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Abbreviations and Acronyms

AAT – Administrative Appeals Tribunal

AAT Act – Administrative Appeals Tribunal Act 1975

ACAT – Australian Capital Territory Civil and Administrative Tribunal

ACT – Australian Capital Territory

ADJR Act – Administrative Decisions Judicial Review Act 1977

ADR – alternative dispute resolution

AJTC – Administrative Justice and Tribunals Council

CCMA - Commission for Conciliation, Mediation and Arbitration

CPA – Consumer Protection Act

COAT – Council of Australasian Tribunals

CODESA – Congress for a Democratic South Africa

COT – Council on Tribunals

CTTT – Consumer Trader and Tenancy Tribunal

DCA – Department for Constitutional Affairs

FC Act – Federal Court of Australia Act 1976

MEC – member of the executive committee

NCAT – New South Wales Civil and Administrative Tribunal

NCT – National Consumer Tribunal

NSW – New South Wales

NSW ADT – New South Wales Administrative Decisions Tribunal

OCR – Organisation of Civic Rights

PAJA - Promotion of Administrative Justice Act

QCAT – Queensland's Civil and Administrative Tribunal

RHT – Rental Housing Tribunal

RPTT – real property transfer tax

SAT – State Administrative Tribunal

SATS – South African tribunal system

SPC – Southern Pipeline Contractors

TCE Act – Tribunals, Courts and Enforcement Act 2007

TS – Tribunals Service

UBT – unincorporated business tax

UK – United Kingdom of Great Britain and Northern Ireland

UT – utility tax

VCAT – Victorian Civil and Administrative Tribunal

WA – Western Australia

Part 1: An Introduction to the Study

Chapter 1: Introduction

1. Background

1.1 Overview of study

In South Africa, numerous tribunals have emerged sporadically over the past two centuries.[1] These tribunals were disconnected from each other, as they functioned independently and each had its own set of rules and legislation. The powers that these tribunals possessed varied from judicial and quasi-judicial to administrative.[2] This thesis attempts to distinguish the classification of powers to draw a distinction between courts and tribunals to establish the definite role and functions of tribunals, independent of the court system. In present-day South Africa, tribunals have evolved and consist of specialised members who are appointed to deliberate specific problems.[3] There are several tribunals scattered across the country that specialise in different areas of law.[4] This thesis investigates five tribunals to propose a harmonised, unified tribunal system in order to promote efficiency, effectiveness and expediency, and to reduce costs. The selection of the tribunals was determined by the similarities in their rules, procedure and mode of daily operation, which are diverse and are adequately representative of tribunals in South Africa. Despite the disconnectedness amongst the tribunals in this study, they still share common features and objectives that create the foundation to reform tribunals by way of the proposed unified, harmonised tribunal system.

The foreign comparative study is based on the age of the tribunal system, its efficiency, tiers and cost-effectiveness, and it being representative of a functional system, and of unified and consistent tribunal systems. As a result, the thesis postulates a comparative framework, which culminates in addressing the creation and role of a harmonised tribunal system. The thesis aims at further enhancing access to justice and administrative justice, and to ensure a

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[1] Rental Housing Tribunal (Rental Housing Act 50 of 1995), National Consumer Tribunal (National Credit Act 34 of 2005 and Consumer Protection Act 68 of 2008), Water Tribunal (National Water Act 36 of 1998), Competition Tribunal (Competition Act 89 of 1998), Companies Tribunal (Companies Act 71 of 2008).

[2] See discussion in Chapter 3, where these aspects are unpacked.

[3] Each piece of legislation that governs the tribunals in this study sets out the specific and specialised jurisdiction of the tribunal, together with the members' requirements, namely specialised expertise and experience.

[4] The Media Tribunal, Pension Funds Adjudicator and CCMA are regarded as tribunals of sorts, as all these bodies' decisions constitute administrative action. An example of a special tribunal is the Special Investigating Unit Tribunal.

more effective and efficient tribunal system in South Africa.[5] In a universal context, tribunals have a history of over two thousand years.[6] In South Africa, the first tribunals were established more than five hundred years ago.[7] In view of these facts, it is apparent that a study of their history enables an understanding of the context within which tribunals operate. Furthermore, the historical context of tribunals elucidates their evolution and the continuous changes they underwent to transform into the present-day tribunals of this study. The historical chapter analyses the purpose, function, characteristics and judicial aspects of tribunals that have evolved with the passing of time. In order to have a comprehensive understanding of their origin, evolution and relevance in the current society.

1.2 Choice of domestic tribunals

The five tribunals comprise the Rental Housing Tribunal,[8] the Companies Tribunal,[9] the Competition Tribunal,[10] the National Consumer Tribunal[11] and the Water Tribunal.[12] They were established in South Africa in the twentieth and twenty-first centuries. Their choice is justified by their similarity in rules, procedures and the nature of their daily operation, which represent the tribunals of South Africa, as previously mentioned. These five tribunals were analysed in terms of the system of operation of tribunals,[13] with a view to address the shortcomings of the tribunals to enhance efficiency and cost-effectiveness for the creation and development of a unified, harmonised tribunal system in South Africa.

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[5] See further discussion of administrative justice in Chapter 3, and access to justice in Chapter 6.
[6] MM Austin & P Vidal-Naquet *Economic and social history of ancient Greece: An introduction* (1977). Reference is made to the Koresos tribunal and, in the second instance, to Athenian tribunals, where matters were heard speedily in the period around 402 BC.
[7] Tribunals can be traced as far back as the indigenous tribes of Africa; see F Kariuki 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 31 March 2015) and AT Ajayi & LO Buhari 'Methods of conflict resolution in African traditional society' (2014) 8(2) *African Research Review* 141.
[8] Established in terms of the Rental Housing Act 50 of 1999.
[9] Established in terms of the Companies Act 71 of 2008.
[10] Established in terms of the Competition Act 89 of 1998.
[11] Established in terms of the National Credit Act 34 of 2005.
[12] Established in terms of the National Water Act 36 of 1998.
[13] This reference to tribunals is to all five tribunals in the South African study.

1.3 Choice of comparative study

My thesis focuses on South Africa, but it will engage in a comparative study of the tribunal systems of various countries, including Australia, France and the United Kingdom, with the aim to reform South African tribunals into an amalgamated tribunal system, similar to the systems with which they are compared. The different foreign tribunal systems were selected on the basis of the evolution of the system, being a tiered system with judicial review, the enacted legislation and their procedures, and these tribunals are representative of the most efficient tribunals in the world. The reference to the tribunals being efficient means that the costs are reduced, the matters are resolved swiftly and expeditiously, the length of time taken to resolve the dispute is not lengthy and the system is user friendly amongst other aspects that are fully mentioned in the thesis. The purpose in making the comparison was to lead to the proposal of a unified tribunal system that is not as scattered,[14] as are the many tribunals currently in operation in South Africa. The thesis proposes that the tribunals discussed should operate within a unified tribunal system, with the same rules and mode of operation, and should be located in one place that houses all the tribunals in each province, where possible. The reason for the choice of France, United Kingdom and France is that it operates with efficiency as the costs are proportional to the complexity of the matters and the short period of time that matters are resolved, the rules are user-friendly, access to justice is achieve, promotion of the rule of law is achieved, procedures are simplified, there are review and appeal mechanisms. Most importantly with the exception of Australia the decisions are enforceable. Furthermore, the presentation of evidence in the foreign tribunal systems are a combination of written and oral, all these aspects culminate into the similar operation of the South African tribunals that makes these countries comparable, suitable and adaptable to a South African context.

[14] See also AP Datar 'The tribunalisation of justice in India' (2006) *Acta Juridica* 295, which describes the establishment of tribunals as operating in a haphazard manner.

1.4 Tracing the evolution of tribunals[15]

In order to understand the subject of tribunals, it is necessary to trace their evolution from the beginning. From a historical perspective, tribunals were created to hear disputes other than in a court, in an informal, cheap, efficient and expeditious manner.[16] It is argued that

> [t]he image of tribunals seems to have gone through several evolutionary changes, from enemies of the rule of law, to useful but rather marginal entities, floating around in a no man's land somewhere between the judicial and the administrative systems, towards becoming fully-fledged, professionally accredited bodies set in the mainstream of a modernised and better integrated system of administrative justice.[17]

The thesis argues for a similar pattern of evolutionary changes in the South African context and attempts to distinguish the implications of administrative justice and access to justice. The characteristics and purpose of tribunals are interlinked in order to enhance access to justice.

1.5 Distinction between courts and tribunals[18]

It is important to mention that tribunals and courts are different. It is crucial to understand some of these distinctions. Characteristically, tribunals reflect in their membership the specific areas of expertise, whilst courts have a generalist expertise.[19] In the same vein, tribunals are inquisitorial whereas courts are adversarial.[20] Another distinctive element of the two is that tribunals utilise application proceedings for hearings, whereas courts make a distinction between action and application proceedings.[21] It is important to bear this distinction in mind as, in terms of procedures, tribunals operate in an almost cloned procedure to courts and confusion arises. Both are similar in this respect, with the exception that tribunals attempt a more relaxed approach than the formal court approach.[22] In spite

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[15] See Chapter 2 for a more detailed discussion.
[16] This aspect will be dealt with in Chapter 3, under the Constitution and tribunals. I Currie & J de Waal (eds) *The bill of rights handbook* (5th ed) (2005) 704.
[17] G Drewry 'The judicialisation of 'administrative' tribunals in the UK: From Hewart to Leggatt' *Transylvanian Review of Administrative Sciences* 28 E SI/2009 47.
[18] See a more detailed discussion in Chapter 3.
[19] C Hoexter *Administrative law in South Africa* (2006) 52.
[20] C Hoexter *Administrative law in South Africa* (2006) 52-53.
[21] C Hoexter *Administrative law in South Africa* (2006) 52-53.
[22] *BMW South Africa (Pty) Ltd v NCC & JSN Motors (Pty) Ltd* NCT/2679/2011/101(1)(P);NCT/2807/2011/101(1)(P); NCT/2806/2011/101(1)(P). The National Consumer

of this. The application of the tribunals' rules are perceived as more flexible *vis à vis* the traditional inflexible court approach.

1.6 Alternative dispute resolution[23]

Moreover, it is argued that alternative dispute resolution (ADR) is an important approach in the resolution of disputes. ADR is a mechanism that has been utilised by indigenous tribunals and tribes in Africa in the early resolution of disputes.[24] Currently, tribunals such as the Rental Housing Tribunal and the Companies Tribunal employ ADR techniques. However, it is not a uniform mechanism across all tribunals discussed in this study. There are a range of benefits and advantages in the adoption of ADR techniques as an early resolution tactic, which results in saving costs and time. This thesis elucidates these ADR advantages for their adoption in a unified tribunal system, of which the net effect will be to intensify access to justice.

1.7 Access to justice[25]

In South Africa, the right of access to justice in relation to tribunals is grounded in section 34 of the Constitution. With reference to the phrase, access to justice, the word access means the creation of a way,[26] whereas the concept of justice has a more complex history of deconstructing.[27] It is further argued that '[j]ustice is a central moral standard against which social conduct, practices, and institutions are evaluated, and this is as it should be'.[28] It is evident, as remarked by Cappelletti and Garth, that '[t]he concept of access to justice has been undergoing an important transformation, corresponding to a comparable change in civil procedural scholarship and teaching,' which is translated into three waves of access to

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Tribunal applied the High Court rules in its consideration of an application of joinder. *Willem HW Makkink v Accordian Investments (Pty) Ltd* NCT/8473/2013/75(1)(b). In this matter, although the tribunal employed a flexible approach, the requirements of default judgement were not satisfied, as condonation was not requested and proper service was not undertaken.

[23] See a more detailed discussion in Chapter 6.

[24] A Aiyedun & A Ordor 'Integrating the traditional with the contemporary in dispute resolution in Africa' (2016) 20 *Law Democracy & Development* 163-164.

[25] See a more detailed discussion in Chapter 3 and Chapter 6.

[26] www.collinsdictionary.com (accessed 12 July 2017).

[27] RL Cohen 'Introduction' in RL Cohen (ed) *Justice* (1986) 4.

[28] RL Cohen 'Introduction' in RL Cohen (ed) *Justice* (1986) 4.

justice.[29] Access to justice was considered as a natural right that was confined to the rigid structure of procedure as a formal right, with an absence of its impact and challenges.[30]

Cappelletti and Garth highlight the need for the establishment and development of tribunals.

> The creation of a landlord-tenant tribunal might then ease that burden on the regular courts, and, if designed to obviate the need for lawyers, might reduce the need for legal services.[31]

From the 1980s onwards, the law, procedures and abovementioned techniques were in a constant state of flux, as human justice[32] is ever changing because of the different needs and circumstances of individuals and the community.

The concept of access to justice in the thesis is canvassed through creating user friendly tribunals, that are easy to access and present matters in person if necessary.[33] Furthermore, implement alternative dispute resolution mechanisms such as mediation, arbitration and negotiation to resolve disputes as amicably and quickly possible.[34] Create a tribunal system that will be as cost-effective as possible for the users. [35] Ensure that all systems are unified so that resources are coalesced.[36]

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[29] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective" (1977-1978) 22 *Buffalo Law Review* 183.
[30] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 181-182.
[31] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective'(1977-1978) 22 *Buffalo Law Review* 227.
[32] M Cappelletti 'Repudiating Montesquieu? The expansion and legitimacy of "constitutional justice"' (1985-1986) 35 *Catholic University Law Review*1'What "human justice" can do is solve, or attempt to solve, concrete problems of individual and societal life: to enact and enforce norms, to create institutions, to design processes, all with that one goal in mind-to solve actual problems. But human problems continuously change, and so do norms, processes, and institutions. Human justice is changing justice whether or not there is, at a final point, an all-encompassing permanence, an Absolute which gives pause, and meaning, and light to all this moving and striving and passing which is human life.'
[33] R Creyke 'Tribunals and access to justice' (2002) *Queensland University of Technology Law and Justice* 64 at 70-71.
[34] R Creyke 'Tribunals and access to justice' (2002) *Queensland University of Technology Law and Justice* 64 at 70-71.
[35] R Creyke 'Tribunals and access to justice' (2002) *Queensland University of Technology Law and Justice* 64 at 70-71.
[36] R Creyke 'Tribunals and access to justice' (2002) *Queensland University of Technology Law and Justice* 64 at 70-71.

1.8 The different types of tribunals

The landlord-tenant tribunals are known by different names in other jurisdictions. The third wave of access to justice passed the shores of South Africa in the 1990s, when the landlord-tenant tribunal became known as the Rental Housing Tribunal.[37] Another tribunal was established for consumers, namely the Consumer Tribunal for debt collection and restructuring, as consumers find themselves financially constrained.[38] In South Africa, this tribunal is known as the National Consumer Tribunal, and was formed in the twentieth century.[39] The development of tribunals in South Africa did not stop there, and the remaining three tribunals of this study were formed, namely the Companies Tribunal, the Competition Tribunal and the Water Tribunal.[40]

1.9 Administrative justice[41]

The tribunals in this study are administrative in that they are a body that exercises a public function. Section 33 of the Constitution provides for administrative decisions to be subject to review or appeal. This means that the decisions of the tribunals amount to administrative action and are subject to the Promotion of Administrative Justice Act (PAJA). In relation to the grounds of review or appeal, it must be shown that the decisions are not impartial, transparent and reasonable, amongst others.[42] Therefore, tribunals in South Africa must operate in accordance with administrative justice, and the proposal of a unified tribunal system enhances administrative justice.

1.10 Proposal of a unified tribunal system as opposed to a cluster tribunal system

The proposal of the thesis is a unified tribunal system. The reason for this is because South Africa already has a disconnected cluster of tribunals that operate across the country, it is better suited that they operate under one unit in an amalgamation because rules can be

[37] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 260-265.
[38] Established in terms of the Rental Housing Act 50 of 1999.
[39] Established in terms of the National Credit Act 34 of 2005.
[40] Companies tribunal established in terms of the Companies Act 71 of 2008. Water tribunal established in terms of the National Water Act 36 of 1998. Competition tribunal established in terms of the Competition Act 89 of 1998.
[41] See Chapter 3.
[42] This is discussed in full in Chapter 3.

standardised, promotion of the rule of law, reducing costs, sharing expertise[43] of the presiding officers. In the foreign systems there have been successful amalgamated super tribunals that operate in the United Kingdom and Australia under one umbrella that coalesce resources and operate effectively as discussed in the thesis.[44] It is necessary to elucidate that having cluster tribunals for a South African context would not be reforming the system unlike in the Ontario context.[45] The one similarity that the Administrative Tribunal of Quebec[46] has in common with the South African context is that the members of the tribunal are experts as are prescribed by statute in the South Africa.[47]

2. Research statement

The current South African tribunal system appears to operate in a disconnected manner, as there is no uniformity of procedures but rather duplication. The proposed reformation argues for a harmonised system with a rationalisation of its rules that will result in improving efficiency and effectiveness, and enhance access to justice and administrative justice.

3. Research question

The main research question is: Exploring the reformation of tribunals in South Africa into a unified system in relation to common objectives and features together with employing trends of foreign comparative tribunal systems?

4. Research objectives

The research objectives of this thesis are as follows:

4.1 The aim of the study is to establish a harmonised tribunal system, with the view that it would operate more effectively and efficiently, and to further improve access to justice and administrative justice.

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[43] Lavene A Jacobs 'The Expert Tribunal' in Laverne A Jacobs & Justice A.L Mactavish (eds) Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007) p 67-92 at 74.
[44] See Chapter 5.
[45] Sossin L & Baxter J, 'Ontario's Administrative Tribunal Clusters: A Glass Half-full or Half-empty for Administrative Justice?' (2012) *Oxford University Commonwealth Law Journal* 157-187.
[46] Lavene A Jacobs 'The Expert Tribunal' in Laverne A Jacobs & Justice A.L Mactavish (eds) Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007) p 67-92 at 78.
[47] See chapter 4.

4.2 The thesis proposes reform of the tribunals discussed in this study through a comparative study to create and develop a harmonised and unified South African tribunal system.

5. Research methodology and approach

The research methodology and approach were as follows:

5.1 Analysis, assessment, evaluation, critique, interpretation, discussion and comparative analysis of the research and case studies from a procedural law perspective. Also analysed are statistical data, which was interpreted and the results captured in the form of graphs.

5.2 The choice of a comparison of domestic tribunals in this study in South Africa, namely the Rental Housing Tribunal (RHT), the Companies Tribunal, the National Consumer Tribunal (NCT), the Water Tribunal and the Competition Tribunal, was made because of the similarity in the mode of operation, rules of procedure, application proceedings, enforcement mechanisms and specialist expertise of the members, which are representative of all tribunals in South Africa.

5.3 The selection of tribunals in foreign systems are from the United Kingdom, Australia and France. These tribunals are representative of the most effective, efficient and harmonised tribunal systems in the world. The comparative choice is dictated by the well-established tribunal systems of these countries, which are tiered and have internal appeal mechanisms within the system. All these tribunal systems are a harmonised, tiered tribunal system that has evolved over a significant period of time. This is especially useful for South Africa in relation to its relatively younger tribunals, and in regard to the proposal of a unified, harmonised tribunal system.

6. Overview of chapters

The thesis is divided into six parts and consists of seven chapters.

Part 1 consists of Chapter 1 and briefly introduces the study.

Part 2 undertakes a historical study of the tribunal system, as set out in Chapter 2. This chapter examines the historical foundation of tribunals globally and domestically. It

illustrates the South African historical context of the framework of tribunals, from their creation, through their evolution to the present day.

Part 3 discusses tribunals in South Africa and constitutes Chapters 3 and 4. Chapter 3 evaluates the current development of tribunals to demonstrate the role of tribunals in South Africa and to suggest potential future developments and improvements in efficiency, which will further enhance access to justice through the creation of a harmonised tribunal system. Chapter 4 introduces the Rental Housing Tribunal, the National Consumer Tribunal, the Companies Tribunal, the Competition Tribunal and the Water Tribunal. It evaluates the significance of these tribunals in South Africa and fully assesses the impact, efficiency and effectiveness of the tribunal model with the aim to expose areas for development, weaknesses, strengths and shortcomings to reform the tribunals for a harmonised and unified tribunal system.

Part 4 consists of Chapter 5, which entails a comparative study. The aim of Chapter 5 is to fully assess the foreign tribunal systems in order to recommend methods of practice and techniques that will improve and reform the South African tribunal system. This chapter explores the lessons to be learnt from Australia, France and the United Kingdom in order to create and develop a tribunal system in South Africa in the form of a harmonised and reformed model.

Part 5 consists of Chapter 6 and sets out the methods to advance access to justice in the tribunal system through the adoption of ADR mechanisms. The variety of ADR mechanisms that are available include online ADR, mediation, arbitration, conciliation, negotiation and a mixture of the mechanisms, resulting in resolution at an earlier stage. ADR is an advancement to saving time and costs, and to ensure confidentiality in the disposing of matters. Only three of the five tribunals utilise some ADR practices, which is insufficient. In a unified tribunal system, all methods of ADR are available to all the tribunals, which will intensify access to justice. This chapter further discusses the shortcomings of the tribunals in this study and aims to address them, which will result in enhancing access to justice.

Part 6 consists of Chapter 7 and contains the conclusion and recommendations. Chapter 7 proposes uniform rules of procedure for the tribunals. It further proposes the adoption of

ADR mechanisms in a South African tribunal system. This chapter addresses shortcomings in the manner of operation of tribunals in South Africa, and recommends methods to reform the tribunals to a unified tribunal system. This chapter also demonstrates the most suitable harmonised model for the tribunal system in South Africa as a result of the comparative study. Lastly, this chapter makes recommendations in view of the study and concludes the thesis.

7. Significance of this study

This study is important, as it demonstrates that South Africa has a multiplicity of tribunals, each of which functions according to its own system. The thesis proposes a harmonised tribunal system that encompasses the variety of expertise of members in relation to different grounds of jurisdiction. To ensure consistency in the rules of procedure for all tribunals, the recommendation of amalgamation into a cluster tribunal system is an obvious choice. Similarly, the foreign tribunal systems discussed in this study constitute a unified system involving tiered hierarchical systems. The impact on the users of a harmonised tribunal system is significant, as it is more coherent, user-friendly, effective and efficient for the users.[48] Most importantly, access to justice and, specifically, administrative justice is relevant for the realisation of rights and in making justice accessible to ordinary people. Access to justice for people is improved through a reformed and harmonised tribunal system based on international trends, practices and techniques to address the relevant needs of the users.

8. Limitations of this study

This thesis does not discuss all tribunals in South Africa,[49] nor will it discuss all the tribunals in foreign tribunal systems. This thesis discusses five tribunals in South Africa, and discusses a few foreign tribunal systems in an attempt to propose a harmonised tribunal system. The empirical statistical data of the South African tribunals in this study deals only with the

[48] A Leggatt 'Tribunals for users: One system, one service. Report of the review of tribunals' (March 2001) Available at http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015).

[49] The Media Tribunal, the Pension Funds Adjudicator and the CCMA are regarded as tribunals of sorts, as all these bodies' decisions constitute administrative action. Special tribunals are excluded from qualifying as administrative action and are excluded from this study. Among the special tribunals are the Special Investigating Unit Tribunal.

number of years that were obtainable at the time for each tribunal. The statistics results culminate in a descriptive study analysis. At times, the data for a five-year period was not accessible, as it had not been published or captured, for example in the RHT. I am not conversant in the french language and hence all the sources that were used are translated sources and are secondary sources and are not the primary text due to the language limitation.

Part 2: Historical Study of Tribunals

Chapter 2: Historical milieu of tribunals in South Africa

1. Introduction

The historical milieu is significant, as it traces the history of tribunals in the South African context. The origin is important because it creates the framework for the use of tribunals, from their inception at a time when law first played a role in governing the ancient civilisation of Greece.[50] The word tribunal is a Western term, as its origins are found in the Roman and Greek civilisations.[51] In an African context, the term tribunal[52] was not coined in indigenous traditional systems, which relied on a practice known as makgotla[53] (meeting), which fostered the principles of ubuntu. Ubuntu encourages the nurturing of community development in that, as a unit or tribe, development is accomplished by recognising an ethical standard of common humaneness.[54] The practice of ubuntu espouses alternative dispute-resolution mechanisms in the mediation of disputes.[55] It is apparent that '[a]t the heart of African adjudication lies the notion of reconciliation or restoration of harmony'.[56] Although the term tribunal is not used in the oral tradition of indigenous communities, it is evident that there were indeed structures akin to tribunals to resolve disputes. This chapter contains two focal points, namely to address the historical journey of tribunals from a South African perspective, and to analyse tribunals regarding their functions, characteristics and daily operations.

2. General historical overview of tribunals

It is a fact that the very idea of society would not have been possible without a minimum level of order and agreements to regulate human relationships and settle disputes. These agreements were originally achieved through what is known as the social contract, as

[50] MM Austin & P Vidal-Naquet *Economic and social history of ancient Greece: An introduction* (1977) 297.
[51] MM Austin & P Vidal-Naquet *Economic and social history of ancient Greece: An introduction* (1977) 297. See also Carnwath, M Chitra, G Downes & P Spiller 'An overview of the tribunal scenes in Australia, Canada, New Zealand and the United Kingdom' in R Creyke (ed) *Tribunals in the common law world* (2008) 2.
[52] The word of origin is tribūnus, which is Latin www.collinsdictionary.com (31 March 2015).
[53] R Choudree 'Traditions of conflict resolution in South Africa' (1999) 1 *ACCORD* 20-22.
[54] A Velthuizen 'Applying endogenous knowledge in the African context' (2012) 42(1) *Africa Insight* 78-79.
[55] A Aiyedun & A Ordor 'Integrating the traditional with the contemporary in dispute resolution in Africa' (2016) 20 *Law, Democracy and Development* 163-164.
[56] AN Allott 'African law' in JDM Derrett (ed) *An introduction to legal systems* (1968) 145.

theorised by Locke, Rousseau and Hobbes.[57] Historically, the beginnings of tribunals can be traced back to the ancient Greek and Roman civilisations in the era before Christ. These civilisations were the founders of legal systems.[58] The earliest documented tribunals were held in Koresos in 402 BC,[59] namely the Athenian tribunals. These tribunals deliberated upon matters in a speedy manner, which is a common characteristic of current-day tribunals.[60] Furthermore, the marketplace of the Greek mainland and islands in the third millennium before Christ was also known as the arena where 'community leaders - tribal kings or princes, or priests, or elders renowned for their oratory and practical reason-gathered to dispense advice and adjudicate disputes'.[61] In the Roman Empire there is reference to the plebeians[62] appearing before a tribunal to settle disputes.[63] This Roman tribunal was a forum for the disputes of the common people, where the Roman advisors and the emperor solved such matters vigorously.[64] These characteristics are important, because the same characteristics were maintained within a South African context. It is apparent that tribunals have always existed in all shapes and forms as an alternative to the judicial system.

3. Historical tribunal periods in South Africa

The history of tribunals in South Africa can be divided into three significant periods, namely the pre-colonial era, during colonisation and after colonisation, which is the present-day democracy. The significance of these periods illustrates the evolution of tribunals in a South African context.

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[57] E Barker 'Introduction' in E Barker, G Hopkins, J Locke, D Hume, JJ Rouseau *Social contract essays by Locke, Hume and Rousseau* (1966) xii-xvi.
[58] SR Letwin 'Plato and Cicero' in NB Reynolds (ed) *On the history of the idea of law* (2008) 9 and 42.
[59] MM Austin & P Vidal-Naquet *Economic and social history of ancient Greece: An introduction* (1977) 297.
[60] MM Austin & P Vidal-Naquet *Economic and social history of ancient Greece: An introduction* (1977) 297.
[61] D Allen 'The origins of political philosophy' in G Klosko (ed) *The history of political philosophy* (2013) 75.
[62] Common people of Rome. Definition available at https://www.collinsdictionary.com/dictionary/english/plebeian (31 March 2015).
[63] R Carnwath, M Chitra, G Downes & P Spiller 'An overview of the tribunal scene in Australia, Canada, New Zealand and the United Kingdom' in R Creyke (ed) *Tribunals in the common law world* (2008) 2.
[64] P Stein *Roman law in European history* (2004) 63.

3.1 Tribunals in the pre-colonial era

During the pre-colonial era in South Africa, which is prior to 1652,[65] the indigenous people were governed by indigenous law, customs and practices.[66] There is evidence that a variety of indigenous tribes inhabited the territory of southern Africa.[67] During this period, law was communicated orally and not in writing.[68] Three approaches to indigenous law were developed, namely the trouble-case method, the rules-centred approach and the contextual approach.[69] The trouble-case method is the study of case studies and the daily life of communities.[70] The rules-centred approach consists of western concepts and framework in explaining indigenous law.[71] The contextual approach aims to identify the storyteller, who gives the story context, power and meaning.[72]

The first approach, or trouble-case method, is used to explain the way of life of the different tribes as well as their characteristics and powers.[73] As a matter of fact, the tribal governance systems were varied: the Cape Khoi and San tribes were nomadic hunter-gathers who lived off the land in harmony with the environment.[74] They laid no proprietal claim to territory. At a later time , the Griquas, Xhosas and Zulus,[75] as well as other tribes, settled in the area.[76]

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[65] N Worden *Slavery in Dutch South Africa* (1985) 2-3.
[66] NN Buthelezi 'Indigenous knowledge systems and agricultural rural development in South Africa: Past and present perspectives' (2014) 13(2) *INDILINGA - African Journal of Indigenous Knowledge Systems* 234-235.
[67] J Seroto 'Indigenous education during the pre-colonial period in Southern Africa' (2011) 10(1) *INDILINGA - African Journal of Indigenous Knowledge Systems* 78.
[68] J Seroto 'Indigenous education during the pre-colonial period in Southern Africa' (2011) 10(1) *INDILINGA - African Journal of Indigenous Knowledge Systems* 77-78.
[69] G van Niekerk 'Indigenous law and narrative: Rethinking methodology' (2009) 32(20) *Comparative and International Law Journal of Southern Africa* 209.
[70] G van Niekerk 'Indigenous law and narrative: Rethinking methodology' (2009) 32(20) *Comparative and International Law Journal of Southern Africa* 209.
[71] G van Niekerk 'Indigenous law and narrative: Rethinking methodology' (2009 32(20) *Comparative and International Law Journal of Southern Africa* 209.
[72] G van Niekerk 'Indigenous law and narrative: Rethinking methodology' (2009) 32(20) *Comparative and International Law Journal of Southern Africa* 210.
[73] G van Niekerk 'Indigenous law and narrative: Rethinking methodology' (2009) 32(20) *Comparative and International Law Journal of Southern Africa* 209.
[74] WK Storey *Guns, race, and power in colonial South Africa* (2008) 25-34.
[75] WK Storey *Guns, race, and power in colonial South Africa* (2008) 35-36. See also N Worden *Slavery in Dutch South Africa* (1985) 42.
[76] WK Storey *Guns, race, and power in colonial South Africa* (2008) 35-36. See also N Worden *Slavery in Dutch South Africa* (1985) 42.

