal court systems and drive down the two prerequisites of modern-day litigation: time and money. This, at least in theory, levels the playing field for small claim litigants.

PART II: SMALL CLAIMS COURTS IN ZAMBIA

To provide a justice forum for small monetary claim litigants who are otherwise shut out of the formal justice system, Zambia founded the SCC in 2009. The SCC is established by Article 120 (1) (b) of the Constitution of Zambia and governed by the Small Claims Court Act (“the Act”).¹ The Act provides for the jurisdiction, powers, and procedure of the SCCs. In terms of their geographic location, the Act gives the Chief Justice discretionary power to determine where these courts are located, after considering the needs of a particular area.²

The composition of a SCC is “one arbitrator sitting alone.”³ To qualify as an arbitrator (or “commissioner”, as more commonly known), one must be a licensed legal practitioner of at least 5 years standing.⁴ The monetary jurisdiction of the SCC is determined by statutory instrument. Until recently, the monetary jurisdiction of the court was limited to ZMK 20,000. A 2023 amendment raised the monetary jurisdiction of the court to ZMK 70,000.⁵

Despite its limited monetary jurisdiction, the SCC has extensive coercive powers to enforce its orders and to compel attendance at court. For example, the SCC is empowered to do the following:⁶

- Summon any person who is a defendant or witness in any matter before it and where such person fails to appear without reasonable cause, the court is empowered to arrest such a person.
- Issue a warrant of distress for the payment of monies due, subject to the following riders:
 - * A warrant cannot be issued for necessities that pertain to livelihood, i.e., “personal clothing, beds and beddings and household utensils for the use of the owner and his family; (b) implements of husbandry and tools of trade of the owner; and (c) foodstuffs required for the feeding of the owner and his dependants”.
 - * A warrant cannot be issued for any property to which a third party has an interest or claim.

The SCC also has wide ranging power to hold in contempt persons who do the following:

- disregard court summons
- threaten, insult, or intimate a constituted court
- behave in a disorderly and disruptive manner in court
- decline to answer questions put forward by the court,
- willfull refusal to effect the order of the court,
- attempt to unduly influence an arbitrator

SIMPLIFIED PROCEDURES

The main goal of the Act is to democratize the justice system by creating simplified procedures that facilitate greater access to those that would otherwise find the court system too complex to navigate. To that end, and in direct contrast to the complexity and rigidity of the formal court system, Section 12 (2) of the Act declares that “proceedings [in the small claims court] shall be simple and formal”.

Proceedings in the SCC are simplified in four fundamental ways: First, SCCs are not bound by the rules of evidence but must instead “apply the law and equity”.⁸ That is, SCC cases should be decided on the merit of the substantial claims made by a litigant and must not be distracted by procedural compliance and evidentiary technicalities. As per Section 14, “substantial justice between the

¹Chapter 47 of the Laws of Zambia.

²Section 3 of the Act.

³Section 4 of the Act.

⁴Section 7 of the Act.

⁵Statutory Instrument No. 20 of 2023.

⁶Sections 18 and 24 of the Act.

⁷Section 25 of the Act.

⁸Section 16 of the Act.

parties” is the primary function of the SCC. Apart from the Industrial Labor Relations court, the SCC is the only other court in the formal system that is explicitly a court of substantive justice.

Second, SCCs are at liberty to conduct proceedings in “any such language as, in the opinion of the court, is convenient for the court and all the parties before it.”⁹

Third, and perhaps most fundamentally, the conduct of an SCC is not strictly adversarial, but rather its deliberations should facilitate the “reconciliation of the parties.”¹⁰

Fourth, section 13 of the Act prohibits legal representation in the SCC and requires that a litigating party in the SCC acts on his or her own behalf. To this effect, section 13 provides that “[N]o 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.” However, as per the SCC Service Charter (n.d.), parties are free to procure “prior” legal assistance at their own cost.

There are two other provisos to the requirement that a litigating party represent themselves. First is section 13 (1) (2), which provides that an SCC may permit “any person who is the spouse, guardian or other member of the household of a party in any proceedings before the court to appear or act for that party.” Second, section 13 (3) provides that “a body corporate or an unincorporated body which is a party to the proceedings before a small claims court may be represented by any person or agent who is authorised by that body to appear on its behalf.”

PART III: ENHANCING THE EFFECTIVENESS OF THE SMALL CLAIMS COURT

There are indications that the SCC has enhanced access to justice for claimants with small monetary claims and that it operates more efficiently than some sectors of the formal court system (World Bank, 2022). However, there are certain binding constraints to service delivery that are undermining the ability of the SCC to fully live up to its potential as a justice enhancing innovation. This brief identifies two of these constraints, and then proposes policy recommendations to address the constraints.

