

SPECIALISED TRIBUNALS IN SOUTH AFRICA AND ACCESS TO JUSTICE

Rashri Baboolal-Frank
Procedural Law, Faculty of Law,
University of Pretoria
Email: Rashri.Baboolal@up.ac.za

ABSTRACT

In South Africa civil Tribunals are sui generis as it falls within the ambit of both administrative and judicial functions. Each Tribunal in South Africa operates differently in relation to inter alia rules of procedure to the functions and powers of the tribunal. As is the case with Tribunals in India, certain civil Tribunals in South Africa can be described as 'haphazard' in the manner in which they function. The aim of the paper is to undertake a comparative study of jurisdictions to assist to enhance the South African civil tribunal model. The enhanced model will ensure that the 'haphazard' function of certain tribunal/s in South Africa is rectified to a unified system that operates in a manner that is 'effective, efficiently, coherently and is cost effective' and in the process, addressing access to justice in a sufficient manner. In France the civil administrative Tribunal has worldwide acclaim with regards to its ability to function optimally. In the United Kingdom the influence of both the Franks Committee and the Leggatt Report has assisted the United Kingdom to remodel their tribunal structure in line with the Leggatt Report, thus creating transparency for people whose disputes are heard before the tribunal. In New South Wales Australia the civil and administrative Tribunal has had many successes in relation to the structure and function of the tribunal, which has influenced other states within Australia. Access to justice becomes tangible when people are satisfied that their dispute/s are aired, heard and that a just decision was delivered rendering both parties gratified given the circumstances. Justice must not only be seen to be undertaken but also reach the minds of the people to be achieved. This paper aims to fleece out South African civil tribunals and the creation of access to justice through civil tribunals.

Key words: access to justice, tribunals, South Africa, leggatt report

Introduction

Section 34 of the Constitution states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, **another independent and impartial tribunal or forum.**' (**my emphasis**) The establishment of tribunals are born from the implications of section 34.

The Hoexter Commissioner Report of Inquiry of 1997 ("Hoexter report") made recommendations for court-annexed mediation, which was proposed to create access to justice. The method of mediation is found in specialised tribunals. A specialised Judicial officer/commissioner is appointed to adjudicate matters at specialised tribunals.

The main aim of the paper is to analyse whether there is an international comparative tribunal structure applicable to a South African context, which will create access to justice and an efficient system.

In order to assess the Leggatt recommendations supporting a one user system it is important to use the report's objectives as indicators for a South African context:

"The object of this review is to recommend a system that is independent, coherent, professional, cost-effective and user-friendly
four main objects: first, to make the 70 tribunals into one Tribunals System that its members can be proud of; secondly, to render the tribunals independent of their sponsoring departments by having them administered by one Tribunals Service; thirdly, to improve the training of chairmen and members in the interpersonal skills peculiarly required by tribunals; and fourthly, to enable unrepresented users to participate effectively and without apprehension in tribunal proceedings."

The paper will evaluate the manner in which tribunals are funded and may be potentially funded in the future.

A comparative study becomes of necessary importance especially when the idea of a one system model was borrowed from the French and English tribunals. Australia, New Zealand and the United States of America have developed a fully functional tribunal and the paper will assess their civil tribunals in relation to *inter alia* access to justice to the hearing of matters.

Background

The necessary function of tribunals was to consider the dispute and to make a finding in the public interest. (Rose Innes, 1963) As a result of the creation of tribunals, a body of commissioners and judicial officers were required to specialise in a specific area of law, with the necessary expertise in order to be able to make competent orders. This provided a cheaper method for parties to approach specialised tribunals (Boraine,2012) to have disputes resolved. There are a cornucopia of tribunals that will be briefly

discussed to indicate the vast areas of laws applicable to tribunals. Tribunals in South Africa are haphazard as no civil tribunal operates in the same manner. (Bharwaney, 1976)

Tribunals

The definition of a tribunal is defined as: 'A body established to settle certain types of disputes' (Oxford Dictionaries). A Tribunal in South Africa consists of an administrative and judicial nature. (Burns & Beukes, 2006)
Tribunals in South Africa are established in terms of statute.