The Zulus (in what is now KwaZulu-Natal) and the Xhosa[77] (in what is now the Eastern Cape) were governed under kingship.[78] The elders of the tribe advised the king on issues of governance, and there were also the chiefsman and headsman of the respective kraals.[79] When conflicts arose, they would be resolved through ADR methods of negotiation and mediation, as well as through a tribunal system.[80] Although it was not referred to as a 'tribunal', a tribunal is a term that originated etymologically from the Latin word *tribunus* and was used by western civilisation.[81] The indigenous system of settling disputes was cast in endogenous knowledge, which consists of both indigenous and cultural knowledge, which are alive and influenced by the surroundings and the people, which are ever changing and adapting to the environment.[82]

The second approach, or the rules-centred approach, to explain the term lekgotla, which is also referred to as inkundla,[83] is that it is the singular of the word makgotla, meaning the people's court. The term is described by Blaine as 'open tribunals following unwritten law and custom having for precedents the judgments of past chiefs…'.[84] It is important to observe that the word 'tribunal' is interchangeable with peoples' court. The makgotla did not function in the same manner as the western court, because the whole community cross-examined the perpetrator or victim.[85] For all purposes, the people's court is best described for these purposes as a tribunal in both function and procedure, to circumvent any

[77] WK Storey *Guns, race, and power in colonial South Africa* (2008) 35-36. See also N Worden *Slavery in Dutch South Africa* (1985) 12, 125.
[78] F Kariuki 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' 5-6 Available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 31 March 2015) .
[79] F Kariuki 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' 5-6 Available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 31 March 2015) See also AT Ajayi & LO Buhari 'Methods of conflict resolution in African traditional society' (2015) 8(2) *African Research Review* 141.
[80] F Kariuki 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' 5-6 Available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 31 March 2015) See also AT Ajayi & LO Buhari 'Methods of conflict resolution in African traditional society' (2015) 8(2) *African Research Review* 141.
[81] https://www.collinsdictionary.com/dictionary/english/tribunal (31 March 2015).
[82] A Velthuizen 'Applying endogenous knowledge in the African context' (2012) 42(1) *Africa Insight* 75-78
[83] N Masina 'Xhosa practices of Ubuntu for South Africa', in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 171.
[84] TW Bennett *A sourcebook of African customary law for Southern Africa* (1991) 91.
[85] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 171.

confusion. Thus the term was further expanded by Comaroff and Roberts, who define lekgotla as a body of 'all advisors and headmen'. [86] This body met periodically to deal with policy and administration matters, as well as to settle disputes. Furthermore, '[t]he procedure tends to be quite flexible: the chief makes opening and closing statements. Free speech is encouraged, and the chiefly decisions, announced at the end, are expected to reflect the weight of all manifest opinion'.[87]

The third, or contextual, approach is used to explain the principle of ubuntu in the following terms:

> In the traditional African view, human existence is seen as unified, interconnected, and integrated. This view recognizes the dialectics in any given system (union of opposites - i.e., the good and the bad). To be out of harmony is regarded as harmful to the well-being and survival of the whole. In the siNtu custom, ubuntu as a concept permeates the whole fabric of society, thus yielding "both/and" conclusions, contrasted with the Christian idea of good or evil with its "either/or" conclusions.[88]

The principle of ubuntu, which is believed to hold the African traditions and perspectives together, amounts to the 'collective personhood', or the 'art or virtue of being human'.[89] In this regard, the principle encourages the resolution of disputes through forums such as 'makgotla', or tribunals, to engage with the community and the victims or complainants to resolve disputes among the tribe. The strategy adopted to resolve the dispute is to attain a win-win outcome for both parties,[90] which is also known as collaboration.[91] This resolution mechanism aims to encourage the restoration of the unity, as one break in the group causes a detrimental effect to everyone. The collective strength of a tribe is fostered through the principle of ubuntu, as encapsulated in the following Nguni proverb: 'umuntu ngumuntu

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[86] TW Bennett *A sourcebook of African customary law for Southern Africa* (1991) 91.
[87] TW Bennett *A sourcebook of African customary law for Southern Africa* (1991) 91.
[88] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 169-170.
[89] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 170.
[90] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 171.
[91] Thomas Kilmans strategies to resolving disputes.

ngabantu' (I am because we are). This means that society consciously takes responsibility for its 'persons' product'.[92] Some case studies provide more insights:

> In some cases where ubuntu functioned in conflict resolution situations during precolonial times, differences of opinion were settled amicably by means of dialogue within the community under the leadership of an authority figure. The fine imposed was generally in the form of cattle; capital punishment was rare. In other cases, punishment was absolute and automatic because the offense was beyond the pale of acceptable behaviour. In a third group, conflict was unmanageable and carried out to its own resolution.[93]

It is submitted that the role played by ubuntu was pivotal in the successful resolution of disputes. Despite the relevance of the principle of ubuntu in fostering and building relationships, this principle does not always guarantee resolution in all scenarios, and this may explain the emergence and development of tribunals during colonisation.

3.2 Tribunals during colonisation

The recognition of tribal practices and customary/indigenous law was marred by a history of oppression and strife.[94] The Dutch representatives of the East India Company arrived at the Cape in 1652 and brought with them Roman Dutch law.[95] The British took control of the Cape in 1814, as the right to the territory was ceded to the British by the Dutch.[96] Under British rule, the laws of the colonies remained in force, as the Roman Dutch law was considered to be a civilised system.[97] As a result, other practices were ignored, such as customary practices, or they became established in a policy of non-recognition.[98] Ordinance

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[92] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 171.
[93] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 171.
[94] N Masina 'Xhosa practices of Ubuntu for South Africa' in IW Zartman (ed) *Traditional cures for modern conflicts* (2000) 169.
[95] OD Schreiner *The contribution of English law to South African law; and the rule of law in South Africa* (1967) 5. See also N Worden *Slavery in Dutch South Africa* (1985) 2-3. The Dutch East India company ruled the Cape Colony from 1652-1795.
[96] T W Bennett *Customary law in South Africa* (2004) 35.
[97] TW Bennett *Customary law in South Africa* (2004) 35.
[98] TW Bennett *Customary law in South Africa* (2004) 35.

50 of 1828 enabled the thrust of the policy of non-recognition.[99] In 1846, after the War of the Axe, the non-recognition policy was abandoned, as the traditional rulers held authority over the subdivided areas of their people.[100] In 1854, subjects who acquired the dependency of Kaffraria were encouraged to relinquish the tribal ways in favour of Christianity and the British notions of civilization.[101] In 1864, the government passed the Native Succession Act 10, which allowed the courts to apply customary law in South Africa.[102] Despite this legislation, which compelled the courts to apply customary laws, Kaffraria was incorporated into the Cape, where the policy of non-recognition remained in force until 1927.[103] However, from 1877 to 1894, the Transkei territories were being brought under colonial rule.[104] This resulted in a shift in certain policies, which until then had remained unchanged. As a consequence, the authorities in the Cape reconsidered their stand and allowed customary law to be applied in courts, despite being confined to the following limitations:

> Specific practices, such as initiation dances and witchcraft, were prohibited, but, more generally, application of customary law was subject to an overriding proviso that it was compatible with 'the general principles of humanity'[105] observed throughout the civilized world.[106]

In 1910, a few of the Southern African colonies formed the Union of South Africa.[107] As time went by, people agreed to settle their disputes in an unconventional manner, which at the time was unrecognised and informalised. In other words, despite the presence of courts to address issues and resolve conflicts in society, the emergence of parallel structures to resolve conflict became noticeable. By 1960, the idea of tribunal had sufficiently evolved, as is evident in the following observation:

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[99] TW Bennett *Customary law in South Africa* (2004) 35.
[100] TW Bennett *Customary law in South Africa* (2004) 36.
[101] TW Bennett *Customary law in South Africa* (2004) 36.
[102] TW Bennett *Customary law in South Africa* (2004) 36.
[103] TW Bennett *Customary law in South Africa* (2004) 36.
[104] TW Bennett *Customary law in South Africa* (2004) 36.
[105] This approach was consistent with Ordinance 3 of 1849, which allowed customary law to apply, provided that it was not repugnant to the general principles of humanity as observed by the civilised world.
[106] TW Bennett *Customary law in South Africa* (2004) 36.
[107] N Worden *Slavery in Dutch South Africa* (1985) 2-3. The British colonised South Africa after 1795. See also L Raditsa *Prisoners of a dream: The South African mirage* (1989).

> The new interest in dispute processing in the 1960s led to a discovery that many if not most, disputes were being dealt with by unofficial tribunals to the apparent satisfaction of the parties concerned. And during the 1970s it became evident that in the urban areas of South Africa an amazing variety of tribunals was flourishing alongside the state courts.[108]

In 1927, the government introduced the Native Administration Act 38 to restore the full authority of customary law across the country. As a result, the Act also introduced a separate system of courts made up of traditional leaders and native commissioners. These two institutions had a distinct role. On the one hand, the courts of traditional leaders were assigned the responsibility to rule based on customary law only. On the other hand, the courts of native commissioners, along with the Appeal Court, could either rule, based on customary law or on common law, in any 'suits or proceedings between Natives involving questions of customs followed by Natives [...]'.[109] It is worth noting that the interim Constitution of 1993, in sections 30 and 31, set out the basis for the application of customary law, which recognised that customary law was no longer to be confined to race, thereby expanding its relevance.[110] The interim Constitution further allowed and empowered litigants to demand respect for their culture.[111]

It is also crucial to mention that, during colonialism, the tribunal system was strongly developed within the church with the establishment of the church tribunal. In the meantime, the role of customary law and ADR was also important. A detailed discussion of developments regarding customary law was provided in a previous section. With regard to ADR, along with the tribunal system in the country, it was also developed to settle other categories of disputes that were not brought before either courts and tribunals. The idea of ADR in South Africa was properly formalised around the 1960s, with a strong emphasis on arbitration. In 1965, the Arbitration Act 42 of 1965 was enacted to regulate ADR in the

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[108] TW Bennett *A sourcebook of African customary law for Southern Africa* (1991) 90.
[109] TW Bennett *Customary law in South Africa* (2004) 41-42, with reference to Section 11(1) of the Native Administration Act 38.
[110] TW Bennett *Customary law in South Africa* (2004) 42.
[111] TW Bennett *Customary law in South Africa* (2004) 42.

country. In addition, in 1976, the country joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and issued the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. Since then, foreign arbitration awards are recognised and enforceable within South Africa.[112] The ADR mechanisms in South Africa achieved a new dimension in the 1980s, with the establishment of non-governmental organisations that helped to enhance access to justice. Among them was the Independent Mediation Service of South Africa (IMSSA), which focused on resolving labour-management disputes.[113] Various other organisations were also set up with the aim of training, mediating and resolving tensions, conflicts and neighbourhood disputes among communities. These organisations include the African Centre for the Constructive Resolution of Disputes (ACCORD), the Vuleka Trust, the Community Law Centre, the Wilgespruit Fellowship Centre, the Community Dispute Resolution Trust (CDRT), the Institute for Multi-party Democracy (MPD), and the Community Peace Foundation (CPF).[114]

The inception and development of relationships between the church and tribunals can be traced back to the beginning of Christianity. It is suggested that Jesus himself drafted the first procedural Church law.[115] As reported in the gospel of Matthew:

> If your brother should commit some wrong against you, go and point out his fault, but keep it between the two of you. If he does not listen, summon another, so that every case may stand on the word of two or three witnesses. If he ignores them, refer it to the church. If he ignores even the church, then treat him as you would a Gentile or a tax collector.[116]

During the colonial period, the church in South Africa was very powerful, as it was subject to its own set of rules including those pertaining to dispute resolution. These rules were not

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[112] NN Ntuli 'Policy and government's role in constructive ADR developments in Africa" available at http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf (accessed 1 July 2017).
[113] Alternative dispute resolution practitioners https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf (accessed 1 July 2017).
[114] Alternative dispute resolution practitioners available at https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf (accessed 1 July 2017).
[115] Archdiocese of Cincinnati History of tribunals available at http://www.catholiccincinnati.org/ministeries-offices/tribunal/history-of-tribunal/ (accessed 31 March 2015).
[116] Matthew 18:15-18.

issued by authorities but were inspired by Christian teachings. It is submitted that the early Church followed that model for conflict resolution in the sense that St Paul, Jesus' apostle, regretted that there would ever need to be litigation among the followers of Jesus. In his second letter to Corinth and his first letter to Timothy (2 Cor. 13:1 and Tim. 5:19), Paul emphasised the importance of having two or three witnesses.[117] The church tribunals formed an important role in freedom of religion.[118] Church tribunals possess 'an optimal degree of freedom and autonomy'.[119] To support this view, the high court held that the civil court's intervention was necessary should the tribunal's procedure be illegal.[120]

It is worth noting that the decisions of the church tribunal were subject to judicial review. This was reaffirmed in a case where, owing to the circumstances of the illegality of the tribunal's procedure, it was held that the civil court's intervention was necessary. The civil court held that the offence with which a church member was charged was adultery, which was referred to as a 'spiritual censure that does not affect any civil or pecuniary rights of the applicant' and, on that basis, the jurisdiction of the civil court was excluded.[121]

The review appeared to be some sort of safety net guaranteeing the fairness of the church tribunal *vis à vis* the parties to a dispute. This means that, if for one reason or another, the tribunal fails to comply with its own rules and thereby infringes upon people's rights, the courts always have the power to review the whole case. This occurred in the case of Van Rooyen v Dutch Reformed Church Utrecht,[122] where the court intervened following a decision by the voluntary association that was 'prejudicial to the complainant, by methods that are contrary to its own constitution and to the ordinary principles of justice'. It was held in this case:

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[117] History of Tribunals available at http://www.catholiccincinnati.org/ministeries-offices/tribunal/history-of-tribunal/ (accessed 31 March 2015).
[118] AWG Raath and SA de Freitas 'Church tribunals, doctrinal sanction and the South African Constitution' (2002) 43(1 & 2) *Dutch Reformed Theological Journal* 276.
[119] AWG Raath and SA de Freitas 'Church tribunals, doctrinal sanction and the South African Constitution' (2002) 43(1 & 2) *Dutch Reformed Theological Journal* 276.
[120] *Van Graan v The Hope Town Consistory of the Dutch Reformed Church* 1886 4 SC 134.
[121] *Van Graan v The Hope Town Consistory of the Dutch Reformed Church* 1886 4 SC 133.
[122] *Van Rooyen v Dutch Reformed Church Utrecht* 1915 36 NLR 323.

> that it is one of the most ordinary and elementary rules of administration of justice by any tribunal of this kind, whether legal or voluntary, that where a person is put upon trial, or where he is called upon to plead to any charge, he shall, first of all, have the fullest and fairest information as to what it is that he is called upon to meet.[123]

These decisions by the court define the parameters of judicial intervention and review. The above case did not contradict the autonomy of the church tribunal and the powers and procedures governing it. This was reiterated in the case of *De Waal and Others v Van der Horst and Others*[124] the law applicable to voluntary associations. This means that the courts do not have the power to determine disputes amongst members of the association, except 'for the enforcement of some civil or temporal right'.[125] Furthermore:

> These persons as members of the church may, within the law, agree on any constitution, and frame any rules they choose for the good government and discipline of the association and are also at liberty to establish any tribunals they please to decide questions that may arise within the association.[126]

A similar judgment regarding the internal autonomy of associations in enacting their own rules occurred in the case of *Long v Bishop of Cape Town*,[127] where it was stated that 'members of a religious body may adopt rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them'.[128] To further affirm this power, the court ruled that,

> when such a body has constituted a tribunal, the decisions of the tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms are prescribed, and if not, has proceeded in a manner consonant with the principles of justice.[129]

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[123] *Van Rooyen v Dutch Reformed Church Utrecht* 1915 36 NLR 330-331.
[124] *De Waal and Others v Van der Horst and Others* 1918 TPD 277.
[125] *De Waal and Others v Van der Horst and Others* 1918 TPD 277.
[126] *De Waal and Others v Van der Horst and Others* 1918 TPD 281-282.
[127] *Long v Bishop of Cape Town* 1863 a Searle 162.
[128] *De Waal and Others v Van der Horst and Others* 1918 TPD 282.
[129] *De Waal and Others v Van der Horst and Others* 1918 TPD 282.

Once again, the court reaffirmed that it would not interfere with the rules and autonomy of the church tribunal and its decisions. As was reiterated in the case of *Forbes v Eden,*[130]

> a court of law will not interfere with the rules of a voluntary association unless to protect some civil right or interest that is said to be infringed by their operation, and that least of all will it enter into questions of disputed doctrine, when not necessary to do so in reference to civil interests.[131]

The court will only intervene when there is an impairment of a civil right or interest. Judge De Villiers expanded on the authority of the court to intervene by stating that 'I have assumed above that this Court has the power of determining the true construction of the rules and regulations of the Church…'[132] The judicial limitation was further emphasised by Judge McGregor, who argued that,

> If the matter is now in dispute, as it appears to be, a matter of internal doctrine, government or discipline, and not a matter where either proprietary or civil rights are involved, it seems to me, on the authorities which have been laid before us, that it is a matter where this Court should not interpose.[133]

In the same vein, the ability of a civil court to intervene was expanded on as follows in *Lucas v Wilkinson and Others*,[134] where it was stated that

> the civil court can interfere only where something had been done which, though it may be within the rules of association, is contrary to the principles of natural justice; or where, though within the rules, the proceedings have not been *bona fidei* but fraudulent or malicious.[135]

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[130] *Forbes v Eden* L R Sc Ap C 1, 568.
[131] *De Waal and Others v Van der Horst and Others* 1918 TPD 283.
[132] *De Waal and Others v Van der Horst and Others* 1918 TPD 286.
[133] *Nel and Others v Donges NO and Others* 1919 OPD 7 at 15.
[134] *Lucas v Wilkinson and Others* 1926 47 NLR 10.
[135] *Lucas v Wilkinson and Others* 1926 47 NLR 16-17.

The court held that it has been 'a full, fair, patient and impartial trial; conducted according to the rules of the association'.[136]

The aspects of natural justice and the grounds of jurisdiction were set out to justify the court's intervention in tribunal decisions in *Du Plessis v The Synod of the DR Church*.[137] The court held that 'it is not for the civil court to decide whether the decisions on charges concerning heresy are right or wrong,'[138] and the court went on to argue that *mala fide* acts will require the court's intervention and determination in those circumstances.[139] The limitations of judicial interference in tribunal decision were reaffirmed in *McMillan v Free Church*, where 'it was concluded that a civil court is entitled to interfere if it should be established that a church tribunal had acted irregularly, in excess of its powers and in violation of the contract between the members of the association'.[140]

The above developments convey the idea that judicial review was granted on a number of grounds, namely *mala fides* acts, irregular procedure, excess of powers - that is acting *ultra vires*, infringements of the principles of natural justice, and where there were concerns of civil rights protection. These parameters set the basis for the grounds of judicial review, up to present-day tribunals. In a nutshell, these cases reaffirm the autonomy and power of the church, which has been able to enact its own rules and settle its disputes in an independent manner outside the classical processes and procedures of litigation that characterise the courts. Nonetheless, the churches' independence was restricted by the possibility that their acts and rules could be reviewed by the courts.

In 1948, there was an important change in the political structures of the country, with the National Party[141] taking control of South Africa.[142] The National Party implemented the

[136] *Lucas v Wilkinson and Others* 1926 47 NLR 24.
[137] *Du Plessis v The Synod of the DR Church* 1930 CPD 403.
[138] *Du Plessis v The Synod of the DR Church* 1930 CPD 422.
[139] *Du Plessis v The Synod of the DR Church* 1930 CPD 422.
[140] *Du Plessis v The Synod of the DR Church* 1930 CPD 425.
[141] The political party in South Africa that represented the Afrikaner peoples' rights. The country was a dual state - of democracy for white people and paternalist rule for black people. Apartheid refers to the governance

apartheid system, which comprised legal policies supporting and enforcing the segregation of people on the basis of race. This change in political power did not alter the judicial review process regarding the decisions of the church tribunal. Despite colonisation, the Union had maintained close ties with Britain [143] as a result of the natural resources, precious metals and other raw materials that attracted European capital to South Africa.[144] It is submitted that the exploitation, management, contracts and deals around such resources naturally caused disputes and disagreements, and resorting to the institution of tribunals became unavoidable to settle disputes. Through case law, the courts developed and pronounced the function of tribunals, which 'is to consider evidence and to decide whether in the public interest to grant a licence; its function is not primarily to adjudicate or to reconcile issues raised between individual litigants'.[145] The emergence of tribunals was an alternative to courts, as the latter still maintain the power to review the decisions of the former. This was exemplified in a two-stage inquiry that was set out to justify the judicial intervention in a tribunal decision in the review of *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein*.[146] In this case, it was held

> that the sheer transgression of the rules of a voluntary association is insufficient to justify the applicability of a court of law. Firstly, the aggrieved person must prove that he was disadvantaged and that he has a civil right or interest that is violated by such transgression.[147] Secondly, clarity had to be gained concerning the issue whether the applicant had a sufficient civil right that merits protection from the courts of law.[148]

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of the country through the separation of races, and the legislation of the time supported this regime of separateness.

[142] H Ebrahim *The soul of a nation: Constitution-making in South Africa* (1998) 13.

[143] SM Ndlovu 'The geopolitics of apartheid South Africa in the African continent: 1948-1994' in South African Democracy Education Trust *The road to democracy in South Africa Volume 5* (2013) 2-3.

[144] SM Ndlovu 'The geopolitics of apartheid South Africa in the African continent: 1948-1994' in South African Democracy Education Trust *The road to democracy in South Africa Volume 5* (2013) 2-3.

[145] L Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 41.

[146] *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein* 1952 (2) SA 83 (O).

[147] *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein* 1952 (2) SA 83 (O) 101.

[148] *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein* 1952 (2) SA 83 (O) 101.

Judicial intervention in reviewing tribunals' decisions also occurred in *Odendaal v Kerkraad van die NG Bloemfontein-Wes*,[149] which was about a deviation from the two-stage inquiry. The court intervened on a new ground following the procedure's irregularity, and raised the reason for the deviation from the two-staged inquiry '[…] to matters concerning church disciplinary hearings, where it is clear that an irregularity in the disciplinary procedure has taken place that had caused the accused to be disadvantaged'.[150] Through this judgment, the court addressed the imbalance of power that may be caused by tribunal decisions.

Once again, the court intervened to review a tribunal decision on the grounds of a violation of the principle of natural justice. In *Odendaal v Loggerenberg en Andere*,[151] it was observed that 'the basic requirements for review of a quasi-judicial act is where there had been a violation of the church's rules or statutes or where the elementary principles of justice had been neglected and such neglect really disadvantaged the condemned person'.[152]

Another instance of judicial intervention in reviewing tribunals' decisions occurred in *Theron en Andere v Die Ring van Wellington van die Nederduitse Gereformeerde Sendingkerk*.[153] The requirement of reasonableness embedded in the Promotion of Administrative Justice Act[154] constitutes one of the grounds for judicial review in current tribunals. This was reiterated in the abovementioned case, where

> the Court of Appeal added to the formal measure, consequently increasing the jurisdictional area of the law courts on matters pertaining to ecclesiastical tribunals. Besides having to adhere to the requirements of the formal test, the presumption against unreasonableness and unfairness also had to be applied. Hereby the court has to investigate whether the decision of the tribunal was reasonable.[155]

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[149] *Odendaal v Kerkraad van die NG Bloemfontein-Wes* 1960 (1) SA 160 (O).
[150] *Odendaal v Kerkraad van die NG Bloemfontein-Wes* 1960 (1) SA 160 (O).
[151] *Odendaal v Loggerenberg en Andere* 1961(1) SA 712 (O).
[152] *Odendaal v Loggerenberg en Andere* 1961 (1) SA 712 (O) 712.
[153] *Theron en Andere v Die Ring van Wellington van die Nederduitse Gereformeerde Sendingkerk* 1976 (2) SA 1 (A).
[154] Promotion of Administrative Justice Act 3 of 2000.
[155] AWG Raath & SA de Freitas 'Church tribunals, doctrinal sanction and the South African Constitution' (2002) 43(1 & 2) *Dutch Reformed Theological Journal* 279.

As time went by, there was domestic and international pressure for the abolition of apartheid.[156] This resulted in Nelson Mandela being released from prison on 11 February 1990. The changes to the nature of the social, legal and political systems of the country were to be embedded within a new constitution, which would guarantee the rights of citizens in a democratic South Africa.[157] The multiparty Congress for a Democratic South Africa (CODESA) was established.[158] The gathering of CODESA was held on 20 and 21 December 1991, and was well represented and attended by government and nineteen political parties.[159] It led to the formation of five working groups, and the most relevant for the purposes of this discussion is working group 2, which dealt with proposals concerning general constitutional principles and a constitution-writing body/process. CODESA II was formed in 1992 because of the political impasse that had been reached.[160] Eventually, on 28 November 1993, the interim Constitution was accepted with sufficient consensus.[161] With regard to dispute resolution, Section 22 of the interim Constitution provides for a guaranteed right 'to have justiciable disputes settled by a court of law or where appropriate, another independent and impartial forum'. Ackermann further elaborated on the purpose of section 22, which is:

> to emphasise and protest generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the 'regstaatidee,' for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into

[156] J Slovo '"Reforms" and revolution in South Africa' in C Crais & TV McClendon (eds) *The South Africa reader (History, Culture, Politics)* (2014).
[157] H Ebrahim *The soul of a nation: Constitution-making in South Africa* (1998) 5.
[158] W de Klerk 'The process of political negotiation: 1990-1993' in B de Villiers (ed) *Birth of a Constitution* (1994) 6.
[159] W de Klerk 'The process of political negotiation: 1990-1993' in B de Villiers (ed) *Birth of a Constitution* (1994) 7.
[160] W de Klerk 'The process of political negotiation: 1990-1993' in B de Villiers (ed) *Birth of a Constitution* (1994) 7.
[161] W de Klerk 'The process of political negotiation: 1990-1993' in B de Villiers (ed) *Birth of a Constitution* (1994) 9.

> 'courts'… .By constitutionalising the requirements of independence and impartiality the section places the nature of the courts or other adjudicating fora beyond debate […]'[162]

Section 22 provides for the independence and impartiality of tribunals to make decisions of law without any undue influence to protect the right of access of citizens to 'justiciable decisions'. Prior to democracy, there had been limited access to tribunals, but now they were to be available to everyone, irrespective of race, colour, religion or ethnicity.

3.3 Tribunals after colonisation

Following the end of apartheid and colonialism, a new era emerged in South African history - a new era culminating in the advent of democracy. This new era was preceded by major international events, such as the fall of communism, the rise of liberalism and the collapse of the Berlin wall in 1989. Four years after his liberation, and following general elections in 1994, Nelson Mandela became the first democratically elected president of South Africa.[163] Two years later, in 1996, the Constitution of the Republic of South Africa was promulgated and appeared to be one of the best in the world for innovating at many levels. With regard to the institution of tribunal systems, which form the focus of the present thesis, the former section 22 of the interim constitution became section 34[164] of the final Constitution. Compared to the previous provisions of section 22, the formulation of the current section was amended slightly, as follows:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before courts or, where appropriate, another independent and impartial tribunal or forum.

Section 34 creates a constitutional obligation on the State to establish independent tribunals for the resolution of civil disputes. This was emphasised in *Bernstein v Bester*, which reiterates that 'in all democratic societies the state has the duty to establish

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[162] *Bernstein v Bester* NO 1996 (2) SA 751 (CC) para 105.
[163] F van Zyl Slabbert 'Government & opposition - Are the checks and balances intact?' in B Bowes & S Pennington (eds) *South Africa: The good news* (2002) 53 .
[164] This section will be discussed in greater depth in section 3.3 in Chapter 3.

independence for the resolution of civil dispute […] in a constitutional state that obligation is a fundamental importance and it is clearly recognised as such in our constitution'.[165] This was followed by a period of creation and development of domestic tribunals.[166] Today, owing to the varied demography and the persistent tension and conflicting interests between people, and between people and their rulers, the modern state is characterised by the coexistence of various institutions to settle disputes. These institutions include not only the classical courts generally referred to as the judiciary, but also alternative dispute-resolution mechanisms, at times incorporated by tribunals.[167] Thereafter, the final Constitution of 1996 provided in section 211(3) that '[t]he courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law'.[168] The five tribunals we examine in this study were all established at the advent of the democratic South Africa. Detailed developments regarding these tribunals will be provided in Chapter 4 of the study.

4. The importance and role of a unified tribunal system

A unified tribunal system in South Africa is important to prevent many tribunals operating in a disconnected manner from each other. The church tribunals are an example of the ecclesiastic beginnings of the formation of tribunals, and the tribunals that were formed by indigenous people illustrate the establishment of tribunals through different eras, eventually leading to the development and establishment of the current tribunals of this study. The church tribunals set the foundation for the independence and judicial review of tribunal decisions. It is evident that tribunals enhance access to justice in the utilisation of informal procedures, their relaxed mode of operation and the employment of alternative dispute-resolution mechanisms. This study proposes the establishment of a unified tribunal system to address the shortcomings of the tribunals discussed in this study that will, first, ensure the rationalisation of tribunal rules for the tribunal system, instead of different sets of rules that are unnecessary duplication of one another. Second, I propose the adoption of

[165] *Bernstein v Bester* NO 1996 (2) SA 751 (CC) para 51.
[166] Rental Housing Act 50 of 1999; Companies Act 71 of 2008; Competition Act 89 of 1998; National Water Act 36 of 1998; National Credit Act 34 of 2005.
[167] J Harries *Law and empire in late antiquities* (2004) 215.
[168] TW Bennett *Customary law in South Africa* (2004) 43.

ADR mechanisms by the unified tribunal system, since not all the tribunals currently utilise ADR techniques as a method to ensure the early resolution of disputes. Third, the tribunal system must ensure it has power and thrust to enforce its decisions, because there is reliance on the court system for the enforcement of decisions. Fourth, the tribunal system should be tiered so that there are opportunities for the matter to be heard, referred to, reviewed and appealed, which will enable the system to be independent of the court system, thus easing the court load and not adding to the burden on courts. These aspects will be dealt with more comprehensively in Chapter 4, where the proposed unified tribunal system and the necessary creation and establishment thereof are explained.

5. Concluding observations on the historical milieu of tribunals

The current chapter examined the historical milieu of tribunals, tracing their historical beginnings within a South African context. Since their inception, tribunals have played a determining role in settling disputes among members of society. Their peculiarity in South Africa lies in the fact that they were developed alongside existing, alternative dispute-resolution mechanisms embedded in customary law, indigenous customs and the principle of *ubuntu*. The tribunals and tribunal system have crossed time and space within the South African context, and their role is identifiable not only prior to the colonial period in the country, but also after colonisation, during the apartheid system and in the current democratic state. Several cases exemplify the relevance of tribunals, which notwithstanding being independent, remain subject to judicial review by courts, especially where it is believed that justice was not served. This chapter depicted the relevance of the tribunal system as an alternative to the classical dispute resolution provided by courts. However, a full understanding of the general framework of tribunals in South Africa requires a detailed study, which is the focus of the next chapter.

Part 3: Tribunals in South African Law

Chapter 3: General framework of tribunals in South Africa

1. Introduction

The focus of this chapter is on establishing the general framework of tribunals in South Africa in order to contextualise the tribunals presented in this study, which are discussed thoroughly in Chapter 4. The role of tribunals in South Africa is not always clear, as some tribunals display a multitude of characteristics within their own hierarchical tiers. The meaning of these hierarchical tiers and their role will also be analysed in an attempt to distinguish courts from tribunals. This chapter explains tribunals from the constitutional and administrative legal framework. This framework distinguishes the role of the courts from tribunals to introduce clarity between the two forums to resolve disputes.

2. General framework of tribunals

Tribunals are administrative because they are a body that exercises public power.[169] Tribunals regulate and protect the welfare[170] and socio-economic[171] rights of their users. Each tribunal consists of a panel of members with expertise to deliberate on the disputes or matters before it. Tribunals are less formal than courts and operate in an expedited manner to dispense with matters. Tribunals improve access to justice by being a body to resolve disputes, which are regulated by legislation. Legislation pronounces on exclusive jurisdiction;[172] in certain instances, tribunals enjoys concurrent jurisdiction with the courts.[173] The concurrent jurisdiction is a problem because this means that people have the choice of either going to court or to a tribunal to hear a dispute, eliminating the choice, creates more cases to be heard before the tribunals if exclusive jurisdiction was granted to a unified tribunal system. Accordingly, legislation would need to be amended or created to

[169] Section 236 of the Constitution of the Republic of South Africa, 1996.
[170] The mission statement of the rental housing tribunal (RHT) 'seeks to promote stability in the rental housing sector by facilitating the process of resolving disputes and advising landlords and tenants'; Western Cape Rental Housing Tribunal Annual Report 2013/2014 7.
[171] To promote the provision of rental housing property.
[172] The Rental Housing Tribunal enjoys exclusive jurisdiction regarding unfair practices perpetuated by a landlord.
[173] In relation to over indebtedness applications regarding debt review in terms of the National credit Act, both the Magistrates' Court and the national consumer tribunal possesses concurrent jurisdiction to hear these matters.

facilitate for the exclusive jurisdiction granted to tribunals. Tribunals improve administrative justice, as tribunal members deliver decisions that are binding and enforceable.[174] As a result, the characteristics and functions of tribunals promote access to justice. It is apparent that tribunals and courts are distinguishable from one another in many respects, and this is elucidated by the *sui generis* nature of tribunals, amongst other aspects previously mentioned, which will be fully discussed in this chapter.