Constraint No. 1: Limited-to-no Legal Assistance for Indigents

The statutory bar on lawyers in SCCs makes sense. Lawyers typically drive-up costs and reinforce asymmetries between the rich and poor. However, it would be a miscalculation to assume that legal assistance in the SCC is unnecessary. Of course, when compared with the procedures and paperwork of superior courts, SCC procedures are much simpler and more user friendly than those in the formal system. However, it must be remembered that low legal literacy levels in Zambia mean that even these simplified processes are likely too complicated for the average litigant. Where this is the case, asymmetries between the legally literate and the legally illiterate are reinforced.

The reinforcement of these asymmetries is amplified by the provision in the SCC service charter that allows litigants to obtain “prior” legal assistance before appearing in the SCC, as well as the provision in the Act that allows body corporates sued in the SCC to be represented in court by “any person or agent” authorized to represent the body corporate. Even if this agent is not a legal practitioner, there is a high likelihood that an agent of a body corporate has higher legal literacy levels than the average litigant. Similarly, the permissibility of procuring prior legal assistance, if it is outside the courtroom, means that better resourced claimants who can procure legal assistance outside court benefit from briefing, coaching, and document preparation that provide a significant advantage over litigants that have no access to legal assistance.

One of the insidious dangers of SCCs is that they can, if improperly designed, reinforce the power asymmetries they seek to correct. While the Service Charter of the SCCs assigns the “clerk of court” the responsibility of assisting claimants with the preparation of court documents (SCC Service Charter, n.d.), given the volume of SCC cases, it is not realistic to expect that one clerk of court can effectively assist all claimants.

⁹Section 16 of the Act.
¹⁰Section 15 of the Act.

Further, assistance from the clerk of court is limited to assistance with the preparation of the claimant's documents. It does not extend to legal assistance that may be required beyond this and also does not extend to defendants. Many self-represented litigants are unacquainted with the most basic of legal concepts. This slows down court processes but also reduces the likelihood of success when prosecuting or defending a case.

Legal assistance gaps in the SCCs are also conduits for corruption since they create a black market of legal services where vulnerable litigants solicit assistance from unauthorized agents who are often unqualified to offer legal assistance. The SCC service charter recognizes this by cautioning members of the public to seek "services only from prescribed officers and offices and not in the streets, court corridors, car parks, etc (SCC Service Charter, n.d.)."

More perniciously, the lack of legal assistance for SCC litigants can have unjustifiable punitive consequences for litigants. As earlier explained, the SCC has wide coercive powers to hold persons in contempt for a wide variety of infractions, including the disregarding of court process and orders, and the refusal to answer a question put forward by the court. Contempt of the SCC is a criminal offence the consequences of which can include imprisonment.¹¹

The failure to comply with court orders or processes may arise from unfamiliarity with the court system or misinformation. So too, a litigant's failure to answer a question put forward by the court may stem from a fear of self-incrimination or other misapprehension of the law. The chilling effect of non-compliance with court orders and the extensive enforcement powers of the SCCs makes the availability of some form of legal assistance for litigants even more pertinent.

Constraint No. 2 – Limited Geographical Reach of the Small Claims Court

The justice gains of the SCC innovation are undermined by its limited geographical reach. Currently, the SCC operates only in the urban centers of Lusaka, Ndola and Kitwe. As such, only small claim litigants in these three areas benefit from the reduced barriers to legal recourse offered by the SCC.

The limited presence of the SCC reinforces the country-wide concentration of legal services in urban centers. This disproportionate distribution of legal services means that residents of rural areas have greater unmet legal needs than residents in urban centers. A key barrier to extending the geographical reach of the SCC is that due to funding constraints, the commissioners who staff these courts are engaged only on a part-time basis (World Bank, 2022). As earlier explained, SCC commissioners, as required by law, are qualified legal practitioners. Qualified legal practitioners are concentrated in urban areas. Indeed, many districts in Zambia do not have a single legal practitioner. It is therefore not currently feasible to extend the SCC to areas of the country that do not have a pool of legal practitioners to recruit from. Further, since their work on the SCC is part-time, legal practitioners serving as commissioners must secure other work opportunities for their livelihood. Since legal-related work opportunities are largely only available in urban centers, part-time commissioners recruited from urban centers are unlikely to agree to relocate to staff SCCs in rural areas that cannot provide supplementary work opportunities.

The servicing of the SCC by part-time commissioners also affects their efficiency. While the target disposal period of a SCC case is 60 days, cases typically take twice as long (World Bank, 2022.)

POLICY PROPOSALS TO ADDRESS THE CONCERNS

This brief puts forward the following two policy proposals to address the identified constraints:

Recommendation No.1 – Increased Legal Assistance for SCC litigants

The provision of free, out of court, advisory services to self-represented litigants of the SCC is an urgent need. The establishment of a help desk at the SCC manned by paralegals must be considered. These desks can provide legal assistance in document preparation provide information about the court process, and coach litigants set to appear in court.