- (a) *National Consumer Tribunal* (GN 789 of 28 August 2007)
- (b) *Competition Tribunal* (Competition Act 89 of 1998 in terms of Section 26)
- (c) *Rental Housing Tribunal* (section 7 of the Rental Housing Act 50 of 1999)
- (d) *Water Tribunal* (Section 146(1) of the National Water Act 36 of 1998)
- (e) *Companies Tribunal* (Companies Act 71 of 2008 section 193 and 195)

Some comparative notes

The Leggatt report sums the purpose and agenda of a tribunal adequately as it was written in a British context but applies succinctly to South Africa. The report states that:

'The arrangements for the funding and management of tribunals and other bodies by Government departments are efficient, effective and economical; and pay due regard both to judicial independence, and to ministerial responsibility for the administration of public funds;' (Leggatt Report, 2001)

The issue with South African tribunals is that they do not all function efficiently, effectively and economically. (Loggerenberg & Boraine, 2012) Tribunals are funded by government in order to operate and that the lack of competence of commissioners appointed at tribunals stagnates finalisation of matters. A lack of execution mechanisms also contribute to a further frustrated legal system, which amounts to wastage of monies that could have been spent for better delivery of justice to individuals. Laverne argues that in order for the improvement of tribunals in regard to independence and impartiality a comparison on a sectoral basis can be undertaken meaning:

'by examining tribunals individually or in groups of those with similar natures or purposes as opposed to searching for a global notion of independence applicable to all administrative tribunals' (Jacobs, 2008)

Another method would be to have specific but fully functioning tribunals. However, in South Africa it has been ascertained that not all domestic tribunals are fully functional. It has been proposed that '[r]etaining a distinctive tribunal system should also provide a cost-effective alternative to pursuing a case through the courts.' (Radcliffe, 2007)

In France their Constitution does not specifically provide for administrative tribunals however in order to allow for it, their Constitution will have to be interpreted in a broader context. (Boyron, 1998) The President of the Tribunal may appoint a single Judge to preside in a matter before the Tribunal de grande, where there is no complexity and the Judge's experience allows for the matter to be speedily resolved. (Boyron, 1998)

In England there were various reasons over the years for the establishment of specialised courts and tribunals, which are as follows:

- the ordinary courts of law were not able 'to deal with the economic, social, business, industrial relations and other considerations that lie behind certain types of dispute.' (Marsh & Soulsby, 2002)
- Procedure of ordinary courts was stifled and tribunals were created to decide upon matter expeditiously. (Marsh & Soulsby, 2002)
- Procedure in ordinary courts was costly. (Marsh & Soulsby, 2002)
- Ordinary courts operate in a very orthodox manner that does not allow for flexibility (Marsh & Soulsby, 2002)
- Ordinary courts do not allow an individual to enforce their rights in person (Marsh & Soulsby, 2002)

The abovementioned reasons can be equated to the South African context for the government also creating specialised courts and tribunals for the same multi-layered purpose.

In France there is a one tribunal that hears all matters at such a fast speed that it leaves global judicial courts stunned at its efficiency. The French seem to have perfected its tribunal system in the amount of cases that are heard and finalised, which is access to justice at its best.

Operation Of Tribunals Through ADR

Alternative dispute resolution (ADR) mechanisms have become a global phenomenon and trend in first world countries who are utilising this forum to solve disputes timeously resulting a less costly and effective platform. (Blake, Browne & Sime, 2011) Through ADR parties to a dispute feel they actively participate in solving their dispute compared to litigation where the attorney/advocate represents the case in open court. (Brown & Marriott A, 1993) technique that is a method of ADR is negotiation

that solves disputes in an innovative way. (Sander,1995) A few advantages of ADR is that it is not in the public media and that involves less anxiety than one would be exposed to during a trial. (Davis, 2002) ADR can also inspire further creative methods of resolving disputes not limited to negotiation, mediation, conciliation, arbitration and fact finding for the parties to reach a settlement. (Fine & Plapinger,1987) The future of dispute resolution that is summed up by Mackie is that:

‘[i]n stimulating this new awareness, it has also generated a new confidence for experimentation and action. It has mobilized academics and practitioners to rethink and challenges anachronistic, unsatisfactory and unchallenged dispute resolution processes, to seek new means to extend access to justice and in the process to explore anew definitions and forms of justice’ (Mackie, 1991)

This is the impetus of dispute resolution is that it provides access to justice to all people in an expedited manner, cutting through the orthodox method of accessing the law.

In the United Kingdom the ADR mechanisms encourage the judges to be ‘more interventionist and flexible to the point of acting as mediator in such disputes.’ (Brown & Marriott, 1999)

Similarly in South Africa, both courts and tribunals adopt alternative dispute resolution mechanisms and it is necessary to unpack the efficacy of these methods in relation to costs and the time period that the dispute is resolved in relation to the complexity of the matter.

Establishment Of Specialised Tribunals

Section 34 of the Constitution states that ‘[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’ (my emphasis) The establishment of specialised courts and tribunals are born from the implications of section 34. The establishment of specialised tribunals was created in terms of statute to resolve disputes specific to the cause of action such as, rental disputes which are heard at the rental housing tribunal.