Currently, each tribunal develops and functions independently from the others, which is not ideal, as a unified tribunal system is more favourable. An amalgamated tribunal system has never been created or developed in South Africa. The proposed unified tribunal system will prevent the individual tribunals in South Africa from operating with different sets of rules that duplicate each other.[175] The tribunals do not create a binding precedent, as each decision is decided on a case-by-case basis, and previous decisions are not followed.[176] As a result, there is no principle of *stare decisis* of the tribunal.[177] Despite this, the decisions by tribunals refer to both the rules of the High Court and case law decisions when deliberating upon a decision. The tribunal delivers written reasons, as prescribed by the Promotion of Administrative Justice Act,[178] read with the rules of the tribunals. The rules of evidence that govern tribunals are regulated by the rules of the tribunals read with the rules of court, which are also applied. The proposed unified tribunal system would spearhead all procedures and precedents under one system of operation.

3. Section 33 of the Constitution of the Republic of South Africa, 1996

The courts supervise the decisions of the administrative tribunals through review or appeal,[179] and section 33(3) of the Constitution allows a court or tribunal to hear a review application of an administrative decision.

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[174] A decision by the rental housing tribunal is equivalent to a Magistrates' Court decision. The decisions of the competition tribunal, water tribunal, national consumer tribunal and companies tribunal have a status equivalent to decisions by the High Court.

[175] Companies tribunal rules, competition tribunal rules, rental housing tribunal rules, water tribunal rules, national consumer tribunal rules.

[176] C Hoexter *Administrative law in South Africa* (2006) 52-53.

[177] C Hoexter *Administrative law in South Africa* (2006) 52-53.

[178] Promotion of Administrative Justice Act 3 of 2000.

[179] Promotion of Administrative Justice Act 3 of 2000 53.

> Section 33(3) of the Constitution opens the door to the review of administrative decisions by a court 'or, where appropriate, an independent and impartial tribunal.'[180] This has been taken up in PAJA, which contains several references to review by a court or tribunal, and which defines a tribunal in s1 as 'any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act.' The Act thus lays the foundation for what might in time become a system of special administrative courts or type of 'non-judicial review'.[181]

The administrative tribunals are subject to section 33 of the Constitution, which 'provides for "procedurally fair" administrative action and thus seems to leave neither room nor need for s34's fairness guarantee'.[182] 'The Constitution requires the administration to act in accordance with fundamental principles of justice, fairness and reasonableness.'[183]

The Constitution is the champion of administrative rights, as '...the Constitution conferred a fundamental right to administrative justice and thanks to the doctrine of constitutional supremacy, prevented legislation from infringing on that right'.[184] 'In essence, this meant that challenges to the validity of administrative action involved the direct application of the administrative justice rights in the Constitution. Since commencement of the PAJA, however judicial review of administrative action generally has a legislative basis.'[185] It is apparent that '…administrative action is conduct of an administrative nature performed by public authorities or private persons and entities when they exercise public powers or perform public functions'.[186]

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[180] This aspect of access to a tribunal to hear a dispute is repeated almost verbatim in section 34 of the Constitution.
[181] Promotion of Administrative Justice Act 3 of 2000 61.
[182] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 713. This reference cites Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC) 146-147.
[183] C Hoexter 'Administrative action' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 645 cite as chapter in the book in the references.
[184] C Hoexter 'Administrative action' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 645-646.
[185] C Hoexter 'Administrative action' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 646.
[186] C Hoexter 'Administrative action' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 647.

It is important to note the characteristics of tribunals as set out in *Sidumo v Rustenburg Platinum Mines Ltd*.[187] In this case it was held that, as a tribunal, the CCMA displayed characteristics of a court, but was administrative in nature and its functions amounted to administrative action in terms of section 33 of PAJA. The Labour Relations Act applied to the CCMA instead of PAJA. In the majority decision, Acting Judge Navsa remarked in terms of the confusion about the overlap of the tribunals' function with that of courts as follows: '[i]n form, characteristics and functions, administrative tribunals straddle a wide spectrum. At one end they implement or give effect to policy or to legislation. At the other, some tribunals resemble courts of law.'[188] This is an important differentiation that, although tribunals are administrative and not judicial, they at times resemble the courts of law in terms of their functioning, namely in their court rules and procedures.

Judge O'Regan concurred with the majority judgment and stated that, although the tribunals' functions are administrative, there is no automatic presumption that section 33 of PAJA is applicable. She stated:

> While independent and impartial tribunals may perform adjudicative tasks, it does not automatically follow that their functions are within the contemplation of section 33. Nor does it necessarily follow that because independent and impartial tribunals are governed by section 34 they are not governed by sections 33. [189]

This is an important differentiation and distinction made by Judge O'Regan, as it substantiates the necessary investigations and inquiries to be conducted on whether section 33 is applicable to all the decisions of the tribunals of this study.

Under PAJA, the following elements needs to be present to qualify as administrative action:

1. a decision
2. by an organ of state (or a natural or juristic person)

[187] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 ZACC 22 (CC).
[188] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 ZACC 22 par. 82 p. 41.
[189] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 ZACC 22 par. 126 p. 59.

3. when exercising a public power or performing a public function
4. in terms of any legislation (or in terms of an empowering provision)
5. that adversely affects rights
6. that has direct, external legal effect, and
7. that is not specifically excluded by the list of exclusions

For the purposes of this thesis, I will briefly engage with the elements of administrative action, because the decisions of the tribunals in this study constitute administrative action.

1. a decision

The legislature chose a definition that entailed the characteristics of administrative action, and was borrowed from the Australian Administrative Decision (Judicial Review) Act of 1977 (ADJR).[190] This means that, in terms of PAJA, a decision entails:

> Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-
>
> (a) making, suspending, revoking or refusing to make an order, award or determination;
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> (d) imposing a condition or restriction;
> (e) making a declaration, demand or requirement;
> (f) retaining, or refusing to deliver up, an article; or
> (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.

[190] C Hoexter *Administrative law in South Africa* (2012) 198.

The abovementioned elements were discussed in the case of *Bhugwan v JSE Ltd*,[191] where Claassen approved the steps to be followed as:

i) Except where an authority acts of its own accord, a final application, request or claim must have been addressed to the authority to exercise its public power in relation to a set of factual circumstances applicable to the subject;

ii) All relevant information must have been gathered and placed before the authority;

iii) There must have been an evaluative process in which the information was considered;

iv) A conclusion must have been reached by the authority as to how its powers should be exercised; and

v) There must have been an exercise of the power based on the conclusion reached.

Irrespective of this proposed list, Claassen recognised that the list is not applicable verbatim to each and every case, and that each case is considered on its own merit, hence it can be seen as a guideline.[192]

2. by an organ of state

An organ of state performs administrative action in terms of the Constitution, provincial constitution or legislation.[193] It is relevant to highlight that the organ of state exercises any power in terms of the Constitution.[194] In exercising power in terms of legislation, it is limited to public power and functions.[195]

3. when exercising a public power

In terms of the *Calibre Clinical Consultants*[196] decision, all relevant factors were considered in determining whether there is an exercise of public power, such as public funding,

[191] *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 10.
[192] *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 11.
[193] C Hoexter *Administrative law in South Africa* (2012) 206.
[194] C Hoexter *Administrative law in South Africa* (2012) 206.
[195] C Hoexter Administrative *law in South Africa* (2012) 206.
[196] *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) 47 & 61. Referred to as the Calibre Clinical Consultants.

regulating committee, and is not limited to whether the annual report is tabled in Parliament to mention a few factors.

4. in terms of any legislation (or in terms of an empowering provision)

The reference is to any legislation and, in terms of the FIFA[197] decision, also entails the exercise of public power.

5. that adversely affects rights

The verb 'affects' refers to 'determining rights or taking away or abolishing rights'.[198] The rights that are adversely affected are the rights to administrative justice, meaning lawful, reasonable and procedurally fair administrative action, as well as the right to reasons.[199]

6. that has direct, external legal effect

The reference to directness amounts to finality.[200] The external consequence is the reference to the 'public impact'.[201] The legal effect means the immediate, final and binding effect, which overlaps with the concept of directness.[202]

7. and, that is not specifically excluded by the list of exclusions

The list of exclusions is not completely unreviewable due to the principle of legality.[203] The list of exclusions is as follows: executive powers and functions, national executive, provincial executive, executive powers and functions of a municipal council, legislative functions, judicial functions, decisions to institute or continue a prosecution, decisions of the judicial service commission, decisions in terms of PAJA, decisions in terms of section 4 (1) of PAJA.[204]

Thereafter, it is necessary to engage with tribunal decisions that were taken on judicial review on the basis that the decision amounted to administrative action.

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[197] *M & M Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd* 2011 (5) SA 163 (GSJ) 324.
[198] C Hoexter *Administrative law in South Africa'* (2012) 221.
[199] C Hoexter *Administrative law in South Africa* (2012) 224.
[200] C Hoexter *Administrative law in South Africa* (2012) 231.
[201] C Hoexter *Administrative law in South Africa* (2012) 234.
[202] C Hoexter *Administrative law in South Africa* (2012) 234.
[203] C Hoexter *Administrative law in South Africa* (2012) 235.
[204] C Hoexter *Administrative law in South Africa* (2012) 235-245.

In the RHT ruling of *Fikile Vusi Jele and 18 Others v Young Ming Shan CC* of 8 May 2013, a decision was taken on review to the High Court.[205] The review judgment is important, as the court held that the decision of the tribunal was administrative action and that PAJA was applicable. The facts of the matter dealt with the complainants being all charged a flat rate of R385 for all service charges, without being given an invoice from City Power to illustrate the amount of electricity being utilised or how the amount of R385 was constituted. This was found to constitute an unfair practice, and the landlord had to reimburse all the tenants for this service charged in May 2009.[206] The Tribunal used the decision of the Constitutional Court, which confirmed the Rental Housing Tribunal's power to declare provisions of lease agreements an unfair practice, as the service charge levied was in terms of a clause contained in the lease agreement.[207] The abovementioned decision was taken on review and the functions of the Rental Housing Tribunal were discussed at length. It was stated:

> The Tribunal is, nevertheless, a state organ exercising public power. Its functions are essentially administrative in nature and its proceedings are expressly made reviewable and its rulings are not appealable. It is appropriate that the Rental Housing Tribunal be held to the standards espoused by the Constitution in section 33, namely, lawfulness, reasonableness and procedural fairness. When all facts and circumstances are taken into account its function, including those of an adjudicative nature, constitute 'administrative action' as contemplated by section 33 of the Constitution.208 PAJA does not exclude the proceedings and funtions [sic] [functions] of the Rental Tribunal established in terms of the Act. Since PAJA is the legislation contemplated to give effect to the rights contemplated in section 33 of the Constitution, it is applicable to the proceedings of the Rental Tribunal.[209]

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[205] *Young Ming Shan CC v Ajay Chagan NO & Fikile Vusi Jele and 80 Others* Case no: 26148/2013 Gauteng Local Division, Johannesburg (the court name previously referred to has subsequently changed to the Gauteng Division, Johannesburg).

[206] *Young Ming Shan CC v Ajay Chagan NO & Fikile Vusi Jele and 80 Others* Case no: 26148/2013 Gauteng Local Division, Johannesburg (the court name previously referred to has subsequently changed to the Gauteng Division, Johannesburg) paras 1 & 6, pp 1-3.

[207] *Fikile Vusi Jele and 18 Others v Young Ming Shan* CC RT 909/12 (Gauteng Rental Housing Tribunal, Johannesburg) para 76 p 21.

[208] *Young Ming Shan CC v Ajay Chagan NO & Fikile Vusi Jele and 80 Others* Case no: 26148/2013 Gauteng Local Division, Johannesburg (the court name previously referred to has subsequently changed to the Gauteng Division, Johannesburg) para 45 p 26.

[209] *Young Ming Shan CC v Ajay Chagan NO & Fikile Vusi Jele and 80 Others* Case no: 26148/2013 Gauteng Local Division, Johannesburg para 46 p 26.

> The Act empowers the Tribunal to make such a ruling as it may consider just in such circumstances. In my view the applicant has not shown that the Tribunal ruling was not fair and just in the circumstances and, in any event, has made out no case either in terms of PAJA, or otherwise, justifying the review and setting aside of the Tribunal's ruling. In the result the following order is made: The application is dismissed with costs.[210]

The review decision by the High Court was important, because it set out the test to overcome proving that a ruling was not fair under the circumstances, and further making a case in terms of PAJA for the decision to be set aside. The judgment also emphasised the functions of the tribunal and the section 33 standard of 'lawfulness, reasonableness and procedural fairness' on the grounds against which the decisions and procedures are measured. A decision of the Water Tribunal reflected on the role of section 33 and the administrative function of the tribunal. In the case of *The Federation for Sustainable Environment v The Department of Water Affairs; Chemwes (Pty) Ltd; Mine Waste Solution (Pty) Ltd and First Uranium (Pty) Ltd* WT/08/03/2011, it was stated that the Water Tribunal is administrative and that section 33 of the Constitution is applicable: 'The Tribunal is of the viewpoint that the provisions of section 33 and not that of section 34 of the Constitution apply to the operation of the Tribunal, as the decisions of the Tribunal are 'administrative' and not 'judicial' in nature.' Iles does not agree with this view as the basis for the exclusion of section 34, but rather believes it should be discussed in terms of a 'correct decision'. The Tribunal makes administrative decisions within the framework of the law (by deciding appeals on the wisdom of the conduct of the responsible authority on the merits of the case) and not applying the law to a dispute. This means that precedents are not applicable to the Tribunal, as in the case of a court of law.[211]

In a decision that went on review to the High Court in the case of *Johnnic Holdings Limited & Mercanto Investment (Proprietary) Limited v The Competition Tribunal, Competition Commission & Rupert Smith NO*,[212] the decision was set aside on the basis that it was vague

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[210] *Young Ming Shan CC v Ajay Chagan NO & Fikile Vusi Jele and 80 Others* Case no: 26148/2013 Gauteng Local Division, Johannesburg para 84 p 46.
[211] See chapter 23 of J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (2005) 498.
[212] CT CASE NO: 78/LM/Aug05 (Competition Appeal Court of South Africa) .

and ambiguous and did not comply with section 6(2) of PAJA, as tribunal decisions are subject to PAJA.[213]

Univision Services Association NPC and Others v The National Consumer Tribunal and The National Consumer Commission[214] was an application of judicial review in terms of PAJA regarding the review of not awarding costs to the applicant. The matter was remitted for costs to be decided by the first respondent in favour of the applicants, and against the second respondent.

The decisions of the Companies Tribunal have been reviewed and set aside. In the *Piquante Brands* case,[215] the Companies Tribunal refused an application to direct Pepperdew Functions (Pty) Ltd to change its name in terms of the Companies Act so that it is not confusingly similar.[216] The court directed that Pepperdew Functions (Pty) Ltd change its name and, failing to change the name, the Companies Tribunal was ordered to change the name to the registration number.[217] The Companies Tribunal operates in the same manner as the tribunals mentioned above in this study and are therefore also subject to PAJA, as the decisions constitute administrative action.

4. Section 34 of the Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996 provides for disputes to be heard

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[213] CT CASE NO: 78/LM/Aug05 (Competition Appeal Court of South Africa) 55.3.
[214] Case No: 97574/2015 & 3/11/16 Gauteng Division, Pretoria.
[215] *Piquante Brands International (Pty) Ltd & Peppadew International (Pty) Ltd v Pepperdew Functions (Pty) Ltd; Companies Tribunal and The Companies and Intellectual Property Commission*. Case No: 47724 Gauteng Division, Pretoria para 1. Hereinafter referred to as the *Piquante Brands* case. See also similar cases heard before the High Court in the following matters: *Bayerische Motoren Werke Aktiengesllschaft v The Companies Tribunal*; Ms Lucia Glass; Z4 International (Pty) Limited & Companies and Intellectual Property Commission Case No: 23417/2016 Gauteng Division, Pretoria; *All Life (Pty) v All Life Investments (Pty)*; The Companies Tribunal and The Companies and Intellectual Property Commission Case No: CT017Aug2014 Gauteng Division, Pretoria; Michael Dov Terespolsky and The Companies Tribunal, Companies and Intellectual Property Commission, Morituri Restaurant CC Case No: 33352/14 Gauteng Division, Pretoria.
[216] Companies Act 71 of 2008, section 11(2)(b) and (c).
[217] *Piquante Brands International (Pty) Ltd & Peppadew International (Pty) Ltd v Pepperdew Functions (Pty) Ltd; Companies Tribunal and The Companies and Intellectual Property Commission*. Case No: 47724 Gauteng .Division, Pretoria paras 2.1 & 2.2.1.

before a tribunal.[218] The purpose of the right to be heard was for people to have access to courts.[219] Section 22 of the Interim Constitution is mirrored in section 34, which creates a forum for the resolution of disputes.[220] It is apparent that section 34 ensures that disputes are adjudicated and that an outcome or decision is reached, as confirmed by Iles: 'Section 34 also prevents the dilution of rights by legislation that compels disputes to be adjudicated in a tribunal programmed to reach an outcome favourable to the state or to other powerful interests.'[221] Section 34 guarantees three distinct rights for a person:[222]

1. It creates a right of access to court or another tribunal or forum.
2. It requires tribunals or forums other than courts to be independent and impartial when they are involved in the resolution of legal disputes.
3. It is a 'due process' guarantee requiring that the legal disputes to which it applies are decided in a fair and public hearing.

Firstly, the right of access to a tribunal is addressed by the establishment of the tribunal as a forum to hear disputes. Secondly, the tribunals are seen and established to embody the attributes of impartiality and independence. Thirdly, the due process guarantee is fulfilled, as tribunals create a platform for a fair hearing that is also a public hearing, as the public have the option of attending the hearing. The decisions of tribunals are published by the media and by the tribunal in the decision database on the respective website. In order for access to the right to be established, the threshold of enquiry must be satisfied, namely 'that there must be a dispute capable of resolution by law'.[223] 'Once this is present, the components of s34 (access, independence and impartiality, and fairness) are triggered.'[224] 'S34 requires that hearings before tribunals and fora must be fair, suggesting that s34 may apply to administrative tribunals.'[225] A review of administrative action under section 33 and

[218] Section 34 of the Constitution of the Republic of South Africa, 1996.
[219] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.
[220] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.
[221] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.
[222] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.
[223] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.
[224] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.
[225] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 713.

section 34 will apply.[226] In terms of section 34, a person or company is not entitled to a 'correct' decision by a court or a tribunal.[227] The establishment of tribunals was a legislative innovation to improve access to justice.[228]

As the Supreme Court of Appeal held in *Trinity Asset Management (Pty) Ltd v Investec Bank Limited*,[229]

> the main purpose of s34 is to confer on litigants the right of access to courts and other independent and impartial tribunals. The section places an obligation on the state to establish such fora. But it does not purport to define the category of litigants who qualify to take disputes to courts, nor does it describe the nature of relief a party can competently seek.

Section 34 does not establish who may qualify as litigants, nor does it set out the limitations of the nature of the relief that is sought from the tribunals. The legislation that governs each and every tribunal expands these parameters by setting out who may address the tribunal on the grounds of jurisdiction, and what are the limitations of the relief that can be claimed. The meaning of 'where appropriate', as covered in section 34, is that tribunals overcome the lack of specialised knowledge or experience in a specific area of law that courts lack.[230]

> The rationale for allowing tribunals and forums other than courts to perform judicial functions is obvious. Specialisation, expertise, the need to consider local circumstances and the need for the adoption of expeditious, informal and inexpensive procedures justify the establishment of such bodies by legislation.[231]

Although the standards of impartiality and independence are subject to aberration, it is important that a standard or degree of impartiality and independence is still maintained or

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[226] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 713-714. See also *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) 36.
[227] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 714. See also *Lane and Fey NNO v Dabelstein* 2001 (2) SA 1187 (CC) 4; *Van der Walt v Metcash Trading Ltd* 2002(4) SA 317 (CC) 14; *SACCAWU v Pick 'n Pay Retailers (Pty) Ltd* 2012 33 ILJ 279 (LC).
[228] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 715.
[229] 2009 (4) 89 SCA 58, cited in K Iles 'Access to courts" in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 717.
[230] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 732.
[231] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights Handbook* (2013) 732.

upheld.[232] In *Financial Services Board v Pension Fund*,[233] '[t]here are undoubtedly degrees of independence. Not every tribunal can be as completely independent as a court of law is expected to be. The independence of courts of law and administrative tribunals cannot be measured by the same standard'.[234] 'Some tribunals are part of the executive, while others cannot be regarded as "structurally" independent from the executive.'[235] This is very important, as the court is recognising the distinctiveness of a tribunal against a court, and that they cannot be measured against the same standard, as they have different origins.

> The specialised nature of some tribunals can result in them becoming identified with the policies and interests in the area they regulate. They may even make the rules they apply or oversee the enforcement of their findings. These factors do not however in themselves make such tribunals biased. …the test is whether a fully informed person would harbour a reasonable apprehension of bias.[236]

Tribunals must operate impartially and independently. This means that the procedures must be fair and transparent. The aspect of fairness was expanded in the *De Beer*[237] case, as the Constitutional Court stated the following about the purpose of the fair hearing component of s34 in relation to courts and that the fair hearing principle of natural justice applies *verbatim* to tribunals:[238]

> This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the

[232] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 732.
[233] *Financial Services Board v Pension Fund* 1999 (1) SA 167 (C).
[234] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 733 cited at 1999 (1) SA 167 (C) at 174F-G.
[235] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 739.
[236] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 739.
[237] *De Beer No v North-Central Local Council and South-Central Local Council* 2002 SA 429 (CC).
[238] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 739-740.

> proceedings fair.[239] The hearing itself must also be fair. It can be fair in relation to notice only if the court has a discretion not to grant the order or to require further notice to be given if fairness demands that it be done. The court must, in addition, have the power to investigate whether it is reasonably possible to bring the notice to the attention of the affected person if it is clear that fairness requires an investigation of that kind.[240]

The principles of fairness, impartiality, integrity, independence and transparency were emphasised in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*.[241] The court held that:[242]

> Courts should in principle welcome public exposure of their work in the courtroom….The foundational constitutional value of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standard of independence, integrity, impartiality and fairness.[243]

Similarly, these principles apply to the functioning of tribunals in an independent and impartial manner, subjected to openness, and decisions are made in public and by upholding integrity and fairness, aligned with the principles of natural justice.

5. Characteristics of a tribunal

The characteristics[244] of a tribunal are:

(i) Tribunals are adjudicative bodies performing a judicial expertise function

Tribunals deliberate upon matters and perform a judicial expertise function. Similar to the case with judges, a decision is reached because of the particular specialised expertise in a specific field, for example in competition matters or companies matters.

(ii) Tribunals possess the power to determine issues in dispute, but the power is distinct from the court

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[239] *De Beer No v North-Central Local Council and South-Central Local Council* 2002 SA 429 (CC) 11.
[240] *De Beer No v North-Central Local Council and South-Central Local Council* 2002 SA 429 (CC) 14.
[241] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31 (CC).
[242] K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 743.
[243] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31 (CC) 41.
[244] D Feldman & P Birks (eds) *English public law* (2004) 985.

The tribunal's power to determine issues in dispute is an inquisitorial investigation, whereas in court the parties establish the issues in dispute and the court plays an adversarial role in adjudicating the issues in dispute.

(iii) Tribunals are more accessible and less formal than courts

The members of the tribunal apply the rules of the court and rules of the tribunal in a more relaxed and flexible manner; that is, if rules are not complied with, they look at the effect and severity of the non-compliance in order to proceed to hearing the matter fully. Courts, on the other hand, are more rigid and inflexible in the application of the rules governing the process of hearing disputes.

(iv) Tribunals evolved in terms of specialised legislation

Every tribunal examined in this study has an individual set of legislation that was promulgated for the establishment of the tribunal. Courts, on the other hand, have a generalist approach and broader area of jurisdiction that is criminal and civil jurisdiction and if they are in either court, they are equipped with all the skills and knowledge for the whole area of law that is subdivided into sub-areas of expertise. Similar legislation also governs the courts, although high courts possess inherent jurisdiction. A tribunal is similar to a magistrates' court, which is a creature of statute and does not possess inherent jurisdiction with a specific area of expertise.

(v) Tribunals deal with the relationship between the State and citizens

Through the establishment of tribunals, the State provides a medium for citizens to access their rights as protected by the statute. This relationship is regulated by government through implementation of legislation protecting specific rights, such as consumer rights. Unlike tribunals, the courts also deal with the relationship between the State and the citizen, but it is within a different context from civil suits and criminal suits that may arise.

(vi) Tribunals are independent of the government department responsible for the area of policy

Tribunals are independent of the government departments that are responsible for the policy area of the rental housing act, companies act, competition act, national

water act and national consumer act. This reinforces the doctrine of the separation of powers of the legislature, which is distinct from the executive. The courts are also similarly independent from the legislative tier. In view of the abovementioned characteristics, it appears that the characteristics of courts and tribunals are distinct, despite certain characteristics overlapping. It is submitted that confusion may arise to the users because of their similarity of operation. A distinguishing factor is that, at their core, tribunals have a different structure to the court system.

5.1 Functions

5.1.1 Primary functions

Raz's elucidation of the concept of the primary functions of law is linked to the social order, as follows:

5.1.1.a Preventing undesirable behaviour and securing desirable behaviour[245]

5.1.1.b Providing facilities for private arrangements between individuals[246]

5.1.1c The provision of services and redistribution of goods[247]

Applying this concept of primary functions to tribunals, it is argued that tribunals prevent the undesirable behaviour and secure the desirable behaviour through the enforcement of the legislation that governs the tribunals. Secondly, the tribunals provide facilities for making private arrangements between individuals.[248] Thirdly, tribunals offer services in that they provide a platform to deliberate upon various disputes; however, there is no element of providing redistribution of goods.

5.1.2 Secondary functions

Raz describes the secondary functions as indirect and sets them out as follows: 'The law's secondary social functions have to do with the operation of the legal system

[245] J Raz *The authority of law: Essays on law and morality* (1983) 169.
[246] J Raz *The authority of law: Essays on law and morality* (1983) 171.
[247] J Raz *The authority of law: Essays on law and morality* (1983) 172.
[248] The Rental Housing Tribunal provides a forum to mediate a dispute between a landlord and a tenant and, once an agreement is concluded, the parties sign the agreement.

itself. They provide for its adaptability, its efficacy and its smooth and uninterrupted operation.'[249]

They are expanded further as:[250]

5.1.2.a Determination of procedures for changing the law

5.1.2.b The regulation of the operation of applying organs

The secondary functions deals with 'law applying and law making'.[251] When applying the secondary functions as elucidated by Raz to tribunals, it is argued that the secondary functions of tribunals lie in the adaptability of relaxing their rules to hear matters for their users. The efficacy is illustrated through the timeframes of reaching decisions for their users. The smooth and uninterrupted operation of tribunals is demonstrated through the user-friendly systems of lodging disputes and applications by parties.[252] The secondary function of the tribunal, as law applying, is relevant, as the tribunal decisions apply the law and the procedures for potentially affecting and changing the law.[253]

5.2 Quasi-judicial

It is important to note that, although tribunals display quasi-judicial characteristics in that the decisions that are made are binding upon the parties, as in a court, for all purposes tribunals are administrative. The tribunal decisions are subject to review by the court. The tribunals in this study are *sui generis*, meaning of their own kind, because each tribunal has its own set of rules and, as a default position, applies high court rules. Tribunals do not require legal representation for the parties. It is evident that tribunals aim to resolve matters as expeditiously as possible and to bridge the gap of justice that is delayed by the courts.

5.3 ADR in tribunals

[249] J Raz *The authority of law: Essays on law and morality* (1983) 175.
[250] J Raz *The authority of law: Essays on law and morality* (1983) 175.
[251] J Raz *The authority of law: Essays on law and morality* (1983) 176.
[252] Applications deal with a dispute on affidavit (no dispute of fact) whereas the actions deal specifically with a dispute of fact in the pleadings and oral evidence is given.
[253] In the case of *Edcon v National Consumer Commission*, the tribunal ordered that the company compensate the customers as of 2009 for the excessive and irrelevant credit fees charged, which did not take into account prescription. The year that the claim was instituted to the date claimed would be covered and in this case it was for nine years the fees were refundable to the consumer. Subsequently, the decision is before the High Court.

Alternative dispute resolution is a mechanism to reach finality on a dispute without it being heard before the tribunal members. The mechanisms that are utilised by tribunals are mediation, conciliation, arbitration and negotiation. The Rental Housing Tribunal and Companies Tribunal, Water Tribunal utilise ADR techniques, and the other tribunals in this study, namely the National Consumer Tribunal and the Competition Tribunal, would be able to benefit from ADR techniques, which would be possible in the case of a harmonised, unified tribunal system.

Currently, in the Rental Housing Tribunal, the methods used for ADR are that a complaint form is filled out and a case manager manages the process and mediates the dispute between the parties. Should mediation not be successful, then the matter becomes a full trial. Through the adoption of all the ADR techniques for the unified tribunal system will ensure the earlier resolution of the disputes. Currently, a case manager also mediates disputes in the Water Tribunal that once again, it is facilitated through a paper process. Lastly, the Companies Tribunal facilitates by the agreement between the parties to allow for the dispute to be resolved through any alternative dispute resolution mechanism. Similarly, all the tribunals under the the unified tribunal system should be provided for to allow for any alternative dispute resolution technique to be resolve the dispute at an earlier stage.

6. Administrative law and administrative justice in relation to tribunals

The quintessence of administrative law was set out in the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [254] as 'an incident of the separation of powers under which the courts regulate and control the exercise of public power by the other branches of government'.[255]

Hoexter sums up the complex nature of administrative tribunals[256] by pointing out that they mirror the characteristics of the courts, but are not courts in principle. Tribunals may be

[254] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
[255] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45.
[256] See also Laverne A. Jacobs & Justice Anne L. Mactavish (eds) *Dialogue between Courts and Tribunals Essays in Administrative Law and Justice* 2001-2007 (2008) 55.

operated by policy or rules or a combination of the two, and the purpose of their creation was to enhance access to justice and case load relief for the courts.

> Just as law making is not the sole preserve of legislatures, so the resolution of disputes is by no means the sole preserve of the judiciary in the modern state. Administrative tribunals play a role in adjudicating disputes in all sorts of fields: licensing, taxation and employment[257] are some of the most prominent. Their rather grand-sounding name suggest administrative bodies bearing a close resemblance to courts of law, but tribunals vary widely and can take the form of a single departmental official. The disputes in question also vary greatly. They may be dominated by policy factors (at the administrative end of the spectrum) or by rules (at the judicial end) or be governed by a combination of the two. The constitutional era has seen the creation of some specialist courts and tribunals in this country. Their establishment has been motivated by a dual desire to relieve the pressure on the ordinary courts and to improve access to justice.[258]

The advantage of tribunals is that they develop a specialised jurisdiction, unlike courts, which have a generalist nature. The formal procedure of courts[259] lengthens the time period of the resolution of disputes. The informality and flexibility of tribunals allows for disputes to be resolved expeditiously.

> Courts are unable to adjudicate effectively on many specialised matters, while administrative bodies can do this more informally, quickly, cheaply and expertly-and not necessarily any less justly. Administrative adjudication can be undertaken not only by specialist bodies, usually known as administrative tribunals, but also by a range of other public authorities and individual administrative officials.[260]

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[257] Hoexter references the CCMA as a tribunal created in terms of the Labour Relations Act 66 of 1995, but for the purposes of this thesis, the CCMA will not be analysed due to the difference of its operation from other tribunals, as it is a forum only for conciliation, mediation and arbitration and deals only with ADR aspects of hearing a dispute, unlike the abovementioned tribunals, which are more versatile in their manner of hearing a matter and are not confined to ADR mechanisms.