¹¹Section 25 of the Act

Providing these services free of charge can go some way in remedying the comparative advantage enjoyed by those who are able to procure this kind of legal assistance at their own cost. To create a justice enhancing forum for small claim litigants, the state must do more than ban legal representation in court. It must level the playing field by legally empowering litigants to effectively use the justice innovation of the SCC.

Recommendation No. 2 – Extend the geographical reach of the SCC to non-urban centers by using a hybridized model of full and part-time commissioners

A resource mobilization strategy aimed at recruiting full-time SCC commissioners to staff courts in non-urban centers must be considered. The use of part-time commissioners in the three urban centers where the SCC currently exists need not be dispensed with. Rather, a hybridized model of full and part-time commissioners can ensure that the SCC is established in remote areas that have limited-to-no presence of legal practitioners. An offer of full-time employment will give legal practitioners in urban centers a greater incentive to relocate to rural areas and serve as SCC commissioners.



¹¹Section 25 of the Act

CONCLUSION

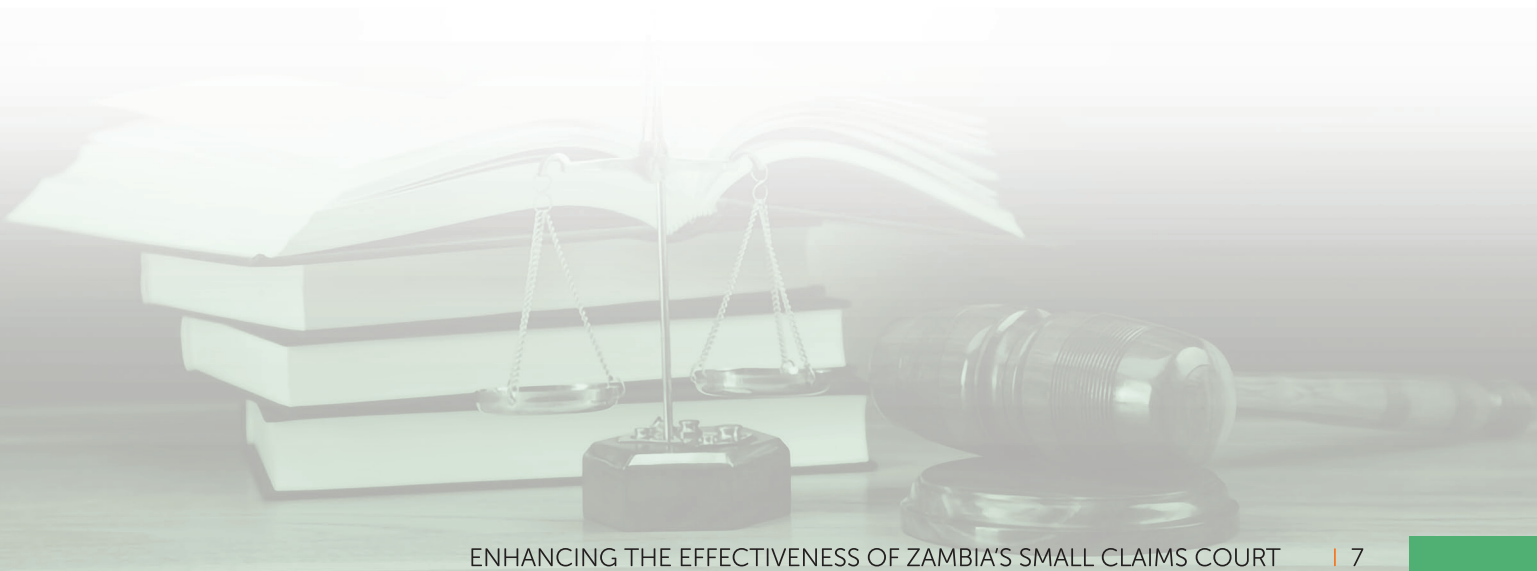
The SCCs are an important innovation that have enhanced justice for litigants of small monetary claims. However, their limited geographical reach and the lack of legal assistance for SCC users are limiting the effectiveness of these courts. This brief has advanced two recommendations to remedy these constraints. First, a legal assistance scheme for SCC users must be operationalized and second, the geographical reach of the SCC must be extended to non-urban centers by the establishment of SCCs in these centers, and by the recruitment of full-time commissioners to staff these courts. Operationalizing these two policy recommendations will go some way in helping SCCs fulfill their mission of providing justice services to small claim monetary claimants unable to access the formal court system.

REFERENCES

The Small Claims Court Act Chapter 47 of the Laws of Zambia

Statutory Instrument No. 20 of 2023

World Bank, Zambia Judicial Sector Public Expenditure and Institutional Review, 2022





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