South African law is deeply rooted in Roman Dutch Law and English Law. (Kleyn & Viljoen, 2002) When one analyses the sources of the Constitution in terms of the influence of foreign established Constitutions, it is apparent that South African codifiers were influenced by, France, Great Britain, United States of America, Canada, Japan and Germany. (Venter, 2000) The source of section 34 with specific reference to how tribunals and courts found its way into the Constitution, may be English law, because of the oldest statutes namely the Arbitration Act of 1698 that allowed for the resolution of disputes through arbitration. The establishment of the London Court of International Arbitration in 1892 stated its quintessential purpose as follows:

‘This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer-up of strife.’ (A Redfern & M Hunter et al,2004)

The core function was to ensure that matters were resolved in an expeditious and peaceful manner, and the reference to section 34 in the Constitution illustrates the same purpose.

However the history of administrative tribunals stems from the South African Law Reform Commission that proposed tribunals in 1992 and the proposal of a one administrative council for tribunals was rejected. In 1999 the South African Law Reform Commission suggested one administrative tribunal for South Africa.

Purpose And Need

The purpose of specialised tribunals is illustrated in the enabled statute for the specialised tribunal.

Functions And Role Of Specialised Tribunals

Montesquieu (French political philosopher), expanded the term *trias politica* in his thesis, that is ‘the separation of executive, legislative and judicial power was a condition precedent for liberty,’ which sums up the doctrine of separation of powers in a democracy. (Devenish, 2005) The South Africa Constitution sets out the separation of powers as three tiers, namely the executive, legislature and judiciary. The Courts fall under the judiciary tier and tribunals fall under the administrative function which is a tier of the executive. Hence the argument that there is an overlap of the sphere of the judiciary and executive by the establishment of tribunals. (Okpaluba, 2003) In the United States, ‘the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.’ (Okpaluba, 2003) Similarly in South Africa, the doctrine of separation of powers also means that the three tiers of powers function in unison in order not to impair each other. The aim of the principle was to prevent the maladministration of power, if the organ of state had excessive power. (Devenish, 2005) Courts perform a judicial function for review or appeal procedure, as a party may approach the High Court to confirm or amend the decision of the tribunal. De Ville describes separation of powers in another manner as

‘the role of the courts in judicial review must be seen as a dialogue with parliament and the executive relating to the interpretation of the Constitution so as to promote the common good,’ (de Ville, 2000)

The description illustrates the ironical harmonious nature of the separation of powers despite the description of separateness; there is a needed and necessary communication between the tiers. A dialogue implies an ongoing conversation, which is definitely a necessary action between the three tiers to serve the common good of the people through transparent discussions amongst the tiers to uphold the values of the Constitution for the people.

Upon consideration whether the establishment and function of the specialised courts and tribunals are constitutional or not, it is concluded with a resounding affirmation that specialised courts and tribunals are indeed constitutional. There was an argument that if a Judge had to appear in the High Court and later appears in the Magistrate Court and thereafter Equality Court, then these different roles usurp the powers of its function as a judicial officer, hence being unconstitutional. (Okpaluba,2003) This cannot be because each role and function is separate and an independent entity, and thus can only be analysed individually, and to amalgamate all the roles and to conclude unconstitutionality would be improbable. (Hopkins, 2006) Devenish has argued in view of case law that the doctrine of separation of powers is a 'flexible rather than absolute' (Devenish, 2005) measure, which is an argument that is more than agreeable, as all the powers certainly do overlap, and a rigid approach will result in more administration than smoother democracy of the specific functions.

Prescribed Rules

Each civil Tribunal in South is a creature of Statute and the legislation dictates the rules so that each tribunals adheres to a different set of rules.

Specialised Tribunals And The Operation Of Mediation And Adr Mechanisms

Alternative Dispute Resolution mechanisms have infiltrated specialised tribunals in that there is court annexed mediation for disputes that have no legislative protocol for disputes that can be mediated. In the Rental Housing Tribunal there is a hands on approach as the dispute is mediated between the parties with a third party to identify the key issues and to indicate where parties can reach consensus regarding their common interests. A skills set of any lawyer in any field of practice is to know how and when to engage in alternative dispute resolution. (du Plessis, 2007) An advantage of specialised tribunals is the inquisitorial approach that allows for the active participation of the chairperson. (Sainsbury & Durkin, 1995)

Specialised Tribunals And Access To Justice

Tribunals and Commissions are financially cheaper for a lay person to approach as opposed to court that requires attorneys/advocates in certain instances. Tribunals allow for robust proceedings without legal representation. Access to justice is a constantly evolving concept in society where peoples' different needs require attention. There are many faces to access to justice ranging from the poor in need for access to the law to alternative dispute resolution for an individual to control the processes to education of the law. All these facets require government to invest and ensure that the needs and interests of the people are met through non-governmental institutions and public law firms. Ongoing research will ensure that access to justice is met in the many different facets. (Hurter, 2011)

In a trendy global world, access to justice also needs an approach that is innovative and 're-engineered' (Ramlogan, 2011) to deal with the daily needs of society and the judicial system.

Conclusion

In South Africa civil tribunals and access to justice is an ongoing and current discussion that needs to be fully realised in the future.

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