[258] C Hoexter *Administrative law in South Africa* (2006) 25.

[259] See also A Uzelac 'Delays and backlogs in civil procedure: A South East perspective' 238 *Revista De Processo* (2014) 40; CH van Rhee (ed) *The law's delay. Essays on undue delay in civil litigation* (2004) .

[260] C Hoexter *Administrative law in South Africa* (2006) 52.

It is important to differentiate between adjudication through courts and adjudication through tribunals:

(i) Adjudication by administrative bodies often departs from the elements associated with adjudication by the courts.[261]

(ii) Many administrative bodies are sufficiently specialised to allow them to take a more active role in the adjudicative process than courts do - for example, tribunals concerned with town planning, labour disputes, competition law and civil aviation.[262]

(iii) To the extent that their orders are binding on large administrative hierarchies, administrative tribunals are involved not only in resolving a past dispute between two parties, but also in regulating administrative conduct for the future.[263]

(iv) The role of precedent is not as prominent in administrative adjudication, since the process is often as much concerned with the contemporary policy as it is with past decisions.[264]

7. The distinction between courts and tribunals

From the abovementioned discussion, the distinctions between courts and tribunals are as follows:

(i) Tribunals are inquisitorial in that the members lead the investigation of disputes, whereas courts are adversarial in that the parties lead the dispute and the judges/magistrates are limited to the pleadings before it.

(ii) The pleadings in the tribunals are based upon application proceedings, whereas court pleadings are both action and application proceedings.

(iii) A complaint is instituted usually in the commission of first instance and reaches the tribunal on appeal. The court has different divisions that operate in lower districts, but does not operate from a complaint-filing process, but rather from an application or action proceedings.

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[261] C Hoexter *Administrative law in South Africa* (2006) 52-53.
[262] C Hoexter *Administrative law in South Africa* (2006) 52-53.
[263] C Hoexter *Administrative law in South Africa* (2006) 52-53 .
[264] C Hoexter *Administrative law in South Africa* (2006) 52-53.

(iv) The members of the tribunals have a specific expertise, whereas the judges/magistrates of the courts have a generalist expertise, as judges sometimes are rotated from criminal to civil to equality to family courts, for example. The members of the tribunals do not rotate to all types of tribunals.

(v) Courts create binding precedent, whereas tribunals do not creating binding precedent. Courts operate on the principle of stare decisis. The Supreme Court of Appeal and Constitutional Court bind the high courts and the district courts.

(vi) Tribunals are quasi-judicial bodies and courts are judicial bodies.

(vii) Tribunal decisions are subject to judicial review, whereas parties elect to take decisions on certain grounds for review or appeal to court.

(viii) There is an administrator at the tribunal to assist with complaints and applications, whilst the court has a registrar or a clerk to issue summons and applications.

(ix) Some members of tribunals operate on a part-time basis, whereas all judges and court magistrates are full-time appointees and do not work on a part-time basis.

(x) Tribunals are mainly administrative and hence the decisions constitute administrative action, whereas court decisions do not constitute administrative action and are exempt because courts are the judiciary.

(xi) Tribunals tend to have a three- or two-tiered hierarchy, whereas courts have a four- to five-tiered hierarchy - from the magistrates' court to the regional court to the high court to the Supreme Court of Appeals to the Constitutional Court, depending on whether one or two tiers are skipped when appealing a decision.

8. An Overview of Common objectives and Common features of Tribunals

The thesis has demarcated the common objectives and common features of the tribunals of this study. The importance of the demarcation is to illustrate the strengths and weaknesses of the tribunals throughout study. The common objectives were sub-divided into five elements namely i) cost-effectiveness, (ii) speedy resolution of matters, (ii) promotion of the rule of law, (iv) simplified procedures, (v) informality. The cost-effectiveness of the tribunal

deals wit the costs involved to have the matter heard in relation to the complexity, time taken for finalisation, legal representation and the administrative costs of the tribunal itself. The speedy resolution of the matters deals with the length of the period of time, from the matter is first enrolled until finalisation of the matter, meaning when a decision is given. Promotion of the rule of law, consists of using case law in the interpretation of legislation to reach a decision, in this aspect the specific case or rule of law or the principles of law are discussed to elucidate that the case law of courts serve as binding authority for tribunals in the interpretation of law. The simplified procedures deals with the operating functions of the tribunal and is linked to the informality of the tribunal in relation to a relaxed, unorthodox and unconventional approach.

Similarly the common features of the tribunals are divided into five elements: (a) individual representation, transparency, judicial review, lack of enforcement mechanisms, high court rules are the default rules for tribunals. The individual representation provides that natural persons or judicial entities may or may not be legally represented as they may appear in person. The transparency of the operations of the tribunal in publishing their decisions. The instances when decisions are judicial reviewed by the courts from the tribunals. There is a major drawback for the tribunals in that all of them lack the enforcement mechanisms of their decisions and approach the High Court for enforcement of same. The tribunals of this study use the High Court rules as a template for their rules, which ensures a form of uniformity, however they still have their own rules which causes confusion.

9. Concluding observations on a general framework of tribunals

Tribunal decisions are subject to section 33 of the Constitution and PAJA, as the decisions constitute administrative action. Tribunals possess similarities to courts that at times can be confusing, but are still fairly distinct from courts. The distinct aspects differentiating tribunals from courts are analysed further in detail, specifically in relation to the five tribunals in this study, together with the comparative study. The deliberation of disputes before tribunals enhances both administrative justice and access to justice, as entrenched in the Constitution. A unified tribunal system will have a distinct three-tiered hierarchical system that is consistent in its manner of operation - from the first instance to the second

instance to appeals. The judicial review and appeal aspect would be before the Supreme Court of Appeal and not the High Court, as the Supreme Court of Appeal would be the final instance of appeal (provided there is no constitutional issue to deliberate upon) to avoid the duplication of tiers within the court system, and hence deterring applicants using the court system as a delaying tactic for the enforcement of decisions.

Chapter 4: South African tribunals forming part of this study

1. General Introduction

The five tribunals forming the basis of this study were chosen due to the similarity of their structure, their rules of procedure and the manner in which the tribunals operate. It is evident that each tribunal has its own set of rules, which is a duplication of the others. All tribunals in this study use the High Court rules in instances where the prescribed tribunal rules do not make provision for certain operational aspects. To address this unnecessary duplication, it is proposed to have a unified set of rules that provides comprehensively for the daily operation of the tribunal through the rationalisation of all current rules. These tribunals were chosen because they represent the different types of tribunals across South Africa. The tribunals in this study have five common objectives, namely cost-effectiveness, speedy resolution of matters, promotion of the rule of law, simplification of the procedures of operation, and comprising a degree of informality and flexibility to deviate from its rules of procedure. The common features of the tribunals are individual representation, transparency, judicial appeal, lack of enforcement mechanisms, High Court rules are the default rules for the tribunals, and legislation prescribes the grounds of jurisdiction.

The purpose of this chapter is to expose the strengths and shortcomings of the tribunals in relation to the common objectives and features of the tribunals. The aim is to propose a unified, harmonised tribunal system that would operate more effectively and efficiently.

2. Rental Housing Tribunal (RHT)

2.1 Overview

The Rental Housing Tribunal was established in order to ensure the balance between and protection of rights of landlords and tenants.[265] The aim of this discussion of the Rental Housing Tribunal is to illustrate its mode of operation and rules of procedure and the cases it hears, its objectives and features, as well as the statistics to measure the tribunal's effectiveness and efficiency. All these aspects culminate in describing the strengths and

[265] Rental Housing Tribunal Act 50 of 1999, Preamble (Referred to as the RHA and the Act).

shortcomings of the tribunal, in that a harmonised tribunal will aim to address the shortfalls of the current tribunal.

2.2 The historical significance of the RHT

The Organisation of Civic Rights (OCR) has been lobbying for the rights of tenants for more than 25 years.[266] The OCR aims to protect tenants from illegal lock-outs, disconnection of water and electricity, high rentals, refusal of landlords to refund deposits held in trust, and landlords not attending to repairs and necessary maintenance.[267] As a result, in 1994, the year of democracy in South Africa, an ideal platform was created for OCR to consult with the then national government and the Minister of Housing to introduce new laws to protect both tenants and landlords, thereby ensuring that both parties understand their rights and obligations.[268] A new task team was formed to meet with the Minister of Housing to deliberate upon the new laws.[269] The deliberations culminated in law in August 2000, when government introduced the new Rental Housing Act 50 of 1999 across all provinces, which included all the proposals made by the OCR.[270] The Rental Housing Act 50 of 1999 made provision for the establishment of the Rental Housing Tribunal, which would in turn be the custodian responsible for ensuring the balance of rights between the landlord and tenant.[271]

2.3 Rental Housing Act of 1999: key provisions

It is important to commence with the Preamble to the Act, together with section 1, and ending with chapter 4, particularly sections 8 to 10 and 12 to 15, which deal with the regulation of the Rental Housing Tribunal. These provisions are highlighted because they regulate the jurisdiction of the tribunal, its mode of operation and procedures, and the composition of the tribunal, amongst other key aspects that constitute the pivotal elements of the tribunal and culminate in its daily functioning. These aspects form the basis for a unified tribunal system.

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[266] SI Mohamed *Tenant and landlord in South Africa* (2010) 1.
[267] SI Mohamed *Tenant and landlord in South Africa* (2010) 1.
[268] SI Mohamed *Tenant and landlord in South Africa* (2010) 1.
[269] SI Mohamed *Tenant and landlord in South Africa* (2010) 1.
[270] SI Mohamed *Tenant and landlord in South Africa* (2010) 2.
[271] Rental Housing Act 50 of 1999, Preamble.

The Preamble highlights the aims of the Act, namely that it sets out to achieve a myriad of objectives, and emphasises the aspects that are pertinent to the Rental Housing Tribunal. The legislation aims to promote section 26 of the Constitution, namely access to housing. This provision aims to regulate the housing industry, creating mechanisms for disputes to be resolved and for the prevention of unfair practices and exploitation between landlords and tenants, thereby creating a forum to hear these disputes and/or unfair practices. These disputes are to be resolved as expeditiously as possible with minimal cost consequences.

The jurisdiction of the Rental Housing Tribunal is determined by an unfair practice, and section 1 is pertinent, because it defines an unfair practice as being:

(a) Any act or omission by a landlord or tenant in contravention of this Act; or

(b) A practice prescribed as unreasonably prejudicing the rights or interests of a tenant or landlord.

Following from the information in section 1, we have section 15, which sets out the instances and grounds of unfair practices:

unfair practices, which, amongst other things may relate to—

(i) the changing of locks;

(ii) deposits;

(iii) damage to property;

(iv) demolitions and conversions;

(v) . . . . . .

[Sub-para. (v) deleted by s. 7 (b) of Act No. 43 of 2007.]

(vi) forced entry and obstruction of entry;

(vii) house rules, subject to the provisions of the Sectional Titles Act, 1986 (Act No. 95 of 1986), where applicable;

(viii) intimidation;

(ix) issuing of receipts;

(x) tenants committees;

(xi) municipal services;

(xii) nuisances;

(xiii) overcrowding and health matters;

(xiv) tenant activities;

(xv) maintenance;

(xvi) reconstruction or refurbishment work; or

(g) anything which is necessary to prescribe in order to achieve the purposes of this Act.

Sections 1 and 15 are therefore interlinked. The Act does not favour the landlord above the tenant and treats both parties equally regarding their actions, obligations and conduct. In terms of section 7 of the Rental Housing Act (RHA), the Member of the Executive Committee (MEC) may establish a rental housing tribunal in each province of the Republic of South Africa. The Rental Housing Tribunal has a duty to fulfil its statutory duties and obligations as set out by the RHA.[272] The Rental housing Tribunal consists of a minimum of three members and a maximum of five members who must be deemed to be fit and proper persons, and are accordingly appointed by the MEC.[273] These members consist of at least a chairperson and deputy chairperson with the requisite experience in rental housing matters.[274] One member must have consumer expertise in relation to housing development matters,[275] and another member must have expertise in property management or housing development matters.[276] The chairperson and members are appointed by the MEC by inviting nominations through the government gazette and in consultation with the Portfolio Committee of housing of the province.[277] The members are appointed for a period of three years, and the MEC may renew the contract, but not for a period exceeding three years. There must be at least three members for a quorum to hear a matter.[278] If a consensus

[272] Section 8 of the Rental Housing Act 50 of 1999.
[273] Section 9(1) of the Rental Housing Act 50 of 1999.
[274] Section 9(1)(a) of the Rental Housing Act 50 of 1999.
[275] Section 9(1)(b)(ii) of the Rental Housing Act 50 of 1999.
[276] Section 9(1)(b)(i) of the Rental Housing Act 50 of 1999.
[277] Section 9(2)(a)-(b) of the Rental Housing Act 50 of 1999.
[278] Section 10(5) of the Rental Housing Act 50 of 1999.

cannot be reached, then the majority constitutes the decision.[279] The funding of tribunal activities come from the Provincial Legislature.[280]

There is a moratorium of three months that is placed on court evictions when a complaint is lodged at the tribunal by a tenant.[281] This means that only after three months have elapsed - either from the ruling or from the date that the complaint was lodged, whichever occurred first - may an application for eviction proceedings be lodged at the Magistrates' or High Court. It is important to note that the landlord is still responsible for the necessary maintenance and upkeep of the premises and that the tenant remains liable for payment of rental to the landlord during the period to which the moratorium applies.[282]

> (7) As from the date of any complaint having been lodged with the Tribunal, until the Tribunal has made a ruling on the matter or a period of three months has elapsed, whichever is the earlier—[283]
>
> (a) the landlord may not evict any tenant, subject to paragraph (*b*);
>
> (b) the tenant must continue to pay the rental payable in respect of that dwelling as applicable prior to the complaint or, if there has been an escalation prior to such complaint, the amount payable immediately prior to such escalation; and
>
> (c) the landlord must effect necessary maintenance.

The Tribunal may pronounce upon a moratorium regarding evictions, but it does not have the jurisdiction to hear eviction applications for eviction orders. This is important, because it means that eviction orders are excluded from the tribunal's jurisdiction and are heard by the courts.

[279] Section 10(7) of the Rental Housing Act 50 of 1999.
[280] Section 12(1) of the Rental Housing Act 50 of 1999.
[281] Section 13(7)(a) of the Rental Housing Act 50 of 1999.
[282] Section 13(7)(a)-(b) of the Rental Housing Act 50 of 1999.
[283] Section 13(7) of the Rental Housing Act 50 of 1999.

(14) The Tribunal does not have jurisdiction to hear applications for eviction orders.[284]

A Tribunal decision is considered to be an order of the Magistrates' Court and is enforced in terms of the Magistrates' Court Act 32 of 1944.[285] The Tribunal may (a) make a costs order which is just and equitable; (b) make the mediation agreement an order of the Tribunal; (c) issue spoliation orders, attachment orders and grant interdicts.[286]

2.4 Rules of the RHT: regulating the procedure

The rules of the Western Cape Rental Housing Tribunal provide for the regulation of the procedure of the Rental Housing Tribunal, from the initiation of the complaint to the finality of the matter, and provide for the utilisation of ADR mechanisms such as mediation.

The Gauteng Rental Housing Tribunal has summed up the procedure of the Tribunal into seven steps:

Step 1:	A file is opened when a complaint is received
Step 2:	A letter is sent to all parties regarding the complaint lodged
Step 3:	The Rental Housing Tribunal will conduct an investigation in order to determine whether the complaint relates to unfair practice
Step 4:	Mediation is used to resolve the dispute or convince the parties to settle
Step 5:	Arbitration hearing is held and an award delivered
Step 6:	A ruling in the Tribunal is deemed to be a ruling of the Magistrates' Court
Step 7:	If the parties are unhappy with the ruling they can take the decision to the High Court for review

Despite step 5 being referred to as an 'arbitration hearing', it is not arbitration as defined in the Arbitration Act. An arbitral award does not have the same status as a judgment of the

[284] Section 13(14) of the Rental Housing Act 50 of 1999.
[285] Section 13(13) of the Rental Housing Act 50 of 1999.
[286] Section 13(12)(a)-(c) of the Rental Housing Act 50 of 1999.

Magistrates' Court. In order for an award to be made a judgment of the High Court it must be done by application proceedings. Another procedural aspect is that there is no agreement to arbitrate and no appeal mechanisms, only a review of the decision by the High Court. The rules of the Rental Housing Tribunal do not refer to the decision of the Tribunal as an award. It is submitted that this arbitration hearing is supposed to be an internal hearing[287] by the Chairperson and members of the Rental Housing Tribunal, and rather not arbitration proceedings, because the latter proceedings are not regulated by the Rental Housing Act 50 of 1999 nor the Arbitration Act.[288]

2.5 Deconstructing the RHT

The Rental Housing Tribunal is a tribunal of the first instance. The Magistrates' Court may refer matters to be heard before the Tribunal.[289] The Tribunal's enforcement mechanisms fall within the Magistrates' Court. The Tribunal thus does not have its own enforcement mechanisms. No decisions may be appealed; they can only be referred for review to the High Court. When there are grounds to appeal the review decision of the High Court to the Supreme Court of Appeal, it becomes an appeal option. The matter is usually finalised before the High Court. The Rental Housing Tribunal is unlike the tribunals referred to in the South African study, because most tribunals are usually three tiered. This means the first tier is a commission, the second tier or second instance is a tribunal, and the third instance is an appeal/review mechanism to a specialised court or High Court. The Rental Housing Tribunal is two tiered, as the Tribunal acts as the forum of first instance, and the second tier is the High Court, as the forum of review and second instance, as there are no appeal mechanisms or remedies. The Rental Housing Tribunal does not have the jurisdiction to hear evictions; these matters are only heard by the Magistrates' Court and High Court, which is a shortcoming. Another shortcoming of the Tribunal is that there is a public perception that it tends to favour the tenant and not give equal hearing to the landlord.[290] A further shortcoming of the Tribunal is that there are no enforcement mechanisms or appeal

[287] Regulated by the Rental Housing Act 50 of 1999.
[288] Arbitration Act 42 of 1965.
[289] Section 13(11) of the Rental Housing Act 50 of 1999.
[290] A Ardé 'Free tribunals protects tenants and landlords' *BusinessLive* 2 July 2017.

procedures. Moreover, the Tribunal is an administrative body and is subject to PAJA, meaning that the Tribunal is supposed to be transparent, and failure to publish its decisions goes against the ethos of transparency for the public. Individuals must lodge the relevant application for access to information to request decisions, which entails an expensive and lengthy process. The only judicial review mechanism is to the High Court. In addition, rules of the Rental Housing Tribunal are for the most part a duplication of the Rental Housing Act,[291] which is unnecessary, as the aim of the rules is to regulate the procedure and then serves as little use to the users. Despite these shortcomings, there is a demand for the Tribunal, since it deals with matters frequently, as tenancy is a flourishing market that requires resolution more robustly than that of the ordinary court system. A harmonised system[292] will address these shortcomings by ensuring a tiered system that allows for enforcement mechanisms, appeal and review mechanisms, the publication of decisions in a single database and an amalgamated set of rules that also allow the hearing of eviction orders sought simultaneously.

2.6 Common objectives of tribunals

The common objectives of the tribunals are the cost-effectiveness, speedy resolution of matters, promotion of the rule of law, simplification of the procedures of operation, and comprising a degree of informality and flexibility to deviate from its rules of procedure. The basis for this discussion is to illustrate that the similarity of the operations of the tribunal provides a basis for the unification into a harmonised tribunal system. The case law is used simply to illustrate the objectives in action through case law.

2.6.1 Cost-effectiveness

The Rental Housing Tribunal is cost-effective, as none of the users need to pay a fee to utilise the Tribunal. No legal representation is required to lodge or hear a matter, which significantly reduces the costs. Matters are dealt with and disposed of quickly, which also plays a role in the overall cost-effectiveness of the Tribunal.

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[291] Rental Housing Act 50 of 1999.

[292] See also Baboolal-Frank, R 'Civil Litigation in Tribunals in South Africa: Creating a Unified Tribunal System' in Uzelac, A and Van Rhee,CH (eds) (2018) *Transformation of Civil Justice.*

2.6.2 Speedy resolution of matters

This case is a good example of the speedy resolution of a dispute. In *Old Age Villages Association v City of Johannesburg*,[293] the ruling was important because it protected the rights of a vulnerable group, namely pensioners within a short period,as the tribunal was able to dispense and protect their rights expediently.Whereas, a court of law would have taken months to years to resolve due to the case backlogs. The pensioners applied to the Rental Housing Tribunal for a reduction in rental against the State, namely the City of Johannesburg. The Tribunal granted the reduction because the City of Johannesburg could not give evidence regarding how it arrived at the rental levied on the pensioners. This decision illustrates the balancing act that the Tribunal serves in the protection of vulnerable groups and protecting both landlord and tenants in reaching a speedy resolution.

2.6.3 Promotion of the rule of law

An example of the Rental Housing Tribunal promoting the rule of law is illustrated in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curiae)*.[294] The facts dealt with the landlord terminating lease agreements to provide for new lease agreements. Both the High Court and the Supreme Court of Appeal found in favour of the landlord. The tenants thereafter appealed to the Constitutional Court. The Constitutional Court recognised the role and importance of the Rental Housing Act.[295]

> This judgment holds that the statutory argument should have prevailed. The Act creates a finely balanced mechanism to resolve disputes between landlords and tenants. It offers an appropriate and fair mechanism for the resolution of this dispute. There is therefore no need to consider the tenants' common law and contractual arguments.[296]

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[293] *RT1871/14 (Gauteng Rental Housing Tribunal, Johannesburg).*

[294] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curiae)* 2012 (5) BCLR 449 (CC).

[295] Rental Housing Act 50 of 1999.

[296] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curiae)* 2012 (5) BCLR 449 (CC) 452 para 4.

This decision is important because it illustrates the importance of the Rental Housing Act[297] and its role in creating harmony between the landlord and the tenant.

2.6.4 Simplified procedures

The case of *Kendall Property Investments v Rutgers*[298] dealt with the simplification of procedure. When a matter is before the Rental Housing Tribunal, the complainant or the respondent may not seek simultaneous relief in the Magistrates' or High Court. The facts of the case related to the matter already having been before the Rental Housing Tribunal, although no decision was formally made at the Tribunal. The landlord simultaneously brought an eviction application to court. The application did not sufficiently prove the merits for eviction and was accordingly dismissed. The decision is important because it illustrates and reaffirms the position of the moratorium that was confirmed in the Constitutional Court decision of *Maphango*.

2.6.5 Informality and flexibility

In the matter of *Tenants of Plettenberg Flats v Young Ming Shan CC*,[299] mediation had failed and the Tribunal hearing was accordingly held on 1 February 2016. The issue dealt with a clause in the lease agreement that placed a moratorium on the increase of rental for the period 2012 to 2015. In 2013, the respondent imposed a 9% increase on the rental and certain tenants refused to pay this increase because it was contrary to the agreement that they had signed.

The ruling of the Tribunal was that all tenants must pay the increased rental, and furthermore that there should not be differentiation in payments between those tenants who agreed and those who did not agree to the increase. Three Tribunal members reached this decision by consensus. In terms of section 17 of the Rental Housing Act, this decision can be taken to the High Court for review.

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[297] Rental Housing Act 50 of 1999.
[298] *Kendall Property Investments v Rutgers* [2005] 4 All SA 61 (C).
[299] Gauteng Rental Housing Tribunal held in Johannesburg, RT 1347/15.

2.7 Common features of tribunals

The common features of the tribunals are individual representation, transparency, judicial review, lack of enforcement mechanisms, that the High Court rules are the default rules for the tribunals when the current rules do not address a matter and possess specific grounds of jurisdiction to hear matters.

2.7.1 Individual representation

The Rental Housing Tribunal operates in a cost-effective manner, as legal representation is not required for a dispute to be launched. Ordinary people may launch an application for a complaint in person and are guided by the representatives of the Rental Housing Tribunal.

2.7.2 Transparency

The Rental Housing Tribunal does not publish its decisions, as this is not the trend with the other tribunals in the South African study. It therefore presents a difficult task[300] to obtain the decisions, and the only decisions that were available online for the public were the decisions that went on review to the High Court. Numerous attempts were made to obtain copies of the decisions from various bodies, such as the chairperson of the Rental Housing Tribunal, by emailing both the Gauteng and Western Cape rental tribunals, undertaking library database searches, as well as searching the internet. A request was made in terms of the Promotion of Access to Information Act[301] for access to information in order to obtain approximately ten decisions for the period 2012 to 2017. Unfortunately, the outcome of that application was only one case.[302]

[300] The website of the Gauteng rental tribunal is inactive. A request for access to information was lodged regarding the decisions, for which payment was made.
[301] Promotion of Access to Information Act 2 of 2000.
[302] *Old Age Villages Association v City of Johannesburg RT1871/14* (Gauteng Rental Housing Tribunal, Johannesburg).

2.7.3 Judicial review

An ideal example of judicial review[303] was in the decision of *Fikile Vusi Jele and 18 Others v Young Ming Shan CC*, held on 8 May 2013. The facts of the matter dealt with the complainants all being charged a flat rate of R385 for service charges. These exorbitant charges were levied without the tenants being presented with an invoice from City Power illustrating the amount of electricity being utilised by each tenant, and/or how the amount of R385 was calculated. This was found to constitute an unfair practice, and the landlord had to reimburse all the tenants for the service charged during May 2009. The Tribunal used the decision of the Constitutional Court, which confirmed the Rental Housing Tribunal's power to declare provisions of lease agreements an unfair practice, as the service charge levied was in terms of a clause contained in the lease agreement. The decision by the High Court confirmed the nature and function of the Rental Housing Tribunal and, by confirming its decision, recognised the sound legal principle as enforceable.[304]

2.7.4 Lack of enforcement mechanisms

The decisions of the Rental Housing Tribunal lack the thrust of enforcement in that, if a party fails to comply with an order of the Tribunal, the Magistrates' Court or the High Court has to be approached to enforce the decision. The lack of enforcement mechanisms by the Tribunal incurs additional costs by the party to approach the court regarding the enforcement or contempt of the order by the Tribunal.

2.7.5 High Court Rules are the default rules for tribunals

The rules of the Rental Housing Tribunal provide that, where the rules do not make provision for a matter, then the High Court rules shall be applicable to the Tribunal. This is a common trend across all the tribunals.

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[303] See also *Young Ming Shan CC v Chagan NO and Others* [2015] 2 All SA 362 (GJ), which illustrates a review application of the decision of the rental housing tribunal to review and set aside the decision regarding the levying of an electrical charge, brought before the tribunal on the basis that it was an unfair practice (363 para 1). In the circumstances of the abovementioned reasoning of the court, the application for review and the setting aside of the rental housing tribunal award was dismissed with costs. The basis for a successful review was not proved (386 para 84).

[304] *Young Ming Shan CC v Chagan NO and Others* [2015] 2 All SA 362 (GJ).

2.7.6 Specific grounds of jurisdiction to hear matters

Ethekwini Municipality v KwaZulu Natal Rental Housing Tribunal[305] and others illustrated the Tribunal's specific jurisdiction to hear matters. The facts of the case related to an unfair practice regarding an illegal eviction/lock-out. The Rental Housing Tribunal dismissed the application of an unfair practice on the basis that there already was another occupant on the premises. The Municipality could therefore not restore her occupation to the premises. The court reviewed the application and stated that the Rental Housing Tribunal had to hear the matter de novo, as the Rental Housing Tribunal failed to take pertinent details into consideration, namely that the applicant was a single mother with children. The court could not replace the decision in terms of section 8(1)(c)(ii)(aa) of PAJA, as the occupant of the premises was required to give evidence before a decision could be reached.

2.8 Concluding observations on the RHT

The Rental Housing Tribunal is an administrative body, and its decisions are subject to judicial review in terms of PAJA and the RHA. Failure to publish its decisions is an inconvenience for its users. It is apparent that the Tribunal has a few shortcomings, which can be addressed through a harmonised tribunal system with amalgamated rules, publication of decisions, and a tiered system that allows for appeal mechanisms. One of the roles of a harmonised system is to ensure that there is enforcement and, furthermore, to cater for the increased jurisdiction in order to hear appeals and evictions, thereby easing the already strained court system. Unlawful tenancy is an important issue for landlords, and to allow for evictions would ensure that a greater balance is created. It is important to note that the statistics show but one aspect to the Tribunal. The Tribunal's statistics cannot be read in isolation and must be read with all of the abovementioned pertinent aspects, namely case discussion, daily functioning and the shortcomings of the Tribunal. A harmonised tribunal system will ensure more public attention and activity than a few hundred cases a year.

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[305] KwaZulu-Natal High Court, Durban and Coast Local Division, Republic of South Africa, Case No: 14921/2009. Judgement delivered on 26 November 2010.

3. Companies Tribunal

3.1 Overview

The Companies Tribunal was established by the Companies Act.[306] With the advent of the Companies Act, the King III report was propelled to address the new Act and ensure that there was guidance regarding the amendments before the Act was promulgated in 2011.[307] The King III report addressed the aspect of ADR as a technique utilised to resolve disputes at an earlier stage through mediation and arbitration.[308] This ensures that matters are resolved expeditiously.[309] The Companies Tribunal addresses constitutional rights in upholding company law and regulations with relation to transparency, dignity, equality, privacy, administrative justice and accountability.[310] The aim of analysing the Companies Tribunal is to expose the shortcomings of the Tribunal, and to propose the harmonised tribunal system to resolve these shortcomings.

3.2 The historical significance of the Companies Tribunal

The outdated Companies Act[311] did not provide for the ever-changing current trends of corporate developments, such as advancements in information technology and the evolving concept of ADR in the negotiation and resolution of corporate and commercial transactions. In 2011, the repeal and replacement of the Act was a necessary transition to the promulgation of the Companies Act.[312] Following the new Companies Act was the King III report, which addresses the new provisions of the Act and, in turn, ensures the applicability

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[306] Companies Act 71 of 2008.
[307] King III Report on Corporate Governance in South Africa, Introduction and Background, September 2009.
[308] King III Report on Corporate Governance in South Africa, Introduction and Background, September 2009.
[309] King III Report on Corporate Governance in South Africa, Introduction and Background, September 2009.
[310] Companies Tribunal Annual Report 2012/13 4. The rights in the Constitution that are applicable are: Section 9, equality clause: '[t]hrough remaining accessible to diverse groupings of consumers and business, the Tribunal plays its role in ensuring that parties have the right to equal protection and benefit of the law.' Also section 10 in relation to human dignity: '[t]hrough the adjudication process, the Tribunal ensures that prohibited conduct, as well as the relevant action thereto, does not impair human dignity,' and section 14 on the right to privacy: '[w]hile adhering to its founding legislation, and as part of the adjudicative role, the Tribunal ensures that the privacy of persons is protected.' Section 33 relates to administrative action: '[t]he Tribunal ensures it hears both sides to a dispute and that it issues reasons for its decisions.'
[311] Companies Act 61 of 1973.
[312] Companies Act 71 of 2008.

of corporate governance across South Africa. The King III report made provision for ADR mechanisms, as it recognised that the statistics reveal that most matters are resolved through ADR techniques in an expeditious, efficient and effective manner.[313] The Companies Tribunal was a forum established by the new Act to ensure that matters are resolved expeditiously using ADR as a tool.

3.3 Companies Act: key provisions

In terms of the Companies Act,[314] the following provisions will be considered and discussed dealing with the jurisdiction of the Tribunal, its mode of operation, its procedures and the composition of the tribunals, amongst other keys aspects that establish the pivotal elements of the Tribunal . All these aspects culminate in the daily functioning of the Companies Tribunal, with the aim of creating a harmonised tribunal system.

Section 160 deals with the jurisdiction of the Tribunal relating to disputes concerning the reservation or registration of company names. In terms of section 160(3)(a), the Companies Act determines whether the name, reservation, or the use of the name, or the transfer of the reservation or registration of the name satisfies the requirements of the Act.[315] In terms of section 160(3)(b)(i), the Companies Tribunal may make an administrative order directing the Commission to reserve a contested name, or register a particular defensive name that has been contested for the applicant.[316] The Companies Tribunal possesses the power to order the Commission to register a name or amended name that had been contested as the name of a Company.[317] The Companies Tribunal may make an administrative order directing the Commission to cancel the reservation of a name, or the registration of a defensive name.[318] Once again, the Companies Tribunal may direct the Commission to make an

[313] King III Report, section 8.8 '39. Alternative dispute resolution (ADR) has been a most effective and efficient methodology to address the costly and time consuming features associated with more formal litigation. Statistics related to success range from a low of 50%, for those situations in which the courts have handed down a case for ADR, to an average of 85% - 90% where both parties are willing participants.'
[314] Companies Act 71 of 2008.
[315] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011).
[316] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 160(3)(b)(i)(aa).
[317] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 160(3)(b)(i)(bb).
[318] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 160(3)(b)(i)(cc).

administrative order to transfer or cancel the transfer of the reservation of a name or the registration of a defensive name.[319]

The Companies Tribunal may make an order directing a company to choose a new name. This includes filing a notice of an amendment to its Memorandum of Incorporation within a specific period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment.[320]

Section 166 regulates ADR and provides that a complaint filed at the Companies Tribunal may be resolved through mediation, conciliation or arbitration.[321] If the Companies Tribunal finds that either of the parties fails to conduct proceedings in good faith, or alternatively that there is no reasonable prospect of a resolution, then the Companies Tribunal will file a certificate that ADR has failed.[322]

In terms of the Companies Act, the Tribunal is empowered to conduct ADR as envisaged in section 156, read together with sections 166, 167 and 169(1)(b). In terms of section 166, persons stated under part 6 of these guidelines may refer matters to the Tribunal or an accredited entity or any other person, for resolution through mediation, conciliation and arbitration as an alternative to applying to court[323] or filing a complaint with the Commission. This deals with complaints and resolving matters through consent orders in terms of section 170, when a person or an accredited entity refers a matter for ADR.[324] The attire at tribunal is formal, but court apparel or gowns are not prescribed.[325]

The Companies Tribunal possesses the following powers of adjudication during the hearing: (a) may direct or summon any person to appear at any specified time and place; (b) may

[319] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 160(3)(b)(i)(dd).
[320] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 160(3)(b)(ii).
[321] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 166(a).
[322] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 166(2).
[323] Practice Directions 11.
[324] Practice Directions 12.
[325] Practice Directions 31.

question any person under oath or affirmation; (c) may summon or order any person - (i) to produce any book, document or item necessary for the purposes of the hearing; or (ii) to perform any other act in relation to this Act; and (d) to issue five directions prohibiting or restricting the publication of any evidence given to the Tribunal.[326]

Both the Companies and Intellectual Property Commission ('CIPC') and the Takeover Regulation Panel ('TRP') may, after receiving a report from an inspector or an independent investigator, refer the complaint to the Companies Tribunal, as the case may be.[327] The CIPC and the Companies Tribunal may grant a consent order in the resolution of a dispute.[328] A compliance notice may be set aside by the Companies Tribunal.[329] A decision by the Companies Tribunal is binding, and the setting aside of a compliance notice is subject to review or appeal to court.[330] It is not clear whether PAJA applies to the compliance notices, but it is submitted that it does apply due to the provisions as contained in section 170(4),[331] which allow judicial review. Furthermore, the functions of the Companies Tribunal are administrative.

The Companies Tribunal is vested with powers to determine its own procedures.[332] The Companies Tribunal takes into consideration the circumstances of each case when determining its own procedures.[333] The Tribunal has jurisdiction throughout the Republic of South Africa.[334] It is independent and subject to the Constitution and the law.[335] The Companies Tribunal must exercise its function in accordance with the Act and must perform its functions without fear, favour or prejudice, and in a transparent manner as is required.[336] The organs of state must assist the Tribunal to maintain its independence and impartiality to

[326] Section 182(a)-(d) of the Companies Act 71 of 2008.
[327] Section 170(1)(b) and Section 170(1)(d) of the Companies Act 71 of 2008.
[328] Section 170(1)(d) of the Companies Act 71 of 2008.
[329] Section 171(5) (a)(i) of the Companies Act 71 of 2008.
[330] Section 172(4) of the Companies Act 71 of 2008.
[331] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 170(4).
[332] Section 183 of the Companies Act 71 of 2008.
[333] P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) 183.
[334] Section 193(1)(a) of the Companies Act 71 of 2008.
[335] Section 193(1)(b) of the Companies Act 71 of 2008.
[336] Section 193(c)-(d) of the Companies Act 71 of 2008.

perform its functions effectively.[337] In carrying out its function, the Tribunal may have regard to international developments in company law and may consult any person, organisation or institution in relation to the matter.[338] The Companies Tribunal consists of a chairperson and not less than 10 other male or female members that have been appointed by the Minister on a full-time or part-time basis.[339] The Tribunal members must comprise persons with suitable qualifications and experience in economics, law, commerce, industry or public affairs, along with sufficient legal training.[340] The Minister appoints both the chairperson, deputy chairperson and members of the Tribunal.[341] The chairperson and each member serve a term of five years and may be reappointed for a second term.[342]

The Companies Tribunal may adjudicate on any application before it in terms of the Act.[343] The chairperson of the Tribunal is responsible for allocating the caseload and may assign a single member to a matter, or a panel of three members per matter.[344] In the panel allocation, at least one member must have legal qualifications.[345] The decision of the panel must be reduced to writing with reasons.[346] An order of the Tribunal may be filed with the High Court as an order of the court in accordance with the court rules.[347] The Companies Tribunal is financed by (a) money appropriated by Parliament; (b) any fees payable in terms of the Companies Act 71 of 2008; (c) income derived from their respective investment and deposit of surplus money from the financial year end; (d) other money accruing from any source.[348]

A unified tribunal system will assist greatly with a unified set of rules for all tribunals, which will save time, opposed to reformulating own procedures for each matter on a case-by-case

[337] Section 193(2) of the Companies Act 71 of 2008.
[338] Section 193(3)(a)-(b) of the Companies Act 71 of 2008.
[339] Section 193(4) of the Companies Act 71 of 2008.
[340] Section 194(3)(a)-(b) of the Companies Act 71 of 2008.
[341] Section 194(1)(a) and section 194(4) of the Companies Act 71 of 2008.
[342] Section 194(7) of the Companies Act 71 of 2008.
[343] Section 195 (1)(a) of the Companies Act 71 of 2008.
[344] Section 195(2)(a)-b) of the Companies Act 71 of 2008.
[345] Section 195(3)(a) of the Companies Act 71 of 2008.
[346] Section 195 (5) of the Companies Act 71 of 2008.
[347] Section 195(8) of the Companies Act 71 of 2008.
[348] Section 210(a)-(d) of the Companies Act 71 of 2008.

basis. Furthermore, a harmonised tribunal system ensures a pool of resources to enhance the liquidity of the tribunal system in relation to running costs and administration of same.

3.4 Companies Tribunal: regulating the procedure

Regulations govern the procedure of the Companies Tribunal.[349] The most interesting aspect is that regulation 154(1)(b)[350] allows the Tribunal to give consideration to the High Court rules with regard to procedure when deliberating on disputes in terms of the regulations.[351] The practice directive guidelines, which were published in 2014,[352] assist the Tribunal in reaching decisions.

Part F of the regulations governs the conduct of Tribunal proceedings. It is necessary to holistically discuss these regulations to illustrate the daily operations of the tribunal and the manner in which it is regulated. The Companies Tribunal operates similarly to the High Court in relation to the regulations that relate to the intervention, substitution and joinder of parties to the application that possess a material interest in the matter.[353] The Companies Tribunal has the power to grant default judgment.[354] The Tribunal holds pre-hearing conferences for the applications to ensure that there are no outstanding documents or interlocutory applications to proceed with the matter.[355] This is similar to a pre-trial conference for a trial in the courts. It is not pertinent to go through each and every regulation to make the submission that the Tribunal operates in a similar manner to the courts, except to say that it is equipped with more flexibility to deviate from its regulations to ensure that matters are resolved efficiently.

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[349] Companies Act 71 of 2008.
[350] 'for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these regulations, the member may have regard to the High Court Rules.'
[351] Competition Tribunal Directives acknowledge that the regulations mimic the High Court rules 5.
[352] K Manamela 'Practice guidelines (Setting Out Procedure And Reflecting What Constitutes Best Practice) of the Companies Tribunal of the Republic of South Africa' Version 1 Promulgated by Adv Simmy Lebala SC, Chairperson, effective date February 2014.
[353] Regulations 158-159.
[354] Regulation 153.
[355] Regulation 149.

3.5 Deconstructing the Companies Tribunal

The Companies Tribunal is part of a three-tier system. The first tier is the Companies Intellectual Property Commission (CIPC) and Takeover Regulation Panel (TRP). The second tier is the Companies Tribunal. Sometimes the TRP and CIPC refer matters to the Companies Tribunal, and these are heard at the first instance. The third tier is the High Court as the forum of review or appeal, or to make the decision of the Tribunal an order of court. The rules of the Tribunal are comprehensive in that they make provision for its daily operation, as the rules are influenced by and based on the High Court rules. However, the influence of the High Court rules causes the Companies Tribunal to be formal and, as a result, to lose its informality in regard to making the proceedings as expeditious and informal as possible. The Tribunal attempts to cure this shortcoming by being allowed to formulate its own procedures, depending on the circumstances of the case; however, the rigidity of the rules confines the Tribunal to certain parameters and procedures. Another shortcoming is that the Tribunal lacks enforcement mechanisms and is dependent on the High Court through application proceedings to make the decision an order of court. This is the same procedure followed in making an arbitral award an order of court. This is a drawback in that, once a decision is received from the Companies Tribunal, and if there is non-compliance by parties with the decision, then the only remedy available is to approach the High Court in order to compel the other party to adhere to the decision. This is done by applying to have the decision made an order of court. A unified tribunal system would address these drawbacks, because the tribunal system would have enforcement mechanisms, meaning that no party has to approach the court to make the decision enforceable and executable. The unified tribunal system would ensure uniform rules that allow for matters to be resolved expeditiously and informally. A strength of the Companies Tribunal is that ADR mechanisms are utilised, which means that ADR mechanisms can be enhanced through a unified system, within a singular pool of resources, in cases where ADR is encouraged as an early form of resolution.

3.6 Common objectives of tribunals

The tribunals mentioned above have common objectives, which are discussed individually in relation to each tribunal, and at times are illustrated by cases.

3.6.1 Cost-effectiveness

A default order saves time and costs. *Domino's IP Holder LLC v Domino's Pizza (Pty) Ltd*[356] dealt with an application for a default order in terms of the Companies Act and regulations. The respondent was directed to change its name, as it was confusingly and deceptively similar to that of the applicant. This decision illustrates the Tribunal's role and function in deliberating on a conflict relating to a company's name that is in violation of the Companies Act and regulations, in that the Tribunal held that the respondent was indeed in violation of the abovementioned law and was ordered to change its name.

3.6.2 Speedy resolution of matters

The Tribunal resolves matters swiftly to ensure that more cases can be heard. In the case of *Rishaad Dawood v Companies and Intellectual Property Commission*,[357] the Tribunal dealt with an application regarding the reservation of the name of the applicant's company within a significant lessened period than the court system. It was granted by the Tribunal and the respondent was directed to reserve the name and to furnish the notice to the applicant accordingly. This decision is important, because it demonstrates the binding authority of the Tribunal over the CIPC, in addition to elucidating the first-tier relationship of the CIPC and the second-instance tier of the Companies Tribunal. Furthermore, it illustrates that the Companies Tribunal disposes of matters speedily.

3.6.3 Promotion of the rule of law

The principle of the promotion of the rule of law is supported by the Companies Tribunal in that it upholds the well-established principles in case law relating to the

[356] CT005June2015.
[357] CT001Oct2015.

principle of 'good cause' shown for trademark infringements. In *Aranda Textile Mills (Pty) Ltd v Aranda Security and Projects (Pty) Ltd*, the applicant complained about the trademark infringement regarding its name, which it alleged had fallen foul of the Companies Act. The application was refused on the grounds of 'good cause', which had not been proven in the papers. This is an important decision, as it shows the merits of 'good cause' that needs to be properly founded before a trademark infringement will be granted. Furthermore, this decision illustrated that substance triumphed, similarly to what happens in courts, which place emphasis on the substance of an application. The principle of 'good cause' has further been confirmed in other decisions of the Companies Tribunal.[358]

3.6.4 Simplified procedures

The Companies Tribunal hears matters relating to name infringements, where a name is too close to another name and infringes the legislation. The procedures to hear and dispose of the matter are simplified. *National Academy of Recording Arts and Music Inc. v Africa Grammy Awards (Pty) Ltd*[359] was an application regarding the name and trademark infringement of the applicant in terms of the Companies Act and regulations. The Companies Tribunal does not have the jurisdiction to make a finding of an infringement in terms of section 34 of the Trade Marks Act, as this falls within the jurisdiction of the High Court. The respondent was ordered to change its name. This case exposes the limitations placed on the Tribunal's jurisdiction, in that there were two issues before the Tribunal and only one that it could pronounce upon, namely that the respondent be ordered to change its name.

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[358] In *PPC Limited v PPC (Pty) Ltd* CT007Jul2015, an application was made for an order confirming that the respondent's name does not satisfy the requirements of the Companies Act 71 of 2008, section 160 and section 11. The application was postponed *sine die*, as the application did not deal thoroughly with the aspect of good cause, and the applicant was given more time to file a supplementary affidavit to address this aspect and serve it on the respondent. This was a substantive issue, similar to that experienced by courts when considering the merits of whether a matter should be postponed, and also dealing with the aspect of good cause. In *Cohen Brothers v Samuels* 1906 TS 224, good cause is evaluated against the merits of each case. This case and the *Aranda Textile Mills (Pty) Ltd v Aranda Security and Projects (Pty)* Ltd CT004Sept2015 are based on the same principle.

[359] CT001Feb2015.

3.6.5 Informality and flexibility

An example of the informality and flexibility of the Tribunal in granting companies extensions to comply with legislation is illustrated in *Ex parte application: African Bank Limited*,[360] in which the applicant brought an application in terms of the Companies Act[361] for a time extension for the convening of an annual general meeting. The applicant was granted an extension to prepare the annual financial statements, and an extension to hold the annual general meeting. This decision is important, because it allowed the company more time to be compliant in terms of legislation to prepare its annual financial statements. The Companies Tribunal condoned the non-compliance with the time periods of the Companies Act, which illustrates the flexibility in its decisions in allowing this company more time to be compliant with legislation.

3.7 Common features of tribunals

As mentioned above, the tribunals have common features that are discussed individually in relation to each tribunal, and cases are used at times to illustrate.

3.7.1 Individual representation

In applying for a default order against the other party, there is only individual representation, if the other party fails to defend the application. *Johannes Casparus Lemmer v Companies and Intellectual Property Commission*[362] dealt with an application for a default order against the respondent in terms of the Companies Act and regulations. It was ordered that the applicant be directed to provide more information by setting out reasons why he should be entitled to the relief requested, and also to ensure that there was proper service of the application on the respondent. This case exposed one procedural issue and one substantive issue, which created irregularities, namely that there was no proper service and that the case was not set out properly before the Tribunal, as more information needed to be provided. The procedural steps were emphasised in order for the applicant to be granted the relief sought.

[360] CT004APR2015.
[361] Companies Act 71 of 2008, section 61(7)(b).
[362] CT007FEB2015.

3.7.2 Transparency

The principles of natural justice and upholding transparency are important to the Tribunal in allowing both sides a fair opportunity to be heard. *Maropeng a'Afrika Leisure (Pty) Ltd v Maropeng Theatre (Pty) Ltd and Commissioner of Companies*[363] was an example of this. The facts relate to the applicant objecting to the name of the respondent in terms of the Companies Act and regulations. The application for a default order was postponed *sine die* for service of the application on the first respondent. This decision is important, as it illustrates the procedural formality of effecting proper service of documents before an order can be granted to ensure the transparency of the process to both parties. This is an instance in which form was of the utmost importance, because a successful service of documents ensures that the principle of *audi alteram* is upheld, thereby being afforded an opportunity to defend the application in this case**.**

3.7.3 Judicial review

The decisions of the Companies Tribunal are subject to the High Court for review/appeal. The High Court is a forum of third instance. The Companies Tribunal is a forum of second instance, and sometimes even of first instance if the matter was not before the Companies and Intellectual Property Commission and was simply a referral.

3.7.4 Lack of enforcement mechanisms

The Companies Tribunal turns to the High Court to give its decision enforcement when the parties fail to comply with the orders of the Tribunal. This is a major shortcoming, as it contributes to the heavy caseload of the High Court, instead of reducing the load by having its own enforcement mechanisms.

3.7.5 High Court Rules are the default rules for tribunals

In the High Court, the rules provide for an application to compel the other party in relation to discovery amongst other applications. Similarly, in *Ex parte application: Xoffice Stationers (Pty) Ltd and Shafeeq Ismail Tayob*[364] there was an application to compel the CIPC to reserve the name of the applicant. The order was made to compel

[363] CT001SEPT2015.
[364] CT007JAN2015.

the CIPC to reserve the name for the applicant. Once again, this decision illustrates the subservience of the CIPC to the Companies Tribunal. This decision also shows that, if the CIPC makes a mistake, the review/appeal mechanism lies with the Companies Tribunal to rectify that decision or to confirm it.

3.7.6 Specific grounds of jurisdiction to hear matters

An example of a specific ground of the jurisdiction of the Tribunal is that it hears matters regarding the application for exemption from the Social and Ethics Committee in terms of the Companies Act. In *Ex parte application: Adventure Industrial Cleaning (Pty) Ltd*,[365] the applicant applied for an exemption from appointing a social and ethics committee in terms of the Companies Act and regulations. The application for exemption was refused, as the applicant failed to address the qualitative criteria for exemption. This decision is important, as it illustrates that the merits for exemption must be shown before the application can be granted.

3.8 Concluding observations on the Companies Tribunal

The Companies Tribunal is an administrative tribunal that only hears applications and makes decisions within the confines of the Companies Act. The shortcomings of the Tribunal are the use of formal High Court rules and the fact that there are no enforcement mechanisms - meaning that it is dependent on the High Court to enforce its decisions, which contributes to the fact that fewer cases are heard on an annual basis. The parties to proceedings would prefer one forum to ensure the resolution and enforcement to the end. A major inconvenience is furthermore created by multiple forums, which delay finalisation of the matter due to the fact that an application to make the Companies Tribunal decision an order of court must first be brought to execute against the party, in order to enforce the decision in the High Court. The statistics are important, because they illustrate the expenditure of the Tribunal, the number of cases heard and the finalisation of matters. The statistics[366] reveal finalisation of nearly seventy percent of matters, which is a great statistic in comparison to the backlog and finalisation of matters in court. Once again, efficiency can be

[365] CT002NOV2015.
[366] Refer to Annexure.

concluded from the statistics, bearing in mind that they involve only a few aspects that are analysed against each other. The Companies Tribunal still has shortcomings, which a unified tribunal system can address by further enhancing the efficiency and effectiveness and societal demands. It is important to emphasise that, of the few hundreds of cases that are heard annually, the Tribunal cannot be compared to numerous litigious matters that are heard before the courts. A unified tribunal system will address all these shortcomings by making the Companies Tribunal a more attractive forum for users, as the Tribunal would have enforcement mechanisms and a uniform set of rules that allows flexibility and informality, which will provide the capacity for more matters to be heard.

4. Competition Tribunal

4.1 Overview

The Competition Tribunal was established by the Competition Act.[367] The Competition Act[368] aims to redress the inequalities caused by the apartheid regime in relation to unfair competition practices. A consequence of apartheid meant that ownership was concentrated in a few, and there were inadequate restraints on anti-competitive trade practices that would allow for all South Africans to participate freely in the economy.[369] The Act encourages an environment of equality to be created amongst workers, consumers and owners in a competitive, economically balanced environment.[370] The Competition Tribunal was established to adjudicate on competition disputes that arise in addressing the creation of a balance between all parties in competitive activities in relation to the diversification of the economy.[371] The Competition Tribunal is a tribunal of second instance, in that the Competition Commission is the forum of first instance and the Competition Appeal Court is the forum of third instance, namely the specialised court that hears the appeal and review applications. The strengths and weaknesses of the Competition Tribunal are discussed to

[367] Competition Act 89 of 1998.
[368] Competition Act 89 of 1998, Preamble.
[369] Competition Act 89 of 1998, Preamble.
[370] Competition Act 89 of 1998, Preamble.
[371] Competition Act 89 of 1998, Preamble.

explain the motivation for a unified tribunal system in order to address the weaknesses exposed in this discussion.

4.2 The historical significance of the Competition Tribunal

The common law of South Africa did not address rules that could efficiently dispose of anti-competitive practices.[372] There was also no legislation that dealt with the promotion of competition.[373] This stimulated debate regarding the need for legislation to address these subsequent gaps and lack of legislative guidance. The Minister of Economic Affairs directed that the Board of Trade and Industry (the Board) investigate anti-competitive practices such as monopolisation of the market.[374] The Board released the report on its findings in 1951.[375] It made recommendations regarding, *inter alia*, new legislation regulating and solely dedicated to competition law. Finally, in 1956, the legislature obliged and Regulation of Monopolistic Conditions Act[376] was promulgated. This was the first of its kind in regulating competition law in South Africa. The legislation had some shortcomings that needed to be addressed, such as enforcement.[377] The President appointed a Commission in 1975 to investigate the competition policy.[378] The findings of this Commission culminated in the Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act (also known as the Mouton Commission Report), which was published in 1978.[379] The Commission proposed new legislation, namely the Maintenance and Promotion of Competition Act 1979, which was promulgated in 1980.[380] The Act of 1979 was amended in 1985 and 1990. There were suggestions of a merger tribunal and a specialised court.[381] South Africa, with the advent of political changes in 1992, was on the brink of a democratic government. Radical change was proposed by the ANC in the Reconstruction and

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[372] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[373] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[374] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[375] P Sutherland & K Kemp *Competition Law of South Africa* (2017). See also Board of Trade and Industry Report 327 of 1951.
[376] Regulation of Monopolistic Conditions Act 24 of 1955
[377] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[378] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[379] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[380] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[381] P Sutherland & K Kemp *Competition Law of South Africa* (2017).

Development Programme in 1994.[382] There was a macroeconomic policy for growth, employment and redistribution in relation to competition law.[383] The Department of Trade and Industry published its guidelines in relation to the reforming of competition law in order to cure the injustices of the past.[384] The Competition Bill was introduced in 1998, and eventually the Competition Act was promulgated, which allowed for the creation of the Competition Commission, the Competition Tribunal as the adjudicative body, and the specialised Competition Appeal Court.[385]

4.3 Competition Act: key provisions

In relation to the Competition Act[386] it is necessary to deal with numerous sections to illustrate the jurisdiction of the Tribunal, its mode of operation, its procedures and the composition of the Tribunal, amongst other key aspects that constitute the pivotal elements of the Tribunal. The discussion of these sections illustrates the daily functioning of the Competition Tribunal with the aim of creating a unified, harmonised tribunal system.

Section 2(f) sets out the purpose of the Act and illustrates the redress regarding the sharing of the economic market and ownership thereof with all South Africans. The Competition Commission may refer large,[387] intermediate or small mergers[388] that it approved with certain conditions to the Tribunal to review these decisions, whereinafter they will either approve, reject or amend[389] these, with written reasons.[390] The Competition Tribunal has jurisdiction throughout South Africa[391] and is a juristic person.[392] Furthermore, it is a tribunal of record.[393] The Competition Tribunal consists of a chairperson, deputy chairperson[394] and

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[382] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[383] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[384] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[385] P Sutherland & K Kemp *Competition Law of South Africa* (2017).
[386] Competition Act 89 of 1998.
[387] Section 16(2)(a)-(c) of the Competition Act 89 of 1998.
[388] Section 16(1)(a)-(b) of the Competition Act 89 of 1998.
[389] Section 16(3) of the Competition Act 89 of 1998.
[390] Section 16(4)(b) of the Competition Act 89 of 1998.
[391] Section 26(1)(a) of the Competition Act 89 of 1998.
[392] Section 26(1)(b) of the Competition Act 89 of 1998.
[393] Section 26(1)(c) of the Competition Act 89 of 1998.

not less than three and not more than ten members.[395] The President makes the aforementioned appointments and the Minister may make the appointment upon recommendation.[396] Each member of the Tribunal must have the requisite qualifications in either commerce, law, industry or public affairs.[397] The members of the Tribunal are appointed for a period of five years and for not more than two consecutive terms by the President.[398] The chairperson appoints three members to hear a matter, and one member should have a legal background.[399] No member is liable for the decisions that are made on behalf of the Tribunal.[400] The Competition Tribunal adjudicates on prohibited practices as set out in chapter 2 of the Competition Act[401] and any other matter that is prescribed by the Act.[402] The Competition Tribunal may make an interim order on the grounds of reasonableness.[403] After hearing the parties, the Competition Tribunal may grant a consent order on the agreement between the parties.[404] In the event that the Competition Commission issues a non-referral, then the parties may refer the matter to the Competition Tribunal,[405] and the Competition Tribunal may condone any procedural irregularities.[406] The Competition Tribunal may grant any order as regulated by section 58, and the Tribunal may grant administrative penalties after consideration of the circumstances of the respective parties.[407] Decisions of the Competition Tribunal may be appealed or reviewed by the Competition Appeal Court as regulated by the Act.[408] Both the Competition Tribunal and the Competition Appeal Court have the jurisdiction to determine the quantum of a prohibited practice.[409] The appeal of the decisions of the Competition Appeal Court is with the Supreme Court of Appeal or the Constitutional Court. Any decision by the Competition

[394] Section 30(1) of the Competition Act 89 of 1998.
[395] Section 26(2) of the Competition Act 89 of 1998.
[396] Section 26 (2) of the Competition Act 89 of 1998.
[397] Section 28(2)(b) of the Competition Act 89 of 1998.
[398] Section 29(1)-(2) of the Competition Act 89 of 1998.
[399] Section 31(1)-(2)(a) of the Competition Act 89 of 1998.
[400] Section 43(1)-(2) of the Competition Act 89 of 1998.
[401] Competition Act 89 of 1998.
[402] Section 27(1)(a)-(d) of the Competition Act 89 of 1998.
[403] Section 49C(1)-(2)(a)-(b) of the Competition Act 89 of 1998.
[404] Section 49D(1) of the Competition Act 89 of 1998.
[405] Section 51(1) of the Competition Act 89 of 1998.
[406] Section 55(2) of the Competition Act 89 of 1998.
[407] Section 59 of the Competition Act 89 of 1998.
[408] Section 61(1)-(2) of the Competition Act 89 of 1998.
[409] Section 62(2)(b) and 62 (3) of the Competition Act 89 of 1998.

Commission, Competition Tribunal and Competition Appeal Court is executed, enforced and served as if it was an order of the High Court.[410] A decision by the Competition Tribunal and the Competition Appeal Court may be rescinded on the grounds as set out in section 66 of the Act.

4.4 Competition Tribunal: regulating procedure

It is necessary to highlight the rules[411] of the Competition Tribunal in the pursuit of uniform rules to govern the unified tribunal system. The rules of the Tribunal are simplistic in that they set out how a person/juristic entity launches a complaint or an application to the Tribunal. The rules sets out the timelines for the respondent to respond on affidavit to the application.

4.5 Deconstructing the Competition Tribunal

The Competition Tribunal has an issue with enforcement, in that the Tribunal cannot enforce the decisions, as the enforcement lies with the High Court. The enforcement of the decisions is not only confined to the order of the Tribunal, but also to the Competition Commission and the Competition Appeal Court. All the orders by the Competition Commission, Tribunal and Competition Appeal court are considered to be orders of the High Court and, for enforcement purposes, they must be brought by application proceedings for the decision to be made an order of court. This inevitably delays proceedings from reaching finality expeditiously, because the application must be issued, served, filed and set down for hearing. This indicates that the Tribunal has no strength if its decisions cannot be enforced by the Competition Tribunal itself and are reliant on the High Court, and therefore contributes to the heavy case load of the courts, creating an additional burden on the court system for a matter that could have been dealt with by the body with similar powers hearing the matter. The recommended unified tribunal system will assist to address this shortcoming, as the power of enforcement will lie in the confines of the tribunal system and not with the courts. The decisions of the Competition Appeal Court carry the same status as

[410] Section 64(1) of the Competition Act 89 of 1998.
[411] Effective from 1 February 2001.

High Court decisions, instead of carrying the same status as those of the Supreme Court of Appeal. This means that the judicial review and appeal of its decisions continues to the two courts (Supreme Court of Appeal and Constitutional Court) before finalisation, should there be grounds for appeal and a constitutional issue that arises. This is another drawback of the Competition Tribunal and its hierarchical tiers, although it is acknowledged that judicial review is a necessary task. It is postulated that, if the Competition Appeal Tribunal is a specialised court, specifically as a forum of appeal and review, then the process should be finalised there. If the Tribunal already performs the function of review and appeal and is equivalent in status to the High Court, then surely the specialised court should be equivalent to the Supreme Court of Appeal to ensure that the process ends in the specialised court. Once again, this is a shortcoming and defeats the role of the specialised court, as the enforcement and execution of tribunal decisions thereof have to be addressed by the High Court. The unified tribunal system will address these shortcomings by ensuring that the recognised status of any appeal or review mechanism, other than to the tribunal, lies with the Supreme Court of Appeal. This process will occur because the tribunal system consists of hierarchical tiers of the same status as the Supreme Court of Appeal, and therefore will eradicate the duplication of hearing the same matter on the same platform.

4.6 Common objectives of tribunals

The tribunals possess common objectives and it is necessary to discuss these to illustrate what would happen in a harmonised tribunal system.

4.6.1 Cost-effectiveness

Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd v Mittal Steel South Africa Ltd and Macsteel International BV[412] deals with a case where Mittal SA was found to have been in contravention of Section 8(a) of the Competition Act for charging excessive prices. The decision dealt with the penalty to be imposed in relation to the contravention. An administrative penalty of R691 800 000.00 (six hundred and ninety-one million, eight hundred thousand rand) was imposed. This case illustrates the high quantum of the fines that are imposed for anti-competitive behaviour, which penalty is aimed to be a deterrent for committing prohibited

[412] 13/CR/FEB04.

practices.[413]This case also illustrates that the costs incurred of hearing the matter is minuscule in comparison to the penalties imposed thus making the tribunal cost effective.

4.6.2 Speedy resolution of matters

Matters are dealt with expeditiously before the Competition Tribunal as it is disposed of immediately; if there are no merits, the claim is dismissed. In the case of *Ian Walter Buchanan v The Health Professions Council of South Africa and The Professional Board for Optometry and Dispensing Opticians*[414] there was a complaint relating to dealing with Rule 8 of the Ethical Rules of Conduct for Practitioners under the Health Professions Act 56 of 1974, read with the Policy Document on Undesirable Business Practices, and whether it was in contravention of section 4(1)(a) of the Competition Act.[415] The complaint was dismissed as there was no evidence supporting the claim. This case is important because it illustrates that the merits of the claim must be proven for the relief sought and granted.[416]

4.6.3 Promotion of the rule of law

Competition Commission v Sam Louw NO and Anita Louw NO and Welkom Key Centre CC [417] is a complaint arising from the Welkom Centre and Louw's Centre, which entered into an agreement that contravenes section 4(1)(b)(ii) of the Competition Act.

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[413] In the case of *The Competition Commission v Southern Pipeline Contractors (SPC) and Conrite Walls (Pty) Ltd*, the complaint related to a contravention in terms of section 4(1)(b)(i)-(iii) of the Competition Act, where both respondents admitted to the contravention. The decision therefore relates to the penalty imposed. SPC and Conrite Walls were found to have contravened section 4(1)(b)(i)-(iii) of the Competition Act, and an administrative penalty of R16 882 597 (sixteen million eight hundred and eighty-two thousand five hundred and ninety-seven rand) was imposed on SPC. An administrative penalty of R6 192 457 (six million three hundred and sixty-six thousand five hundred and fourteen rand) was imposed on Conrite Walls. Once again, similarly to the Mittal case, the high administrative penalties illustrate the financial consequences of anti-competitive conduct.

[414] Case No: 015958 Order and Reasons issued on 18 December 2014.

[415] Competition Act 89 of 1998.

[416] *Johan Venter v The Law Society of the Cape of Good Hope and The Law Society of South Africa and The Competition Commission* involved a question whether the Law Society had contravened section 4(1) of the Competition Act, which prohibits horizontal agreements (that is 'agreements between competitors that restrain competition'). The application failed to make a case in terms of the Competition Act, and the evidence presented did not prove that the rule contravenes the Act. Once again, this case, which is similar in nature to the case discussed in 4.4.6.1, shows that the tribunal dismisses a case if the evidence does not prove the merits of the case.

[417] Case No: 017731 Order and Reasons Issued on: 18 December 2014.

The Tribunal deliberated and found that, where there is a contravention of the Act, such contravention requires no justification. The approach adopted by the Tribunal was affirmed in the Pioneer Food case. This case is important because it shows that, although tribunals do not follow the doctrine of precedent in matters, this doctrine was adhered to and affirmed.

4.6.4 Simplified procedures

The procedures that the Tribunal utilises are simple and efficient, and allow matters to be dealt with in a swift manner. The Tribunal exercises its powers in a flexible and relaxed manner to enhance access to justice.

4.6.5 Informality and flexibility

In J*G Grant v Schoemanville Oewer Klub*,[418] the applicant brought a complaint against the respondent on the basis of price discrimination in terms of section 9(1) of the Competition Act, which was not proved, and hence the relief sought and complaint were dismissed. It is interesting to note that costs were awarded against the respondent for the respondent's failure to co-operate in relation to filing an answering affidavit and lack of co-operation, which caused undue delays. This shows the versatility of the Tribunal in the exercise of power.

4.7 The common features of the tribunals

The common features of the tribunal are important because they illustrate the basis for a unified, harmonised tribunal system.

4.7.1 Individual representation

The Competition Tribunal allows for individual representation without legal representation. Due to the high penalties that are imposed, companies use legal representations due to the financial implications for the company.

[418] Case No: IR202Dec15 Order and Reasons Issued on: 11 July 2016.

4.7.2 Transparency

The Competition Act encourages companies to operate in a transparent manner. The *Competition Commission of South Africa v Sasol Chemical Industries Limited*[419] was a complaint referred for excessive pricing in two vertically related markets over a four-year period. The Tribunal's finding was that excessive charging was found in relation to purified propylene, and an administrative penalty of R205.2 million was imposed, which was to be paid within 90 days of the decision. Secondly, in respect of polypropylene, an administrative penalty of R328.8 million was imposed, which was also due within 90 days of the order. Once again, this case illustrates the importance of the financial implications of anti-competitive behaviour and transparency for companies, as the consequence is high administrative fines.

4.7.3 Judicial review

The Competition Tribunal is a forum of second instance. Matters are appealed or reviewed to the Competition Appeal Court. From the specialised court, the matters can also be reviewed to the High Court.

4.7.4 Lack of enforcement mechanisms

The Competition Tribunal lacks enforcement mechanisms, as the matters are sent to the High Court for enforcement.

4.7.5 High Court Rules are the default rules for tribunals

The Tribunal utilises the High Court rules as default rules when the Tribunal rules do not make provision.

4.7.6 Specific grounds of jurisdiction to hear matters

The case of *Glaxosmithkline South Africa (Pty) Ltd v Mpho Makhathinini; Nelisiwe Mthethwa; Musa Msomi; Elijah Paul Musoke; Tom Myers; Aids Healthcare Foundation Ltd and The Competition Commission*[420] was an application to make an agreement a consent order in terms of section 49(D) of the Competition Act.[421] The application was

[419] 48/CR/AUG10.
[420] *Glaxosmithkline South Africa (Pty) Ltd v Mpho Makhathinini; Nelisiwe Mthethwa; Musa Msomi; Elijah Paul Musoke; Tom Myers; Aids Healthcare Foundation Ltd and The Competition Commission* Case No: 97/CR/Nov04
[421] Competition Act 89 of 1998.

dismissed, as the Tribunal did not have jurisdiction because the agreement was entered into in December 2003.[422] This is an important decision, because it illustrates that the Tribunal does not operate retroactively. The Tribunal had not yet been formed in 2003, hence it did not have jurisdiction to deliberate upon a matter that predated the Act and the existence of the Tribunal.[423]

4.8 Concluding observations on Competition Tribunal

The Competition Tribunal is a second-instance tribunal. The decisions of the Competition Commission, Competition Tribunal and the Competition Appeal Court all have the same status as those of the High Court. This is problematic, because the Tribunal and Competition Appeal Court have no enforcement powers and the enforcement of the decision lies with the High Court. This creates a duplication and redundancy of functions. A unified tribunal system would overcome this shortcoming by ensuring that the tribunal system possesses the power of enforcement, as time, money and costs are wasted when going to the High Court for the enforcement of decisions. The statistics[424] illustrate a level of efficiency; however, it is also apparent that the Tribunal hears very few cases a year - just over a hundred matters, which illustrates that it is not popular or preferential regarding the litigation of anti-competitive matters, as the parties elect the courts as the one-stop forum to hear, resolve, enforce and execute decisions. This shortcoming will be addressed with the proposed unified tribunal system, which will ensure convenience for the user and the saving of the additional costs for enforcement by avoiding the High Court, in which the procedure can be lengthy and expensive.

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[422] *Glaxosmithkline South Africa (Pty) Ltd v Mpho Makhathinini; Nelisiwe Mthethwa; Musa Msomi; Elijah Paul Musoke; Tom Myers; Aids Healthcare Foundation Ltd and The Competition Commission* Case No: 97/CR/Nov04 para 34: 'For this reason we find that although the settlement in this matter was concluded during the period when the Commission had retained its title to prosecute the complaint, the application for the consent order was made after this period-a time when we find that the Commission no longer retains the right to prosecute and hence no right to conclude, revise or amend a consent agreement. Without the Commission retaining this power, we have no jurisdiction to make the agreement that was entered into in December 2003 into a consent order. The application accordingly fails.'

[423] In *Nedschroef Johannesburg (Pty) Ltd v Teamcor Limited; Waco International Limited; CBC Fasteners (Pty) Ltd and Avlock International (Pty) Ltd*, the applicant brought an application in terms of section 4 (1) (b) of the Competition Act to declare the restraint of trade clause in their business agreement in contravention of the Act. The Tribunal found the clause to be in contravention of the Act and interdicted the respondents from enforcing the restraint of trade. This case elucidates the versatility of the jurisdiction of the tribunal.

[424] Refer to Annexure.

5. National Consumer Tribunal (NCT)

5.1 Overview

The National Credit Act[425] and the Consumer Protection Act (CPA)[426] were promulgated to protect consumers and creditors, debtors and all parties concerned regarding credit agreements and consumer-related matters. South African consumers and debtors were heavily indebted and abused by exorbitant interest rates that saw consumers financially crippled and desolate. The legislation aimed to protect and prevent past incidents from reoccurring and to ensure that debtors were financially smart and savvy, thus creating a burdensome and onerous legislation upon the creditors. Specifically. the legislation protected consumers from reckless credit providers. The national credit regulator played the role of consumer watchdog to prevent consumer and credit abuse. The NCT ensured that there was compliance with the abovementioned Acts.

5.2 The historical significance of the NCT

The Hire Purchase Act[427] provided the Hire-Purchase agreement which was promulgated in 1942 to uphold the rights of the hire purchaser.[428] A drawback of this Act is that it only provides protection for a small number of transactions.[429] New areas arose that evaded the Act, which made it necessary for new legislation to address these shortcomings. The Credit Agreements Act[430] was promulgated and repealed the Hire Purchase Act.[431] The first Usury Act[432] influenced the later Usury Act,[433] through which abovementioned legislation regulated the industry for a quarter of a century.[434] Eventually, it was decided to regulate

[425] National Credit Act 34 of 2005.
[426] Consumer Protection Act 68 of 2008.
[427] Hire Purchase Act 36 of 1942.
[428] JM Otto & RL Otto *The National Credit Act Explained* (2015) 3.
[429] JM Otto & RL Otto *The National Credit Act Explained* (2015) 3.
[430] Credit Agreements Act 75 of 1980.
[431] JM Otto & RL Otto *The National Credit Act Explained* (2015) 3.
[432] Usury Act 37 of 1926.
[433] Usury Act 73 of 1968.
[434] JM & RL Otto *The National Credit Act Explained* (2015) 3.

the industry with one piece of legislation, namely the National Credit Act.[435] The genesis of the CPA[436] was the Draft Green Paper published by the Minister of Trade and Industry, which set the foundation for the formation of the CPA.[437]

5.3 The Consumer Protection Act and the National Credit Act: key provisions

It is important to begin with the Preamble to the National Credit Act, as it illustrates that the Act ensures a marketplace that does not prevent access to everyone to improve standards of consumer information. Another important aspect of the Preamble is that the Act promotes the establishment of the National Consumer Tribunal. The Preamble leads to Section 3, which is the purpose of the Act. A provision that stands out is section 3(1)(j), which provides for a harmonised system of debt restructuring, enforcement and judgment, thereby placing priority on the eventual satisfaction of consumer obligations under credit agreements.

Section 26 provides for the establishment of the Tribunal and its constitution, and the Tribunal has jurisdiction throughout South Africa.[438] The Tribunal is a juristic entity[439] that is a tribunal of record,[440] and exercises its functions within the parameters of the Act.[441] The Tribunal consists of a chairperson and not fewer than 10 other members appointed by the President on a full-time or part-time basis.[442] The Tribunal and its members act in accordance with the NCA[443] or the CPA[444] or both. The Tribunal may adjudicate in relation to any applications as prescribed by the aforementioned Acts.[445] The members of the Tribunal must have suitable qualifications and experience in economics, law, commerce, industry or

[435] National Credit Act 34 of 2005.
[436] Consumer Protection Act 68 of 2008.
[437] S Eiselen & T Naude *Commentary on the Consumer Protection Act* (2014) 18-20. See also T Naudé 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective' (2009) 126 *South African Law Journal* 505.
[438] Section 26(1)(a) of the National Credit Act 34 of 2005.
[439] Section 26 (1)(b) of the National Credit Act 34 of 2005.
[440] Section 26 (1)(c) of the National Credit Act 34 of 2005.
[441] Section 26(1)(d) of the National Credit Act 34 of 2005.
[442] Section 26(2) of the National Credit Act 34 of 2005.
[443] National Credit Act 34 of 2005.
[444] Consumer Protection Act 68 of 2008.
[445] Section 27(a)(i) of the National Credit Act 34 of 2005.

consumer affairs.[446] Each member may be appointed for a term of office of five years, but cannot be appointed for more than two consecutive terms.[447] The chairperson allocates three members to each application.[448] The Tribunal is financed by money derived from Parliament,[449] fees payable in terms of the Act,[450] income derived from the respective investments and deposit of surplus money,[451] and other money accruing from any source.[452] Parties may seek a consent order to resolve a dispute through dispute resolution by mediation, conciliation or arbitration.[453] The Tribunal must conduct its hearings in public in an inquisitorial manner;[454] as expeditious as possible;[455] as informally as possible;[456] and in accordance with the principle of natural justice.[457] A chairperson may assign a member to an application by a consumer or credit provider[458] or for consent orders.[459] A participant may appeal a decision to a full panel before the Tribunal.[460] An appeal may be referred to the High court.[461] Any order of the Tribunal is enforceable, executable and binding as if it was an order of the High Court.[462] In terms of the CPA, the National Consumer Commission may refer matters to the Tribunal.[463] One of the aims of the CPA is to promote responsible consumer obligations, which is important in relation to the National Credit Act to protect both consumers and creditors. [464]

[446] Section 28(2)(c) of the National Credit Act 34 of 2005.
[447] Section 29(1)-(2) of the National Credit Act 34 of 2005.
[448] Section 31(1)(b) of the National Credit Act 34 of 2005.
[449] Section 35(1)(a) of the National Credit Act 34 of 2005.
[450] Section 35(1)(b) of the National Credit Act 34 of 2005.
[451] Section 35(1)(c) of the National Credit Act 34 of 2005.
[452] Section 35(1)(d) of the National Credit Act 34 of 2005.
[453] Section 135(1)(b)(iii) of the National Credit Act 34 of 2005.
[454] Section 142 (1)(a) of the National Credit Act 34 of 2005.
[455] Section 142 (1)(b) of the National Credit Act 34 of 2005.
[456] Section 142 (1)(c) of the National Credit Act 34 of 2005.
[457] Section 142(1)(d) of National Credit Act 34 of 2005.
[458] Section 142(3)(a) of the National Credit Act 34 of 2005.
[459] Section 142(3)(b) of the National Credit Act 34 of 2005.
[460] Section 148(1) of the National Credit Act 34 of 2005.
[461] Section 148(2)(c) of the National Credit Act 34 of 2005.
[462] Section 152(1)(a) of the National Credit Act 34 of 2005.
[463] Section 75(1)(b) of the Consumer Protection Act 68 of 2008.
[464] Preamble, Consumer Protection Act 68 of 2008.

5.4 The NCT: regulating procedure

The rules of the NCT are quite comprehensive in that it contains 199 pages. Only 28 pages comprise rules, while the other pages are proforma forms to utilise for matters that are brought before the Tribunal. The rules are divided into five parts - Part A to E. One rule is that all proceedings are launched as application proceedings before the Tribunal. Leave to appeal a tribunal decision is applied for to the Tribunal. The rules are simplistic and relaxed to make the process as user-friendly as possible, thus enhancing access to justice.[465]

5.5 Deconstructing the NCT

The NCT is a tribunal that, according to legislation, is supposed to be inquisitorial, informal and expeditious in the resolution of disputes. Despite this, the rules of the Tribunal lend the proceedings and formalities to be conducted in a formal manner. The Tribunal meets its objective in that disputes are indeed resolved in an efficient manner.[466] The Tribunal, Commission and Regulator are all given the same status as the High Court decision. The Tribunal does not provide for the enforcement of the order as per the High Court.[467] The result is the applicant would still need to appear before the High Court for the decision to be made an order of the court. This means that the decision of the Tribunal has the same status in namesake only, and not in action or practice. A unified tribunal system addresses these shortcomings in that it provides for informal and simplified rules, and further provides for the tribunal system to possess the thrust of enforcement mechanisms.

5.6 Common objectives of tribunals

The common objectives of tribunals are important to illustrate uniformity, which makes it more susceptible to be converted into a unified tribunal system.

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[465] See also Y Mupangavanhu 'Analysis of dispute settlement under the Consumer Protection Act 68 of 2008' 2012 (15) 5 *Potchefstroom Electronic Law Journal* 320.

[466] http://www.thenct.org.za/mandate (31 March 2015).

[467] See MA Du Plessis 'Enforcement and execution shortcomings of consumer courts' (2010) 22 South African Mercantile Law Journal 517.See also MA du Plessis 'Access to justice outside the conventional mould: creating a model for alternative clinical legal training' (2007) Journal for Juridical Science 32(1):44.

5.6.1 Cost-effectiveness

An application to rescind the licence of a credit provider is not an expensive process. The consequences are saving consumers in millions of rand and from exploitation. In *NCR v Midwicket Trading 525 CC v t/a Butterfly Cash Loans*,[468] the application was to cancel the respondent's company as a credit provider and impose an administrative penalty so that it cannot conduct business. The respondent engaged in prohibited conduct. Hence, the licence to operate as a credit provider was cancelled and an administrative penalty was not imposed to deter it, because it was cancelled as a credit provider. This decision is important, as it illustrates the power of the Tribunal's decisions to take away the licence of credit providers to practise, which can create havoc on a public platform and hence it protects consumers from exploitation.

5.6.2 Speedy resolution of matters

Consumer disputes are resolved speedily and efficiently by the Tribunal. In *Hyundai Automotive SA (Pty) Ltd t/a Kia Motors Roodepoort v The NCC*,[469] the facts related to a compliance notice relating to a vehicle that was issued by the National Consumer Commission based on the version of the complainant without investigating it. The Tribunal cancelled the notice on the basis that there was no investigation and evidence to issue the compliance notice of prohibited conduct by the applicant. The cancellation was based on two grounds; firstly, that the vehicle panel was visually bubbled due to alleged defective paint. Secondly, that the fuel gauge did not work and that replacing the panel and attending to the fuel gauge did not make the vehicle inoperable or defective and unusable. This case is important, as compliance notices should not be delivered without proper investigations being conducted, especially regarding a defective vehicle. This case was efficiently and effectively disposed off within a shorter period than the court system.

[468] NCT/7962/2013/57(1).
[469] NCT/4734/2012/60(3) & 101(1).

5.6.3 Promotion of the rule of law

The Tribunal looks to case law in relation to the interpretation of the rules that govern the High Court, and the rules are also used for the Tribunal. In *BMW South Africa (Pty) Ltd v NCC & JSN Motors (Pty) Ltd*,[470] the application was a consolidation application and, in considering whether the Tribunal had jurisdiction to hear the application, case law was considered regarding consolidations, as follows:

> The Court in *Jacobs v Deetlefs Transport BK2 and Nel v Silicon Smelters J (Edms) Bpk en 'n Ander* held that the aim of consolidation as provided for in Rule 11 (Uniform Rules of Court) and joinder as provided for in Rule 13 (Uniform Rules of Court) is more or less the same, namely to adjudicate on issues that are substantially similar in one matter in order to avoid separate trials being held.[471]

In alignment with the rules of the Tribunal, it was concluded that it indeed had jurisdiction to hear the consolidation of the matters. It was ordered that the two applications be consolidated. These applications dealt with the same issues and the compliance notice was the same. It was convenient to be consolidated, whereas the third matter was not the same, as it was a compliance notice that arose from different issues, and it was ordered to be heard separately. This decision is important, as the rules of the High Court were considered and applied to consolidate the matters, together with the promotion of the rule of law.

5.6.4 Simplified procedures

In *National Credit Regulator v Comprehensive Financial Services Witbank*,[472] the facts of the matter dealt with a contravention by a credit provider in terms of the National Credit Act. The respondent failed to file an answering affidavit. The Tribunal made the decision to deregister the respondent as a credit provider because of the numerous contraventions in terms of the National Credit Act. The importance of this decision is

[470] NCT/2679/2011/101(1)(P); NCT/2807/2011/101(1)(P);NCT/2806/2011/101(1)(P).
[471] NCT/2679/2011/101(1)(P); NCT/2807/2011/101(1)(P);NCT/2806/2011/101(1)(P).
[472] NCT/13518/2014/57(1).

that, although the Tribunal has the power to relax the rules, it is irregular not to obtain the notice from the National Consumer Commission, when the matter is already before them and a referral notice must be given. This decision set out the parameters of the Tribunal and the importance of following due process. This decision illustrates the serious consequences of a credit provider not adhering to the National Credit Act in operating its business in relation to interest rates charged and signing off blank acknowledgements of debt.

5.6.5 Informality and flexibility

The Tribunal adopts an informal and flexible approach in the consideration of irregularities. In *AK Charles and GR Charles v ABSA Bank and Others*,[473] the application dealt with the reconsideration of the refusal of a variation of a debt rearrangement order. The one issue was whether it was *res judicata*. The Tribunal allowed the consideration of the application, as the prejudice caused outweighed any other aspect. The consent orders did not accompany the application and did not constitute *res judicata*, as the application was not proper in terms of considering it for the variation of the re-arrangement. Once the applicants had their papers in proper order, they could bring the variation order. This is an interesting decision, as it illustrates that prejudice is the factor that outweighs others in considering procedural irregularities.

5.7 Common features of tribunals

The common features of the tribunals demonstrate the need for a unified tribunal system due to the cohesion of features amongst the tribunals.

5.7.1 Individual representation

The parties are permitted to represent themselves.

[473] NCT/11206/2013/165(1) (P)..

5.7.2 Transparency

The decisions of the Tribunal are transparent.[474] In the decision of *M C Bouah Enterprises CC v Dynacon Global Trading t/a Go-Bezie Auto*,[475]

> The Tribunal has dealt with a number of similar matters where applications were made for leave to refer a dispute directly to the Tribunal in terms of section 75(1)(b). The Tribunal has consistently held that a notice of non-referral by the NCC must be attached to the application or it cannot be considered. The Tribunal certainly appreciates the dilemma faced by complainants and understands the motivation behind the applications to the Tribunal. However, the Tribunal serves a judicial function in terms of the Act and therefore cannot serve as a regulator or as a general alternative dispute forum (if according to the complaint who lodged the complaint) the NCC does respond to complaints lodged with it (paragraph 35).
>
> It is clear that the notice of non-referral issued by the NCC must be attached to the application in terms of section 75(1)(b). This is a requirement in terms of the Act and the Rules. If the notice is not attached then the Registrar of the Tribunal should issue a notice of incomplete filing to the parties concerned in accordance with Rule 8. If the Notice of non-referral is not attached within the time specified by the Registrar then the application lapses in accordance with Rule 8(2) (paragraph 36).

The application was dismissed. It is apparent that, if the procedural requirements are not satisfied, then the application will be dismissed. It is also important to note the importance that the Tribunal placed upon the judicial function that it fulfils.

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[474] In *NCR v Rustmar* CC NCT/8615/2013/57(1), the matter dealt with an application to interdict the respondent from engaging in prohibited conduct as set out by the National Credit Act. The National Credit Regulator applied for the relief that the respondent refund money arising from the prohibited conduct. This amount would be calculated by the auditor conducting an independent investigation confirming the amount. From the evidence given, the relief was granted as sought. This decision is important, as it illustrates the effect of granting an interdict to prevent prohibited conduct and to protect consumers from unscrupulous creditors. The Tribunal promotes transparency.

[475] NCT/7936/2013/75(1)(b).

5.7.3 Judicial review

The decisions of the Tribunal are subject to judicial review by the High Court, which is a court of third instance, as the matter is heard by the national consumer commission or the national credit regulator before being heard at the Tribunal.

5.7.4 Lack of enforcement mechanisms

When a party fails to adhere to an order of the Tribunal, the other party seeking enforcement turns to the High Court for enforcement.

5.7.5 The High Court Rules are the default rules for tribunals

The High Court rules apply as default rules to the Tribunal. *Willem HW Makkink v Accordian Investments (Pty) Ltd*[476] is an application for default judgment before the Tribunal in terms of the CPA. The facts are that there were alleged defects to a vehicle, which formed the basis of default judgment in terms of the CPA. The CPA had not come into effect. Purely on that basis the Tribunal did not have jurisdiction to deliberate upon the matter, and it was accordingly dismissed. In relation to the procedural requirements of granting default judgment, it is necessary to inquire whether the application was served accordingly within the time frame and that service was proper. The evidence presented in this case was that it was proper in terms of the law. This matter failed in two respects; firstly, service was not properly executed in terms of time limits, and secondly, there was no application for condonation of same. Even if the Tribunal used a flexible approach regarding the condonation application, the second hurdle was too serious to overcome regarding the CPA not being applicable as the legislation had not come into effect in 2010 and the Tribunal had no jurisdiction. The Act could not apply retroactively, since the CPA was not effective when the vehicle defects arose.

[476] NCT/8473/2013/75(1)(b).

5.7.6 Specific grounds of jurisdiction to hear matters

The Tribunal is a creature of statute and its jurisdiction is prescribed. In the matter of *Nayyara Distribution Enterprise CC v Earlyworks 266 (Pty) (Ltd) t/a Gloria Jeans Coffee SA*,[477] the dispute dealt with interim relief. However, since the matter was already before the National Consumer Commission, the NCT did not have any jurisdiction on two grounds. Firstly, that the Commission did not allow the Tribunal to hear the interim relief and, secondly, that the contract between the parties pre-dated the CPA.[478] This case illustrates the reasons why the Tribunal did not have jurisdiction in this matter, as the application of the Act does not apply retroactively.[479]

5.8 Concluding observations on the NCT

The NCT was operating in 2012,six years ago with fewer than thirty cases, and now it has grown to a few thousand cases. It is apparent from the increase in the cases that the budget of the Tribunal has been directly affected. From the statistics for the six years, there is an even split in that for three years it operated on a surplus and for three years there was a deficit.[480] The Tribunal disposes of its cases expeditiously, but there are still shortcomings in relation to the operation of the Tribunal. It is important that statistics must be read from a holistic view of the Tribunal in order to further enhance its efficiency and operation. The establishment of a unified tribunal system will address the shortcomings and further

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[477] NCT/4450//2012/114)(1)(P)CPA.

[478] *Nayyara Distribution Enterprise CC v Earlyworks 266 (Pty) Ltd t/a Gloria Jeans Coffees SA* NCT/4450//2012/114)(1)(P)CPA 8.

[479] *Muzorewa Ratshikuni v First Rand Bank Limited t/a Audi Financial Services* a division of Wesbank: in this matter there were two points in limine; firstly, that the matter was heard before a competent court, that is the High Court, and the dispute was pronounced upon, hence a special plea on the basis of *res judicata* was filed. Secondly, there was no attempt to resolve the matter through alternative dispute resolution before it was brought to the Tribunal. From a procedural aspect, the application was brought before the court regarding the dispute of an instalment for a vehicle purchased on credit, and the application was brought out of time and there was no condonation application for the late filing. The Tribunal considered all these aspects and made the ruling that the application be dismissed. It dealt with the point *in limine* of *res judicata* that it did not have the jurisdiction to determine that matter, as there was already a settlement made an order of court on the same dispute, and secondly, the applicant made no attempt to resolve the dispute through alternative dispute resolution, and on that basis the application for condonation was refused. This case is important, as it pronounced on the aspect of the Tribunal having no jurisdiction on the basis of *res judicata*. It is apparent that the Court respects the process of alternative dispute resolution processes, especially when the parties agree to this method to resolve the dispute.

[480] See Annexure.

enhance the efficiency and effectiveness of the Tribunal, so that it will be able to hear and dispose of more cases.

6. Water Tribunal

6.1 Overview

The Water Tribunal was established in 1998. It aimed to ensure the promotion of water usage, licence and catchment rights. The decisions of the Water Tribunal possess the same status as the those of the Magistrates' Court. The Water Tribunal's decisions are taken on appeal to the High Court. The Water Tribunal is not immune from shortcomings, akin to the abovementioned tribunals. One of the shortcomings was due to the lack of experience and knowledge of the previous chairperson of the Tribunal, which created establishment issues.[481] This meant that the Tribunal was not operating due to the executive's failure to act. The analysis of the Water Tribunal aims to expose the procedure, mode of operation, its functions and the shortcomings of the Tribunal, which will be addressed through the establishment of a unified tribunal system.

6.2 The historical significance of the Water Tribunal

At the time when the Water Tribunal was formed in 1998 the country had been a democracy for four years. The Tribunal was formed to address the apartheid obstacles of preventing access to water as a resource for all people in terms of granting permits for irrigation farming and commercial use. Water is regarded as a sacred source that all South Africans must have access to for use and enjoyment without prejudice.[482] The Water Tribunal aims to regulate the use and enjoyment of and access to water for commercial enjoyment. It is important that the government recognises and ensures that water belongs to the nation and is there for the benefit of all.[483]

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[481] N. Olivier & N. Olivier 'Non-performance of constitutional obligations and the demise of the water tribunal-access to justice denied?' (2014) *Tydskrif vir Suid-Afrikaanse Reg* 163.
[482] http://www.dwa.gov.za/documents/publications/NWAguide.pdf (accessed 31 March 2015)
[483] http://www.dwa.gov.za/documents/publications/NWAguide.pdf (accessed 31 March 2015)

6.3 The Water Act: key provisions

It is necessary to discuss the following provisions of the National Water Act,[484] namely the Preamble, sections 146 to 150 and schedule 6. The Preamble aims to accomplish a few aspects and it is important in that it aims to redress past injustices, when water rights usages were not accessible to all people of South Africa.[485] The Water Tribunal is an independent body[486] that has jurisdiction throughout the Republic.[487] The Tribunal may conduct hearings throughout the Republic.[488] The Tribunal consists of a chairperson, a deputy chairperson and any additional members the Minister deems necessary.[489] The members of the Tribunal must have knowledge of law, engineering, water resource management or other, related fields.[490] The members of the Tribunal, including the chairperson and deputy chairperson, are appointed by the Minister on the recommendation of the Judicial Service Commission and the Water Research Commission.[491] In relation to matters of the Tribunal, neither the Tribunal, chairperson or deputy chairperson or member is liable for an act or omission committed in good faith while performing a function in terms of the Act.[492] The appeals that are heard by the Tribunal are governed by section 148 and the rules that govern the procedure are determined by the chairperson.[493] Appeals from the Water Tribunal are lodged at the High Court,[494] and the appeal is prosecuted as if the appeal was from a Magistrates' Court to a High Court.[495] The Minister may direct from time to time that the parties mediate or negotiate the dispute.[496] Schedule 6 to the Act deals with the regulation of the Water Tribunal members. Members of the Tribunal cannot be appointed

[484] National Water Act 36 of 1998
[485] Preamble, National Water Act 36 of 1998
[486] Section 146(2), National Water Act 36 of 1998
[487] Section 146 (2)(a) National Water Act 36 of 1998
[488] Section 146 (2)(b) National Water Act 36 of 1998
[489] Section 146 (3) National Water Act 36 of 1998
[490] Section 146(4) National Water Act 36 of 1998
[491] Section 146 (5) National Water Act 36 of 1998
[492] Section 147(4) National Water Act 36 of 1998.
[493] Section 148(5)(a) National Water Act 36 of 1998.
[494] Section 149(1)(a) National Water Act 36 of 1998.
[495] Section 149 (4) National Water Act 36 of 1998.
[496] Section 150(1) National Water Act 36 of 1998.

for a term of more than four years.[497] The Tribunal must at the request of any party furnish the parties with written reasons for its decision.[498]

6.4 The Water Tribunal: regulating procedure

The rules of the Water Tribunal were promulgated in 2005.[499] The rules of the Tribunal are short and simplified. The rules of the Water Tribunal set out the appeal procedure, the operating functions of the Tribunal and the daily functioning of the Tribunal.

6.5 Deconstructing the Water Tribunal

The Water Tribunal operates in an informal manner. It hears a few cases per year, which illustrates that the Tribunal is not in demand, nor is it a frequent choice for litigants. The Water Tribunal was not in operation because the Minister had not appointed the necessary staff for the hearing of matters, namely a chairperson, deputy chairperson and members. Subsequently, in 2015, the Minister appointed the requisite staff and the Tribunal is in operation and once again hearing matters.[500] The decisions of the Water Tribunal are equivalent to a decision of the Magistrates' Court. The Tribunal does not possess enforcement mechanisms and would rely on the court to ensure the enforcement of decisions through application proceedings to make the decisions an order of court. A unified tribunal system will ensure that the staff are timeously employed so that the unified tribunal system is always in operation. This further ensures the ability of the tribunal system to ensure that the decisions are enforced without reliance on the court.

6.6 Common objectives of tribunals

The common objectives of the tribunals in relation to the promotion of a unified tribunal system are as follows.

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[497] Schedule 6, item 1(1) to the National Water Act 36 of 1998.
[498] Schedule 6, item 9(2) to the National Water Act 36 of 1998.
[499] Government Gazette No 28060 of 23 September 2005.
[500] E Couzens, D Maduramuthu, A Bellengere *Water Security and Judicial and Administrative Confusion in South Africa : The Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng* 2015 ZAGPPHC 211 (17 April 2015)' 20(1) *Potchefstroom Electronic Law Journal* 19-20 http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812017000100010 (accessed 31 March 2015).

6.6.1 Cost-effectiveness

The Water Tribunal resolves matters as cost-effectively as possible. *Du Plooy PJ v The Director-General Department Water Affairs and Forestry*[501] was an appeal application. The facts related to a licence for a stream flow-reduction activity. The appeal succeeded. The application for a licence for a stream flow-reduction activity was granted. This case illustrates the types of matters that the Tribunal hears and that it grants licences expeditiously, which saves time and money.

6.6.2 Speedy resolution of matters

Escarpment Environment Protection Group and Lankloof Environmental Committee v The Department of Water and Environmental Affairs and Werm Mining (Pty) Ltd[502] dealt with a condonation application. The application was granted because good cause was shown. The appeal was heard and dismissed, as the appellants did not have *locus standi* to lodge the appeal. This case is important because it illustrates that, irrespective of whether good cause[503] is shown, appeal is irrelevant if a party does not have the requisite *locus standi* to lodge the appeal.[504] The Tribunal disposes of matters with the expediency that it deserves. If a party does not have standing to appear before the Tribunal, the matter is dismissed.

6.6.3 Promotion of the rule of law

The rule of law relating to condonation is that it must be a substantive application that adequately addresses why condonation should be granted. *AJ Grobbelaar v The Department of Water Affairs*[505] was an appeal. The facts related to an application for a licence to extract

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[501] WT/3DI.

[502] Case No: 25/11/2009.

[503] In *De Mona Eiendomme CC v The Department of Water Affairs*, a condonation application was not granted because sufficient good cause was not proven. This case illustrates that, substantively, condonation must be proven otherwise the application will be denied.

[504] *The Federation for Sustainable Environment v The Department of Water Affairs; Chemwes (Pty) Ltd; Mine Waste Solution (Pty) Ltd and First Uranium (Pty) Ltd* was an appeal application and the appellant had no *locus standi* to present the appeal. The Tribunal noted the Tribunal's function and limitations. The appeal application was dismissed on the basis that, once again, the appellant had no basis to appear before the tribunal in lodging an appeal.

[505] WT18/08/2010.

water on a farm. The appellant failed to illustrate the reasons for the appeal being lodged late and failed to illustrate prospects for success, and accordingly the appeal failed.[506] This case is important, because it illustrated that condonation has to be satisfactorily addressed regarding late applications, together with proving the merits of the matter. The Water Tribunal promotes the rule of law.

6.6.4 Simplified procedures

The procedures of the Tribunal are simplified, which results in matters being dealt with quicker. *Dries Alberts v The Director General: Department of Water Affairs and Forestry*[507] was an appeal. The facts dealt with an application regarding the unlawful construction of a jetty without following the proper procedures in terms of the National Water Act. The appeal failed, as the jetty was constructed after 1998 and constituted a water use, and it was ordered to be removed. This case illustrates that the Act applies retrospectively to matters.

6.6.5 Informality and flexibility

The Tribunal operates in an informal and flexible manner. In *Goede Wellington Boerdery (Pty) Ltd v Makhanya NO & Another*,[508] the applicant sought an order in terms of Section 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 to review and set aside the decision of the Tribunal regarding the refusal of the water-use licence.[509] The Court considered the aspect of judicial deference in considering the role of administrative law.[510] The Court considered that the Chairperson was not adequately competent to make the decision on the water-use licence and accordingly made a cost order in the *nomino officio* capacity of costs against both the Minister and the Chairperson of the Tribunal. Consequent to this finding,

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[506] *AJ Grobbelaar v The Department of Water Affairs* WT18/08/2010 4: 'According to the Tribunal the following should be addressed in determining whether there is a good reason to grant condonation for the late lodging of the appeal; the degree of lateness; the explanation for the delay; the prospects of success in the matter; and whether there is prejudice to the other parties to the matter. (See for example *Melane v Santam Insurance Co Ltd* 1962 4 SA 531 (A)).'

[507] WT10/08/2005.

[508] [2011] JOL 27640 (GNP).

[509] [2011] JOL 27640 (GNP).

[510] C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484 501-502 .

no Chairperson was willing to hold this post, and which resulted in the Water Tribunal being inoperative for a few years until 2015.

6.7 Common features of tribunals

The common features explains the reasons for a harmonised, unified tribunal system.

6.7.1 Individual representation

The Tribunal provides for individual representation, as it has a more relaxed approach than courts. The aim of the Tribunal is to enhance access to justice to avoid the delays of the court system.

6.7.2 Transparency

The Water Tribunal operates its daily functions within an open and fair forum that is transparent to the public. *AFC Cloete v Director-General Department of Water Affairs and Forestry*[511] was an appeal. The facts dealt with an application for a stream-flow reduction activity licence. The chairperson considered administrative law in making a decision and, considering the circumstances of the relevant situation, accordingly granted the licence. This decision illustrates the reference to administrative law when deliberating upon decisions, as the Water Tribunal is an administrative body.

6.7.3 Judicial review

The Water Tribunal decisions are appealed to the High Court.

6.7.4 Lack of enforcement mechanisms

The Water Tribunal decisions are subject to the High Court in relation to enforcement mechanisms.

6.7.5 High Court rules are the default rules for the tribunals

The Water Tribunal uses the rules of court as the default position in relation to where there is a gap in the rules, as prescribed by the Tribunal.

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[511] WT2/C1.

6.7.6 Specific grounds of jurisdiction to hear matters

An example of the specific jurisdiction of the Tribunal is *AM Marais Boerdery Trust v Department of Water Affairs*,[512] which was an appeal. The issue was the water-use licence for which there was an application. The appellant applied for the permanent transfer of water rights. The appeal succeeded and the licence was granted. This decision illustrates that the Water Tribunal hears appeals from the Department of Water Affairs.[513] In this instance, the Tribunal was a forum of second instance.

6.8 Concluding observations on the Water Tribunal

The Water Tribunal has the same shortcomings as the tribunals in the South African study, as mentioned previously. The enforcement of orders is a challenge, as the parties must go to court on application proceedings to ensure the orders are enforceable. The minister failed to appoint the members of the Tribunal timeously, which created inactivity and made it impossible for the Tribunal to operate for a few years, until political pressure ensured an operating tribunal in 2015. The Tribunal is not popular based on case numbers, in that very few matters are heard. A handful of matters does not justify its operations. A unified tribunal system will ensure that the system is more user friendly, attractive for litigants, and that matters are disposed of as expeditiously as possible. A unified tribunal system will ensure internal enforcement mechanisms without approaching the court for enforcement, thus overcomes further delays, as justice delayed is justice denied.

7. Concluding observations on tribunals reviewed in this study

The Tribunals forming part of this study are not without their problems. The common trend, with the exception of the case load of the National Consumer Tribunal, is that all the other tribunals have a small case load. This means that the tribunals are not being used enough by

[512] WT18/01/2010.

[513] *Brown Family Trust v Department of Water Affairs* was an appeal application for a water-use licence; a settlement was entered into between the parties that a BEE exemption certificate would be submitted in consideration of the licence to redress past racial discrimination. This case illustrates that the tribunal ensures it upholds the aims of the preamble of the Act in deliberating upon matters.

the litigants to disputes. The more matters are heard before tribunals will ensure moving case load traffic away from the courts. Enforcement mechanisms are again a common shortcoming of all the tribunals in this study, in that once the Tribunal makes a decision, the decision must be made an order of the court (appear before the court on application proceedings) to render it enforceable. A unified tribunal system ensures the internal mechanism of enforcement, so that the parties do not have to go to court to enforce the decision should the parties not perform. ADR is not utilised to its full potential by the tribunals in this study. The recommendations will address that people can trust the system and not have to approach the High Court for enforcement, which will lead to an increased caseload. There are other aspects that will encourage an increased caseload, such as the adoption of ADR techniques and a unified tribunal will coalesce resources that will ensure the effective operation of the tribunal. A unified tribunal system will incorporate ADR as an option for early resolution for every dispute. This chapter has aimed to illustrate the shortcomings of the tribunals forming the South African study and the manner in which they can be addressed through a unified tribunal system. The next chapter plays a vital role in unpacking a unified tribunal system to elaborate the study, along with a comparison with foreign tribunal systems, which will ensure the enhancement and effectiveness of the tribunal system in South Africa. It is important to illustrate through the tables below that the tribunals in this study have a few commonalities in terms of objectives and features, which makes it possible to create a harmonised, unified tribunal system.

Companies Tribunal, NCT, Water Tribunal, Competition Tribunal, Rental Housing Tribunal
Objectives:
Cost-effectiveness: The costs of the tribunals are low, as each tribunal operates on a budget that is allocated yearly.[514] The tribunals do not require the presence of legal counsel, although for complex matters that deal with the interpretation of legislation it is best to have legal counsel to argue the matter. The procedures of the tribunals are flexible and relaxed, which is more conducive for people conducting their own matters without legal

[514] See Annexure in particular the tables that illustrate the budget that was consumed relating to the budget deficit and surplus across the tribunals.

knowledge, provided it is straightforward *ex parte* matters. Furthermore, the tribunals deal with their caseload as expeditiously as possible, eliminating arduous backlogs.[515]

Speedy resolution: Matters are disposed of expeditiously by the members of the tribunals to ensure that there are no backlogs. Through case law has illustrated the speedy resolution in the matter that disputes are resolved quickly.

Promotion of the rule of law: Case law is promoted and adhered to in the decisions/rulings of the tribunals. The principles of the law in relation, for example, to rescissions are methodically adhered to. The tribunals do not create their own law, as they are a creature of statute.

Simplified procedures: The procedures are simplified so that the tribunals are user friendly and approachable by people.

Informality and flexibility: The members of the tribunals adopt an informal and flexible approach in the resolution of disputes.

Features:

Individual representation: The tribunals do not require legal representation or legal counsel, and individual representation is acceptable.

Transparency: The tribunals operate in a transparent manner. The legislation that governs the tribunals promotes transparency.

Judicial review: The tribunals' decisions/rulings are subject to judicial review.

Lack of enforcement mechanisms: The tribunals do not have enforcement mechanisms to ensure that there is compliance with the rulings/decisions.

High Court rules are the default rules: The rules are short and comprehensive, so the High Court rules are the default rules for the governance of procedures when the rules governing the procedures are inadequate.

[515] See Annexure in particular the tables and the interpretation relating to the of the caseload numbers of matters that are heard on a yearly basis.

Specific grounds of jurisdiction: There are specific grounds of jurisdiction that a tribunal may hear a matter in terms of legislation, as the tribunals does not have inherent jurisdiction like the High Court to hear matters.
Deficiencies: The tribunals do not have the power of enforcement of their decisions/rulings. The tribunals operate in a disconnected manner from each other. The tribunals do not have a unified set of rules. They do not function from a unified budget, with each tribunal operating from its own budget. The tribunals operate from different procedures in terms of hearing matters.
Remedies: A unified, harmonised tribunal system will make provision for the enforcement of its decisions without approaching the High Court. A unified tribunal system will ensure an amalgamated budget that pools its resources, ensuring less financial constraints. A unified, harmonised tribunal system will ensures a unified set of rules that operates for all tribunals. A unified, harmonised tribunal system ensures uniform procedures for resolving disputes.

Part 4: A Comparative Study

Chapter 5: Foreign tribunal systems

1. Introducing foreign tribunal systems

The aim of this comparative study is to illustrate effective and efficient tribunal systems. This chapter examines foreign tribunal systems, which are unified, tiered hierarchies that operate in a harmonious manner, similar to the proposed harmonised tribunal system for South Africa. This chapter will further discuss the relevance of each foreign tribunal system to the proposed South African tribunal system. The countries chosen each has its significance in relation to a unified South African tribunal system, which will be conveyed in this chapter. The United Kingdom was selected because of the influence of English law in the South African context. This was not the sole reason, but merely a basis of interconnection between the two systems. The United Kingdom has experimented with its tribunal system since the eighteenth century, and it is an appropriate tribunal system to seek guidance from regarding the enhancement of access to justice for the proposed unified tribunal system in South Africa. Second, France has a tribunal model that works efficiently and expeditiously, and the judges that preside at the Conseil d'Etat receive specialist training to adjudicate tribunal matters. This is a useful system and this specialist training is relevant to enhance the South African tribunal system. Third, the Australian tribunal system's structure is constantly evolving, and its system will assist the reform of the current South African tribunal system in relation to an improved structure and operation. Together, these three foreign systems are representative of an ideal tribunal system that operates harmoniously.

2. The French tribunal system

2.1 Overview

The French Constitution does not specifically provide for administrative tribunals; to allow for such, the Constitution will have to be interpreted in a broader context.[516] The Conseil

[516] S Boyron 'People administering justice' in J Bell; S Boyron & S Whittaker (eds) *Principles of French law* (1998) 55. See also GA Bermann & E Picard 'Administrative law' in GA Bermann & E Picard (eds) Introduction to French law (2008) 92-94.

d'État is translated as the Council of State of Administration,[517] and is known as the 'spinal cord' of the whole tribunal system in France that has the dual role of advising government as well as arbitrating upon disputes of executive power.[518] The Conseil d'État is the guardian of fundamental rights and procedures.[519] This tribunal is staffed by experts,[520] administrators and judges, and deals with the adjudication of administrative law.[521] The administrative tribunals in France are known for their impartiality and independence, despite the conflicting dual role that they play.[522] The Council became the body that was in charge of the administrative courts and administrative tribunals, which was part of the executive tier and not the judicial branch.[523] The *tribunal de cassation* was established to prevent judicial abuse by reviewing judicial interpretation and the application of the laws for criminal and civil cases.[524] France has influenced the UK and the USA in the improvement of their administrative tribunals. The French model has also been adopted in 15 member states of the European Union. [525] Thailand and China have also developed models that exactly reflect the Conseil d'État.[526] The adoption of the model across many countries illustrates the success of the French administrative tribunal system.[527]

2.2 History of the tribunal system

In France, on 4 October 1958, the Constitution of the Fifth Republic allowed for the establishment of the Constitutional Council.[528] The Constitutional Council had powers to

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[517] JM Sauve 'Judging the administration of France: Changes ahead?' *Public Law* (2008) 531
[518] J Boughey 'Administrative law: The next frontier for comparative law' 62(1) *International & Comparative Law Quarterly* (2013) 60.
[519] J Bell 'What is the function of the Conseil d'État in the preparation of legislation? 49(3) *International & Comparative Law Quarterly* (2000) 665.
[520] R Errera 'Recent decisions of the Conseil d'État: Article 6.1 ECHR-scope' *Public Law* (2000) 144
[521] J Boughey 'Administrative law: The next frontier for comparative law' 62(1) *International & Comparative Law Quarterly* (2013) 60.
[522] J Boughey 'Administrative law: The next frontier for comparative law' 62(1) *International & Comparative Law Quarterly* (2013) 60.
[523] JH Merryman 'French deviation' 44 *American Journal of Comparative Law* (1996) 111.
[524] JH Merryman 'French deviation' 44 *American Journal of Comparative Law* (1996) 112.
[525] Conseil d'État *The administrative justice system: An overview* www.conseil-etat.fr/content/download/2078/6262/version/1/file/plaquette_ja_english.pdf (accessed 31 March 2015)
[526] Conseil d'État *The administrative justice system: An overview* www.conseil-etat.fr/content/download/2078/6262/version/1/file/plaquette_ja_english.pdf (accessed 31 March 2015)
[527] JM Galabert 'The Influence of the Conseil d'Etat outside France' *International & Comparative Law Quarterly* (2000) 700 at 700.
[528] Constitution, Articles 58 to 63.

determine the legislation adopted or submitted for review to the Council by Parliament, which included rigorous procedural limitations[529] being in accordance with the 'conformity' of the Constitution.[530] 'The French courts are, then, of two kinds: the ordinary or judicial courts and administrative tribunals.'[531] If the tribunals were not subject to review, the tribunals would be placed in the same class of courts, which is not the position.[532] The Conseil d'État was created by Napoleon in 1799 as a privy council, after which the administrative system of tribunals developed.[533] 'The dual court system has worked as satisfactorily as it has, largely because of an absence of political meddling.'[534] Tribunals and court systems operate harmoniously without interference from political leaders.

2.3 Operation of the tribunal system

The Code of Administrative Justice, article one,[535] provides that the Code governs the Council of the State, the administrative tribunals and the administrative courts of appeal. Article two[536] provides that the judgments are rendered in the name of the French people. Both parties are represented by legal counsel,[537] and the hearing is public. A consultant judge is appointed to deliberate the dispute and write an opinion.[538] The judges must give reasons for their judgments.[539] The judgments are rendered public and the judges names are published with the judgments.[540] The judgments are enforceable.[541] Should the administrative tribunal or the administrative appeal court be presented with a new legal issue that is difficult, then the matter may be referred to the Council of the State to resolve

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[529] JE Beardsley 'The constitutional council and constitutional liberties in France' (1972) 20(3) *American Society of Comparative Law* 431.
[530] Constitution, Article 61.
[531] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 366-367.
[532] MB Rosenberry 'Administrative law and the constitution' (1929) 23(1) *The American Political Science Review* 41.
[533] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 380.
[534] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 386.
[535] Article L1 of the Code of Administrative Justice.
[536] Article L2 of the Code of Administrative Justice
[537] Article L5 and Article L6 of the Code of Administrative Justice.
[538] Article L7 of the Code of Administrative Justice.
[539] Article L9 of the Code of Administrative Justice.
[540] Article L10 of the Code of Administrative Justice.
[541] Article L11 of the Code of Administrative Justice.

within a three-month period.[542] The head of the administrative tribunals and appeal tribunal courts may appoint a person to administer the conciliation processes, subject to the agreement of the parties.[543] Each administrative appeal court consists of chambers.[544] In the administrative tribunals, judges are appointed from the ordinary courts.[545] The members of the administrative tribunals and administrative appeal courts and the judges are divided into the following grades: president, senior judge and judge.[546] The Superior Council of Administrative Tribunals and the administrative appeal court are headed by the Vice-President of the Superior Council.[547] The enforcement of decisions lies with the Court of Appeal or the Superior Council.[548]

2.4 Jurisdiction

In France, there are two separate jurisdictions for ordinary courts (civil and criminal), namely the Cour de Cassation, which is a Supreme Court, and for administrative courts and tribunals there is the Conseil d'État, which is also its own Supreme Court.[549] The Conseil d'État has jurisdiction in relation to whether the administration has taken decisions in compliance with the law,[550] namely that they must relate to the individual, impersonal, collective and general.[551] The Conseil d'État has wide jurisdiction and ultimately aims to protect 'citizens from abuses or errors made by the administration by deciding on the following issues':[552]

> Building permits, tax rates, GMO regulations, or orders to leave the French territory … all acts by the administration may be challenged by citizens. 42 administrative tribunals, 8

[542] Article L113-1 of the Code of Administrative Justice.
[543] Article L211-4 of the Code of Administrative Justice.
[544] Article L221-3 of the Code of Administrative Justice.
[545] Article L223-1 of the Code of Administrative Justice.
[546] Article L231-2 of the Code of Administrative Justice.
[547] Article L232-2 of the Code of Administrative Justice.
[548] Article L911-4 of the Code of Administrative Justice.
[549] MP Frydman 'Administrative justice in France' 2 11th paper presented at AIJA Tribunals Conference in Association with the Council of Australasian Tribunals 5-6 June 2008 Watermark Hotel & Spa, Surfers Paradise, Queensland http://www.aija.org.au/Tribs08/Frydman.pdf (accessed 31 March 2015).
[550] H Cohen 'France: The Conseil d'État: Continuing convergence with the Court of Justice' (1991) 16(2) *European Law Review* 144.
[551] H Cohen 'France: the Conseil d'État: Continuing convergence with the Court of Justice' (1991) 16(2) *European Law Review* 144.
[552] Conseil D'État *The administrative justice system: An overview* www.conseil-etat.fr/content/download/2078/6262/version/1/file/plaquette_ja_english.pdf (accessed 31 March 2015)

> administrative courts of appeal and the French Conseil d'État rule on disputes between individuals and public authorities (the State, local authorities, independent administrative authorities and public institutions.[553]

The jurisdiction of the administrative tribunals is as follows in relation to the national and local authorities,[554] and 'extends to any subject matter brought before them',[555] but not limited to the following list:

- Public hospitals
- Civil service
- Urban planning
- Taxation
- Environmental protection
- Public health
- Economic control

The jurisdiction list is not limited to these aspects, as the administrative jurisdiction comprises of rights between citizens and the public authorities.[556] The Conflicts Court acts 'as the arbiter of jurisdictional disputes between the two court systems'.[557] It is:

> one of the strongest branches in France. Yet it is almost never heard of outside professional circles; it hears fewer cases than any other court (though it has existed since 1848), it decided no case on the merits until 1933 and even now only rarely does so, and it is absolutely prohibited from arriving at an

[553] Conseil D'État *The administrative justice system: An overview* www.conseil-etat.fr/content/download/2078/6262/version/1/file/plaquette_ja_english.pdf (accessed 31 March 2015).
[554] Conseil d'État *The Conseil d'État in a few words* http://english.conseil-etat.fr/content/download/32954/285585/version/1/file/CE_EnBrefEnglish.pdf (Accessed 2 August 2016) 3
[555] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 379.
[556] Conseil d'État *The Conseil d'État in a few words* http://english.conseil-etat.fr/content/download/32954/285585/version/1/file/CE_EnBrefEnglish.pdf (accessed 2 August 2016) 3
[557] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 367.

> independent interpretation of the law governing the merits of a case. Its sole purpose is to keep the two judicial systems from trenching on each other's territory.[558]

The decisions of the Conflicts Court are not subject to review or appeal.[559] There is a list of specialised administrative tribunals and specialised courts in France, which are:[560]

- Court of Auditors
- Budget and Finance Disciplinary Court
- Central Commission of Social Aid
- Supreme Judicial Council
- National Court of Asylum

The particular abovementioned grouping does not illustrate a distinction between the 'specialised administrative courts and tribunal', but rather is a special category in its entirety. The Justice Ministry manages the resources for the operation of the justice system, including the operation of tribunals and the hierarchical administrative review of the decisions to the appeals court and the Conseil d'État.[561]

2.5 Rules of Procedure

Article 6.1 of the European Convention on Human Rights of 1950 applies to tribunals in that they must make decisions in an impartial and public manner. The Conseil d'État applied this

[558] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 382.
[559] GL Kock 'The machinery of law administration in France' (1959-1960) 108 *University of Pennsylvania Law Review* 384.
[560] Conseil d'État *The administrative justice system: An overview* www.conseil-etat.fr/content/download/2078/6262/version/1/file/plaquette_ja_english.pdf (accessed 31 March 2015).
[561] French Ministry of Foreign Affairs 'The French justice system' (2007) 3-4 http://www.ambafrance-us.org/IMG/pdf/Justice_ag.pdf (accessed 31 March 2015)

procedure, and the fact that experts from a profession are used to deliberate upon a matter strengthens the impartiality aspect of the tribunal to ensure accuracy and fairness.[562]

The Conseil d'État was formed as a result of the French revolution and plays a dual duty of a consultative and judicial role. The role of consultation deals with the review of draft legislation. The Conseil d'État is divided into five sections: the first four sections deal with consultation chores and the fifth section, namely the litigation division, deals with the hearing of administrative action, which is the judicial function of the tribunal.

> The Conseil d'État arose in the aftermath of the French Revolution and performs both a consultative and a judicial role. Consultation typically entails the required review of draft laws that the government wishes to introduce, either as statutory law for adoption by the national assembly or as administrative regulations that will become binding upon promulgation. Four sections of the Conseil d'État, organised by subject matter, handle these consultative chores. A fifth section, the so called Litigation Division, hears judicial challenges to administrative action throughout the nation. It does so, either in the first instance, or upon review of a lower tribunal.[563]

The procedure for the Conseil d'État to hear matters begins with the application for review. The tribunal will allocate the matter to a judge reporter to investigate the legal and factual issues. The investigation may require additional information, such as from the government ministry, inspection *in loco* of expert testimony. The plaintiff is legally represented and, throughout the investigative process, can comment on the evidence. However, the proceedings are mainly based on the written pleadings rather than oral submissions.

> French administrative procedure begins with the submission of a petition for review. Assuming its timelines, the tribunal will assign the file to a judge reporter who will conduct an investigation of the relevant legal and factual issues. The investigation (instruction) may involve a request for information to the government ministry, as well as expert testimony and site visits. The plaintiff normally has counsel, and a right to comment on the evidence

[562] R Errera 'Recent decisions of the Conseil d'État: Article 6.1 ECHR-scope' *Public Law* (2000) 144-145. See also E Errera 'Art 6(1) ECHR - right to an independent and impartial tribunal - impartiality examined separately - composition of tribunal' (2003) *Public Law* 353; the composition of the tribunal was held to be lawful.
[563] JE Pfander 'Government accountability in Europe: A comparative assessment' (2003) 35 *George Washington International Law Review* 621.

adduced through the investigative process, but the proceedings depends heavily on written, rather than oral, submissions.[564]

Once the investigation is completed, the case goes to an official 'who opines on the proper legal disposition of the matter'. Thereafter the case goes to the Litigation Department for 'deliberation and judgment'.[565] The Conseil d'État issues judgment without dissenting opinions.[566] The President of the Tribunal may appoint a single judge to preside in a matter before the *Tribunal de Grande* if the matter is not complex and the judge's experience would allow for the matter to be resolved speedily.[567] The staff composition of administrative tribunals consists of the president, members and members who have been seconded to the tribunal in terms of regulation.[568] If the required number of tribunal members is not present, then the replacement can be a judge from another administrative tribunal.[569] Judges render the judgments of the tribunal; there are an uneven number of judges to ensure a majority judgment. The president has the deciding vote when there is an even split of voting. The administrative tribunals are tribunals of first instance, and the decisions are subject to appeal to the administrative appeal courts, and thereafter the final arbiter is the Conseil d'État. The Conseil d'État does not review the merits of the decision of the appeal court but merely the 'legal and procedural aspects of the judgment'.[570] The

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[564] JE Pfander 'Government accountability in Europe: A comparative assessment' (2003) 35 *George Washington International Law Review* 621.
[565] JE Pfander 'Government accountability in Europe: A comparative assessment' (2003) 35 *George Washington International Law Review* 621.
[566] JE Pfander 'Government accountability in Europe: A comparative assessment' (2003) 35 *George Washington International Law Review* 621.
[567] S Boyron 'People administering justice' in J Bell; S Boyron & S Whittaker (eds) *Principles of French law* (1998) 52-53.
[568] Code of Administrative Justice, Legislative Part, Chapter I Organisation of the Administrative Tribunals and Appeal courts, Article L221-1. http://www.conseil-etat.fr/content/download/37782/327923/version/1/file/ENG_CJA%20partie%20legislative_MAJ_20141017.pdf (accessed 31 March 2015).
[569] Code of Administrative Justice, Legislative Part, Chapter I Organisation of the Administrative Tribunals and Appeal courts, Section 2: Organisation of the Administrative Tribunals Article L221-2 http://www.conseiletat.fr/content/download/37782/327923/version/1/file/ENG_CJA%20partie%20legislative_MAJ_20141017.pdf (accessed 31 March 2015).
[570] Code of Administrative Justice, Legislative Part, Chapter I Organisation of the Administrative Tribunals and Appeal courts, Section 2: Organisation of the Administrative Tribunals Article L221-2 http://www.conseiletat.fr/content/download/37782/327923/version/1/file/ENG_CJA%20partie%20legislative_MAJ_20141017.pdf (accessed 31 March 2015).

Conseil d'État applies the principle of legality when reaching decisions on judicial review. Decisions of the tribunal and the administrative appeal court are given in under thirteen months. Decisions of the Conseil d'État are given in less than ten months. There is a significant increase in matters that are heard before the administrative forums over time.

2.6 Tiers of the tribunal system

There are three tiers of the tribunal system in France, namely the administrative tribunals as the first tier, the administrative court of appeals as the second tier, and the Conseil d'État as the third tier, which is also known as the supreme administrative tribunal.

2.6.1 Administrative tribunals

The administrative tribunals are the tribunals of first instance, unless there is a specialised tribunal that is assigned to hear a matter by legislation.[571] There are 36 administrative tribunals in France.[572] The specialised administrative tribunals are known as the commercial tribunal and the labour tribunal.[573]

2.6.2 Administrative Court of Appeal

The Administrative Court of Appeal hears matters from the lower tribunals of the administrative tribunals and specialised tribunals.[574] The nature of the appeal relates to points of law and whether the application of the law was correct.[575] This is the forum of second instance.

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[571] European Union Agency for Fundamental Rights 'Access to justice in Europe - Thematic study: France' file:///C:/Users/rashr/Downloads/1531-access-to-justice-2011-country-FR.pdf (accessed 31 March 2015) 5.
[572] European Union Agency for Fundamental Rights 'Access to justice in Europe - Thematic study: France' file:///C:/Users/rashr/Downloads/1531-access-to-justice-2011-country-FR.pdf (accessed 31 March 2015) 5.
[573] European Union Agency for Fundamental Rights 'Access to justice in Europe - Thematic study: France' file:///C:/Users/rashr/Downloads/1531-access-to-justice-2011-country-FR.pdf (accessed 31 March 2015) 3.
[574] European Union Agency for Fundamental Rights 'Access to justice in Europe - Thematic study: France' file:///C:/Users/rashr/Downloads/1531-access-to-justice-2011-country-FR.pdf (accessed 31 March 2015) 5.
[575] European Union Agency for Fundamental Rights 'Access to justice in Europe - Thematic study: France' file:///C:/Users/rashr/Downloads/1531-access-to-justice-2011-country-FR.pdf (accessed 31 March 2015) 5.

2.6.3 Conseil d'État

The Conseil d'État plays various roles in that it is an advisor to the French Parliament regarding legislation and draft bills. It is also the managing authority over the administrative tribunals, administrative appeals courts and national asylum courts.[576]

The final arbiter role that the Conseil d'État performs can be summed up as follows:

> The Conseil d'État is also the final arbiter on any question relating to the administration: it is thus the ultimate judge of the actions of the executive, of local government, of independent authorities or of any other public administration establishment which possesses prerogatives of public power.[577]

The Conseil d'État known as the supreme administrative tribunal aptly fits its title because of the various roles that it fulfils. The Conseil d'État holds the inherent jurisdiction to determine the manner and creativity to dispose of matters. The power that the Conseil d'État possesses is unlimited as it is not statute based.

> Apart from insisting on administrative compliance with written and prior decisional law, the Conseil d'État regards itself as empowered to develop its own ideas of lawfulness, confined neither by rigid adherence to precedent nor by a detailed statutory code. In this development of general principles of law, the Conseil d'État exercises its greatest creativity. These general principles exist apart from any particular text, and do not have an explicit constitutional basis.[578]

It is apparent that the Conseil d'État is of a *sui generis* nature and possesses unlimited power as the council of final arbiter.

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[576] Conseil d'État *The Conseil d'État in a few words* http://english.conseil-etat.fr/content/download/32954/285585/version/1/file/CE_EnBrefEnglish.pdf (Accessed 2 August 2016) 2.
[577] Conseil d'État *The Conseil d'État in a few words* http://english.conseil-etat.fr/content/download/32954/285585/version/1/file/CE_EnBrefEnglish.pdf (Accessed 2 August 2016) 2.
[578] JE Pfander 'Government accountability in Europe: A comparative assessment' (2003) 35 *George Washington International Law Review* 623.

2.8 Concluding observations on the French system

The French model is a system that has existed and been improved upon for a few centuries. It is a model that is adopted and respected in the West and the East. It is indeed a unique model in the manner that the administrative tribunals possess inherent jurisdiction and play a dual role of being consultative and judicial. The distinct tiers of the mainstream courts of the Cour de Cassation are divided into civil and criminal matters. Administrative tribunals are divided into generalist and specialist tribunals and courts across the country. The decisions of the administrative tribunals are subject to appeal to the administrative appeal court, and the final arbiter is the Council of the State. It is a system that operates according to an administrative panel consisting of experts and judges who are well versed in the area of law under the specific circumstances. The Conflict Court serves as the mediator of conflicts of the two systems, in that, if the merits cannot be heard in either system, the Conflict Court would be the final arbiter. The French have thought of every eventuality and every aspect to ensure a public forum for the matter to be heard in a transparent manner. The popularity of this model not only illustrates the success of the model on an international level. The Council of the State is not bound by precedent; the judges may decide each matter as they deem fit, which need not be aligned to previous decisions. This procedure of operation of the Council of State allows for greater access to justice in an efficient and expedited manner. The requirement for a decision to be made in fewer than thirteen months in both the tribunals and the court of appeals illustrates that, although the caseload is large, justice is still delivered by ensuring that judgments are delivered within a reasonable time. The Supreme Tribunal, being the Council of State, delivers judgments at an even faster rate, although it has five divisions and only one division dedicated to the judicial function; nevertheless, the length of time for the delivery of judgments is less than ten months.

3. The Australian tribunal system

3.1 Overview

The establishment of tribunals created relief for mainstream litigation due to the heavy caseload and complexity of cases.[579]

> The enormous increase in the volume and complexity of litigation throughout Australia was undoubtedly the driving force behind the States and Federal Parliament's reasoning for creating tribunals.[580]

In Australia, tribunals are administrative and also divided into tiers, namely the first tier and the second tier. The purpose of the tribunal is to conduct review proceedings of an administrative nature.[581] The Australian Commonwealth Administrative Appeals Tribunal (AAT)[582] conducts proceedings with as little formality as possible, as well as with flexibility[583] and technical expedition to ensure that the tribunal is efficient.[584] There are a few other review tribunals that are known as specialist tribunals in Australia, namely:[585]

- Migration Review Tribunal (MRT)
- Refugee Review Tribunal (RRT)
- Social Security Appeals Tribunal (SSAT)
- Veterans' Review Board (VRB)

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[579] P Latimer; M Hocken & S Marsden 'Legal representation in Australia before tribunals, committees and other bodies' (2007) 14 *Murdoch E Law Journal* 122.
[580] P Latimer; M Hocken & S Marsden 'Legal representation in Australia before tribunals, committees and other bodies' (2007) 14 *Murdoch E Law Journal* 122.
[581] Australian Law Reform Commission 'Managing justice: A review of the federal civil justice system (ALRC 89)' www.alrc.gov.au/report-89 (accessed 9 February 2016) 904.
[582] Administrative Appeals Tribunal 1975.
[583] R Creyke 'Tribunals and merits review' in M Groves (ed) *Modern administrative law in Australia* (2014) 415 .
[584] Australian Law Reform Commission 'Managing justice: A review of the federal civil justice system (ALRC 89)' www.alrc.gov.au/report-89 (accessed 9 February 2016) 904-905.
[585] Australian Law Reform Commission 'Managing justice: A review of the federal civil justice system (ALRC 89)' www.alrc.gov.au/report-89 (accessed 9 February 2016) 905.

These tribunals are investigative when they conduct reviews.[586] The recommendation that tribunals amalgamate into one tribunal, named the Administrative Review Tribunal,[587] was never fulfilled. [588]

The AAT[589] was established in Victoria in 1984, and in 1998 was merged[590] with the Victorian Civil and Administrative Tribunal (VCAT).[591] The VCAT consists of 'administrative tribunals and party-party tribunals and both review statutory decisions concerned'.[592] The VCAT is known as a super tribunal.[593] These super tribunals developed into a plethora of tribunals around Australia,[594] namely in Western Australia,[595] the Australian Capital Territory (ACT) [596] and Queensland. [597] Examples of party-party tribunals are:

- Consumer Claims Tribunal[598]
- Small Claims Tribunal[599]

Party and party tribunals belong to the 'civil justice system', whereas administrative tribunals belong to the 'administrative justice system'.[600] The legal model of the administrative justice system is inquisitorial, while the civil justice system is adversarial.[601] In

[586] Australian Law Reform Commission 'Managing justice: A review of the federal civil justice system (ALRC 89)' www.alrc.gov.au/report-89 (accessed 9 February 2016) 905.
[587] Australian Law Reform Commission 'Managing justice: A review of the federal civil justice system (ALRC 89)' www.alrc.gov.au/report-89 (accessed 9 February 2016) 898.
[588] P Cane *Administrative tribunals and adjudication* (2010) 6.
[589] Administrative Appeals Tribunal Act 1984.
[590] K O'Connor 'Appeal panels in super tribunals' (2013) 32 *University of Queensland Law Journal* 31. See also R Bacon 'Amalgamating tribunals: A recipe for optimal reform' unpublished thesis, University of Sydney, 2004.
[591] See also Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016) 62-64.
[592] P Cane *Administrative tribunals and adjudication* (2010) 17.
[593] K O'Connor 'Appeal panels in super tribunals' (2013) 32 *University of Queensland Law Journal* 31.
[594] K O'Connor 'Appeal panels in super tribunals' (2013) 32 *University of Queensland Law Journal* 31.
[595] State Administrative Tribunal Act 2004 (SAT Act).
[596] ACT Civil and Administrative Tribunal Act 2008 (ACAT Act).
[597] Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act).
[598] EE Clark 'Small claims court and tribunals In Australia: Development and emerging issues' (1990-1991) 10 *University of Tasmania Law Review* 210.
[599] EE Clark 'Small claims court and tribunals In Australia: Development and emerging issues' (1990-1991) 10 *University of Tasmania Law Review* 212.
[600] P Cane *Administrative tribunals and adjudication* (2010) 18.
[601] P Cane *Administrative tribunals and adjudication* (2010) 18.

1998,[602] the Administrative Decisions Tribunal (NSW ADT) was formed in New South Wales (NSW).[603]

> The ADT's coverage extends to professional discipline applications (primarily legal profession), retail leases disputes, aspects of guardianship and anti-discrimination complaints. This mixing of administrative review, civil disputes, protective matters and human rights claims is typical of the State super tribunals.[604]

NSW began consolidating rental housing claims and consumer claims into two tribunals, namely the Residential Tenancies Tribunal and the Fair Trading Tribunal, which were merged in 2002 and named the Consumer Trader and Tenancy Tribunal (CTTT).[605]

> NSW is now moving to establish a New South Wales Civil and Administrative Tribunal (NCAT), intended commencement date 1 January 2014. It will bring the ADT and CTTT jurisdictions into the one structure, along with the Guardianship Tribunal, various medical and health professional discipline tribunals and some other small tribunals. It will have a scale of filings similar to VCAT. The major difference between the two tribunals is that VCAT has from inception included the planning and environment jurisdiction. In NSW that jurisdiction is vested in a superior court of record, the Land and Environment Court.[606]
>
> The Victorian Civil and Administrative Tribunal (VCAT), WA's State Administrative Tribunal (SAT), Queensland's Civil and Administrative Tribunal (QCAT) and the ACT's Civil and Administrative Tribunal (ACAT) are located in one building in central capital locations. That means all tribunal services are provided in one place.[607]

The Bland Committee proposed the following three tribunals, although only one was adopted:[608]

- Generalist Administrative Tribunal

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[602] K O'Connor 'Appeal Panels in Super Tribunals' 32 University of *Queensland Law Journal* 31 (2013) at 32.
[603] Administrative Decisions Tribunal Act 1997 (NSW).
[604] K O'Connor 'Appeal Panels in Super Tribunals' 32 University of *Queensland Law Journal* 31 (2013) at 32.
[605] K O'Connor 'Appeal Panels in Super Tribunals' 32 University of *Queensland Law Journal* 31 (2013) at 32.
[606] K O'Connor 'Appeal Panels in Super Tribunals' 32 University of *Queensland Law Journal* 31 (2013) at 32.
[607] R Creyke 'Integrity in tribunals' (2013) 32 *University of Queensland Law Journal* 57.
[608] R Creyke 'Administrative tribunals' in M Groves & HP Lee (eds) *Australian administrative law* (2007) 82.

- Medical Appeals Tribunal
- Valuation and Compensation Tribunal

3.2 History of the tribunal system

The Australian federal constitutional system is a hybrid nature because it has a dual heritage of British and American constituents. Australia is a federation and is known as the Commonwealth of Australia. The constituent regional government's entities are six states, namely NSW, Queensland, Victoria, Tasmania, Western Australia and South Australia.[609] There are two mainland states that are self-governing, namely the Northern Territory and the ACT.[610]

> To give a highly simplified, one-sentence summary of Australian constitutional law: the states have responsibility for those areas of law which have not been allotted to the Australian Federal Government under the Australian Constitution and, when concurrent jurisdiction exists, state law must give way to federal statute. Each state and territory has its own government and superior court system for regulating and enforcing state laws.[611]

The recommendations of the Kerr Report of 1971, on the role of review of the federal court and the AAT and an Ombudsman, were incorporated in Australia's tribunal sytem.

> The Kerr Report (1971) prompted a new Federal Court to review decisions on the basis of unlawfulness, a general tribunal to hear appeals on the merits (the Administrative Review Tribunal, later renamed the Administrative Appeals Tribunal – the AAT), an Ombudsman that would investigate complaints that, on expense grounds, did not warrant litigation, and an overall monitoring body, the ARC which would, inter alia, advise bodies which decisions should be subject to merits review.[612]
>
> [The] administrative review structure in the federal jurisdiction is a composite of the traditional (prerogative and appellate) courts based in the Constitution, and integrated court and tribunal-based bodies created by three major legislative initiatives of the 1970s - the Federal Court of Australia Act

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[609] P Cane *Administrative tribunals and adjudication* (2010) 1.
[610] P Cane *Administrative tribunals and adjudication* (2010) 1.
[611] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 188.
[612] T Buck *Administrative justice and alternative dispute resolution: The Australian experience* (2005) (DCA Research Series 08/05) 20.

1976 (FC Act), the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) and the Administrative Tribunal Act 1975 (AAT Act).[613]

3.3 Operation of the tribunal system

There are two types of tribunals, namely administrative tribunals, which are between the state and citizens, and civil tribunals, which are between citizens.[614] The AAT is not a court because it is a body established in terms of Chapter III of the Constitution. The judges are appointed in terms of section 72 of the Constitution.[615] A key characteristic of administrative tribunals is that matters are adjudicated.[616] Section 2 of the Administrative Law Act 1978 (Victoria) defines 'tribunal' as:

> ...a person or body of persons (not being a court of law or a tribunal constituted or prescribed over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.[617]

The Legislation Act 2001 (ACT) Schedule 1 - Dictionary defines 'tribunal' to include 'any entity that is authorised to hear, receive and examine evidence'.[618] The Council of Australasian Tribunals (COAT) Constitution defined Tribunal as:

> ...any Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.[619]

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[613] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 189; See also EE Clark 'Small claims court and tribunals In Australia: Development and emerging issues' (1990-1991) 10 *University of Tasmania Law Review* 203.
[614] R Fisher 'Improving tribunal decisions and reasons' (2003) *New Zealand Law Review* 572.
[615]R Fisher 'Improving tribunal decisions and reasons' (2003) *New Zealand Law Review* 572.
[616] P Cane *Administrative tribunals and adjudication* (2010) 18.
[617] R Creyke 'Administrative tribunals' in M Groves & HP Lee (eds) *Australian administrative law* (2007) 78.
[618] R Creyke 'Administrative tribunals' in M Groves & HP Lee (eds) *Australian administrative law* (2007) 78.
[619] R Creyke 'Administrative tribunals' in M Groves & HP Lee (eds) *Australian administrative law* (2007) 78.

Curtis categorised tribunals into 'court substitute' and 'policy-orientated' bodies. The characteristics of court-substitute tribunals are:[620]

- They provide to each party appearing before them a reasonable opportunity of being heard;
- They carefully weigh the evidence and material put before them;
- They interpret and apply the law;
- They expose their reasoning process to the parties; and
- They avoid actual bias or the appearance of bias

Policy-oriented bodies, on the other hand, 'develop policies applicable to their area of expertise and advise government accordingly'.[621] It is apparent that there is not one definition of tribunals, but common characteristics. Tribunals constitute part of the executive tier and fulfil their function and role to resolve administrative disputes simply and efficiently.

> Whether constitutionally mandated or simply a rule of practical wisdom, the separation of powers principle protects the judicial arm of government from compromise as much as it affords justice to the individual. Provided tribunals are constituted and operate in ways that satisfy the requirements of legality and natural justice, they need not be relegated to some lesser status as a fourth and seemingly illegitimate member of the government family.[622]

Tribunals play an important role in Australia. There is a demand for them because people use them because they are practical and user friendly. The Australian tribunal system is constantly reformed to improve the system for the benefit of the users.

> Tribunals are a significant provider of adjudication services. That is not just because they are the front-line of justice for many people. They are also responsible for developing law affecting more Australians than the courts. As a general rule, their decision-making occurs more quickly than hearings before the courts, they consider more cases, and hence have the opportunity to provide a more comprehensive view of the law on a topic and, because of the frequency with which their

[620] R Creyke 'Administrative tribunals' in M Groves & HP Lee (eds) *Australian Administrative Law* (2007) 78-79.
[621] R Creyke 'Administrative tribunals' in M Groves & HP Lee (eds) *Australian Administrative Law* (2007) 79.
[622] P Johnston 'Recent developments concerning tribunals in Australia' (1996) 24 *Federal Law Review* 342.

> jurisdiction is invoked, they often lead the way in examining issues of general relevance to the wider community. These features mean that tribunals are an important element of the legal landscape.[623]

The distinction between tribunals in Australia is still blurred in that they are not courts but display judicial and administrative functions and are part of the executive tier; legislation is necessary to ensure there are no blurred lines that may be the subject of ambiguity and more litigation for the clarification of the role and nature of the tribunal.[624] Tribunals consist of presidential members and non-presidential members,[625] and referees and magistrates who are legally qualified.[626]

3.4 Jurisdiction

The Australian Federation in 1901 was created by the Constitution and set out the jurisdiction of courts.[627] The jurisdiction of the AAT is very wide in that it reviews the decisions of both first instance (first-tier) and appellate (second-tier) tribunals.[628] It is a tribunal that generates a large body of case law. The characteristic function is to engage in a merits-review procedure.[629] The AAT in Victoria merged into the VCAT.[630]The jurisdiction of VCAT is divided into original jurisdiction and review jurisdiction.[631] VCAT consists of three divisions, namely administrative, human rights and civil,[632]Each division has a list of areas that it deals with, as follows:

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[623] R Creyke 'Tribunals: Divergence and loss' (2001) 29 *Federal Law Review* 425.
[624] R Creyke 'Integrity in tribunals' (2013) 32 *University of Queensland Law Journal* 55.
[625] GL Peiris 'The Administrative Appeals Tribunal of Australia: The first decade' (1986) 6 *Legal Studies* 304.
[626] EE Clark 'Small claims court and tribunals In Australia: Development and emerging Issues' (1990-1991) 10 *University of Tasmania Law Review* 208.
[627] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 189.
[628] P Cane *Administrative tribunals and adjudication* (2010) 2.
[629] P Cane *Administrative tribunals and adjudication* (2010) 2.
[630] K O'Connor 'Appeal panels in super tribunals' (2013) 32 *University of Queensland Law Journal* 31.
[631] Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016) 64.
[632] K O'Connor 'Appeal panels in super tribunals' (2013) 32 *University of Queensland Law Journal* 31.

Civil Division[633]

- fair trading (consumer) matters
- credit
- domestic building
- legal practice matters
- residential tenancies
- retail tenancies

Human Rights Division[634]

- guardianship and administration
- discrimination
- racial vilification

Administrative Division, which has review jurisdiction and deals with the following: [635]

- land valuation
- licences to carry on business, such as travel agencies and motor traders
- planning and environment
- state taxation
- other administrative decisions, such as Transport Accident Commission decisions and freedom of information issues

[633] Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016) 64.
[634] Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016) 64.
[635] Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016] 64-65.

VCAT also reviews decisions made by statutory professional bodies, such as the Medical Practice Board of Victoria.[636] VCAT consists of some tribunals under its 'umbrella'.[637] Combined tribunals, also referred to as amalgamated tribunals, lend themselves to greater accessibility to the public, because they tend to function optimally.[638] Tribunals were created by the Australian Parliament, and it is the latter that ensures the continuous funding and an allocated budget.[639]

3.5 Rules of procedure

The VCAT is governed by the Victorian Civil and Administrative Tribunal Act 1998.[640] In the ACT and Victoria, the powers of the administrative tribunals have a wide scope of review.[641] The rules of procedure are relaxed, and are flexible to allow for the procedure to be user friendly. The rules were 'established to conduct an informal and potentially inquisitorial hearing, free from the rules of evidence'.[642]

3.6 Tiers of the tribunal system

3.6.1 VCAT

The VCAT was established in 1998.[643] The tribunal is busy and finalises more than 85 000 cases a year across 46 venues in Victoria.[644] It was established to hear civil and administrative matters.[645] VCAT only hears a matter on the basis that the law establishes the

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[636] Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016) 65.
[637] TD Winterbottom 'Specialist courts and tribunals' (2004) 12 *Waikato Law Review* 34.
[638] R Creyke 'Integrity in tribunals' (2013) 32 *University of Queensland Law Journal* 56.
[639] R Creyke & J McMillan 'The operation of judicial review in Australia' in M Hertogh & S Halliday (eds) *Judicial review and bureaucratic impact: International and interdisciplinary dimensions* (2004) 162.
[640] Victoria Law Reform Commission 'Civil Justice Review Report 14' http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf (accessed 28 June 2016) 66.
[641] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 188.
[642] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 193.
[643] VCAT https://www.vcat.vic.gov.au/about-vcat (accessed 31 March 2015).
[644] VCAT https://www.vcat.vic.gov.au/about-vcat (accessed 31 March 2015).
[645] VCAT https://www.vcat.vic.gov.au/about-vcat (accessed 31 March 2015).

jurisdiction to hear the matter.[646] VCAT consists of four divisions, which comprise different listings of matters, namely administrative, civil, human rights and residential tenancies.[647] The administrative division consists of three areas of practice, namely legal practice, planning and environment, and review and regulation. The civil division consists of three areas, namely civil claims,[648] building and property, and owners' corporations.[649] The human rights division consists of guardianship, including powers of attorney[650] and human rights.[651] The residential tenancy division consists of matters involving residential tenants and landlords, rooming house owners and residents, Director of Housing and public housing tenants, caravan park owners and residents, and site tenants and site owners.[652]

3.6.2 AAT

The AAT may confirm or change the decision by the primary decision-maker, substitute its own decision, or remit the matter back to the primary decision maker with directions as to law, fact, evidence or mode of exercising the discretion. The AAT does not have greater powers than the original decision maker, and is subject to any statutory limitations that apply to the initial decision maker. A party may appeal to the Federal Court on questions of law on the basis of decisions of the AAT, under the ADJR Act. The judicial function or characteristic was removed from tribunals in totality, in that it was classified as part of the executive. Despite the progressions of the tribunals, there was a major drawback in that their efficiency and effectiveness were toothless because of the lack of enforcement mechanisms, which was confirmed by the courts in the Brandy decision:

> The early success of the AAT and its prolific use by applicants seeking review saw the rise to prominence of a plethora of similar tribunals, specialising in particular areas of decision-making, such as migration law, refugee law and social security, exercising substantial power.

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[646] VCAT https://www.vcat.vic.gov.au/about-vcat (accessed 31 March 2015).
[647] VCAT https://www.vcat.vic.gov.au/about-us/our-structure (accessed 31 March 2015).
[648] Civil claims consist of consumer matters, domestic building works, owners corporation matters, retail tenancies, sale and ownership of property, and use or flow of water between properties.
[649] VCAT https://www.vcat.vic.gov.au/about-us/our-structure (accessed 31 March 2015).
[650] Includes administration.
[651] VCAT https://www.vcat.vic.gov.au/about-us/our-structure (accessed 31 March 2015) Human rights matters comprise equal opportunity, racial and religious vilification, health and privacy information, Disability Act, and decisions made by the Mental Health Tribunal.
[652] VCAT https://www.vcat.vic.gov.au/about-us/our-structure (accessed 31 March 2015).

> However, following the decision of the High Court in Brandy v Human Rights and Equal Opportunities Commission (1985) 183 CLR 245, which determined that federal judicial power (and therefore the power to grant effective remedies) could not be invested in a body other than a court constituted under Chapter III of the Constitution, the position of tribunals was forever undermined, and any element of "judicial" function removed. As Brandy held that tribunals could not enforce their judgments to the extent that they determined substantive rights, their decisions were not judicial in nature, nor could they be made so simply by registration in the Federal Court (the mechanism originally devised to effect that result). As tribunals in general are not created under Chapter III of the Constitution, and exercise "non-judicial" powers which are an anathema to that regime, they cannot form part of the federal judiciary and, instead, form part of the executive. Accordingly, their former independence, akin to that of the courts, was eroded.[653]

3.6.3 NSW ADT

The Brandy decision undermined the function of tribunals, in that they could not exercise judicial power. Super tribunals, such as the NSW ADT, allow for an internal appeal tier to rectify small errors in orders because the parties did not have legal representation.[654]

> But a tribunal's decisions and reasons must meet a number of legal requirements. These include adherence to the tribunal's founding instrument, conformity with natural justice, and observance of any applicable duty to give reasons.[655]

The independence from the courts being eroded is a major drawback for the tribunal system, as the strength of the system lay in their independence and not interdependence, which was a result of a judicial decision.

3.7 Concluding observations on the Australian system

The tribunal system in Australia is ever changing in trying to achieve efficiency and access to justice. The system has developed over time to be enhanced as a global system that is well

[653] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 193-194.
[654] K O'Connor 'Appeal panels in super tribunals' (2013) 32 *University of Queensland Law Journal* 35.
[655] R Fisher 'Improving tribunals decisions and reasons' (2003) *New Zealand Law Review* 571.

respected and admired. In ensuring its independence from the UK system, it is a system that works well in Australia, but is not without its challenges.

> Judicial review in Australia is a dynamic and volatile battlefield upon which government and the judiciary wage war in the quest for balance between government efficacy and justice for individuals.[656]

It is apparent from the Brandy decision that the 'war' is real, and the fight for jurisdiction and powers is still alive between the courts and tribunals. It is further apparent from the Brandy decision that tribunals exercise non-judicial power.

4. The tribunal system in the United Kingdom

4.1 Overview

In the United Kingdom, the tribunal system is under constant review to enhance it. Currently, the nature of the tribunal is adversarial. There are certain exceptions to the norm of the adversarial nature, as the financial tribunals are investigative and inquisitorial in nature.[657] The rigorous analysis of the British tribunal system is useful for the South African context to improve its tribunal systems.

The definition of a tribunal is summarised as follows in relation to the UK context:

> A tribunal is neither a regular court which is part of the system of courts of the land nor is it purely an administrative unit which is part of the civil service departments of the government. Generally, tribunals perform two different kinds of functions a) resolution of disputes b) making administrative determinations (of benefits, liabilities and privileges) in the light of policies. Theirs is thus a judicial or "quasi-judicial function" and also an administrative one.[658]

A working definition of tribunal in this thesis relates to a hybrid context of judicial and administrative, as it addresses a few roles and does not fall into a silo. The tribunal plays

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[656] PD Evans & JA Ambikapathy 'Judicial review in Australia' (2001) 6 *Judicial Review* 188.
[657] W Wade & C Forsyth *Administrative law* (2004) 928.
[658] TKK Iyer 'Accountability and review processes in modern public administration - The role of tribunals' (1991) 12 *Singapore Law Review* 286.

dual roles, namely judicial and executive, but fulfils the former role.[659] Tribunals deal with merit review and administrative decisions.[660] The limitation of the definition of a tribunal is that there is 'no accurate definition of what constitutes a tribunal,' which illustrates the complexity of a tribunal, as it is of its own kind.[661] The tribunal consists of the following staff: the president of the tribunal, chairpersons of the tribunal, members and lawyers, and non-lawyers.

4.2 History of the tribunal system

The Hansard debates there was reference to the forming of special tribunals to resolve disputes as expeditiously as possible without being hindered by the intricacies and precedents of the law, implying a more robust and relaxed approach to reach a resolution.[662] Accordingly this tribunal was vested with 'full powers' as a court.[663] The tribunal hence had new powers and form of an appeal mechanism, resolving to adopt arbitration where necessary.[664] The aspects contributed to the evolving tribunals of present day.

The Council on Tribunals (COT) In the United Kingdom was formed in 1958,[665] as a result of the 1957 Report by the Committee on Administrative Tribunals and Inquiries (also known as the Franks Committee).[666] The functions of the COT was amended to allow for an

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[659] G Richardson & H Genn 'Tribunals in transition: Resolution or adjudication?' (2007) *Public Law* 1.
[660] P Neill *Administrative justice: Some necessary reforms* (1988) 210.
[661] PP Craig *Administrative law* (2003) 67.
[662] Hansard *Hansard's Parliamentary Debates*: Third series, commencing with the accession of William IV (Vol CIV) (1849) at 114. Available at https://play.google.com/books/reader?id=-5ZUAAAAcAAJ&hl=en_GB&pg=GBS.PP5 See the argument that technical rules causes difficulties in resolving complexed matters at 910.
[663] Hansard *Hansard's Parliamentary Debates*: Third series, commencing with the accession of William IV (Vol CIV) (1849) at 898. Available at https://play.google.com/books/reader?id=-5ZUAAAAcAAJ&hl=en_GB&pg=GBS.PP5.
[664]Hansard *Hansard's Parliamentary Debates*: Third series, commencing with the accession of William IV (Vol CIV) (1849) at 911.. Available at https://play.google.com/books/reader?id=-5ZUAAAAcAAJ&hl=en_GB&pg=GBS.PP5.
[665] Tribunals and Inquiries Act of 1958.
[666] CD Alblard 'Some comparisons between the Council on Tribunals and the Administrative Conference of the United States' (1976) 24 *American Journal of Comparative Law* 73.

ombudsman whose role was to oversee specific matters. [667] The UK Constitution is unitary, 'where all power resides in the central state institutions'.[668]

The Administrative Justice and Tribunals Council (AJTC) was established in 2007. The AJTC replaced COT, to play a more ambitious role of review in the United Kingdom. Its purpose was to harness the relationships among courts, tribunals and ombudsmen, and to promote ADR mechanisms to ensure the citizens have access to justice.[669] However, in 2012, the government in the UK abolished the AJTC to merge 192 non-public bodies and cut costs.[670] The rules of natural justice applicable to tribunals were cited in the case of *Beale v. S.A. Trotting League (Inc.)*:[671]

> … all that natural justice requires is (1) that it should act in good faith, and that the party charged should (2) know the substance of what is charged, and (3) have an opportunity of answering it.

Although the proceedings are informal, adherence to the rules of natural justice is 'subject to the will of the tribunal.' [672] The tribunal should act in good faith, and the parties that approach the tribunal should have an understanding of the procedure of the tribunal and should be given an opportunity to respond to their pleadings in terms of applying the principles of natural justice to practice.

4.2.1 Franks Committee Report

The Franks Committee did not make any recommendations concerning the speedier resolution of disputes before the Tribunal.[673] One of the recommendations was to remove the restriction of two specific tribunals, which required the consent of these tribunals for legal representation and thus created an exception, because legal representation was

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[667] CD Alblard 'Some comparisons between the Council on Tribunals and the Administrative Conference of the United States' (1976) 24 *American Journal of Comparative Law* 75.
[668] C Taylor *Constitutional and administrative law* (2010) 5.
[669] M Adler 'The rise and fall of administrative justice - A cautionary tale' (2012) 8 *Socio-Legal Review* 31.
[670] M Adler 'The rise and fall of administrative justice - A cautionary tale' (2012) 8 *Socio-Legal Review* 32 & 38.
[671] JJ Doyle 'Jurisdiction of the courts over domestic tribunals-natural justice' (1963-1966) 2 *Adelaide Law .Review* 418 cited *Beale v. S.A. Trotting League (Inc.)* [1963] S.A.S.R. 209 at 233.
[672] JJ Doyle 'Jurisdiction of the courts over domestic tribunals-natural justice' (1963-1966) 2 *Adelaide Law Review* 420.
[673] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 3.

allowed in all other tribunals.[674] The report aimed to evaluate the proliferation of tribunals in the United Kingdom.[675] The three variables that were assessed by the report were openness, impartiality, and fairness.[676] The recommendations facilitated the improvement of the procedures provided for tribunals, which provided access to justice without maladministration.[677] Another recommendation was that the government set up two councils to oversee the tribunals.[678]

The aim of the report was to recognise the growing tribunal system in the UK and to address the challenges that tribunals faced and improve them.

> Now, in 1957, we have this wide range of tribunals enshrined in our public life and our advance guided as a result of various administrative measures, the Minister in question being enlightened by the results of inquiries. I do not think it would be over-stating the case to say that they are a permanent feature of our judicial system—sometimes partly judicial and partly administrative. It was high time and of great value to our community that the Franks Committee should be able to go into the matter as fully as it has done.[679]

The Franks Committee thoroughly scrutinised the tribunal system in the UK to enhance access to justice. The crux of the report is whether tribunals deal with administrative redress or adjudicative redress, and the author favours the latter. Tribunals were to be regarded as the 'machinery' of Parliament, and not as part of the administration.

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[674] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 4.
[675] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 2.
[676] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 3.
[677] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 3.
[678] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 4.
[679] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 11.

> I myself believe that the all-important remark made in the Report was that Tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of machinery of the administration. That is the fundamental basis of the discontent here, in the United States, in France, in India and everywhere where there is progressive government. Are these tribunals set up to deal with individual cases merely to be considered as part of the machinery of administration, to get on with the business of administration, or are they really to be made tribunals of adjudication in an attempt to do justice between Government Departments and individual citizens?[680]

Tribunals being set up as adjudicative bodies to achieve justice between individuals and Government departments is also a favourable solution to bridge the gap between government departments and individual citizens' access to the system in terms of policy and regulation. The improvement of the administrative system requires the Government to act to ensure that access to justice is achieved; even if problems seem minor, it is still important to address them.

> Many of the matters I have been raising may seem minor criticisms of schemes which, on the whole, are working well, but in these matters we are dealing with the human problems of people for whom this legislation was intended and towards whom the community has a special responsibility. If there is an injustice even in one or two cases only we must take very great care to examine matters to see whether improvements can be made. I hope that the Government will consider the suggestions that I have made.[681]

The aim of the Leggatt Report (see 4.2.2 below) was to make the Government aware of the need to address the issues that caused a blockage in the flow of operations of the tribunal system. The Leggatt report mentioned the key elements highlighted by the Franks Committee, in that '[t]he Franks Committee said that tribunals should be independent, accessible, prompt, expert, informal, and cheap'.[682]

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[680] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 41.
[681] Administrative Tribunals and Enquiries (Report) http://hansard.millbanksystems.com/commons/1957/oct/31/administrative-tribunals-and-enquiries (accessed 17 May 2016) 41
[682] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015) 6.

The essential attributes and characteristics of tribunals are the six elements for the creation of a harmonised system:

(i) independent
(ii) accessible
(iii) prompt
(iv) expertise
(v) informal
(vi) cheap

4.2.2 Leggatt Report

The Leggatt Report is a lengthy document, consisting of twelve chapters and three parts. The most highlighted aspects of the report deal with the:

- management of the tribunals
- nature of the tribunals in the manner that they differ from the courts
- ensuring efficiency in all aspects by reforming the tribunal system.

The first tier and the second tier are problematic, because the different tribunals that hear appeals have different rules, creating no uniformity and confusing for the users. The review consisted of a comparative study of the Australian tribunal model, which was imported as a recommendation for the United Kingdom. The methodology used to gather the data for the Leggatt report was:

> the main part of the Review consisted of finding the facts by five methods: (1) by receiving and reading 300 responses to our Consultation Paper, (2) by visiting over 20 of the most important tribunals, (3) by a visit to Australia by two of us, and our Secretary, for comparative purposes, (4) by holding four seminars, and (5) by limited research conducted by MORI among users.[683]

[683] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm(accessed 31 March 2015) 2. Note that MORI is a company that provides different services. See https://www.ipsos-mori.com.

The problems with tribunals in the United Kingdom is that they were overburdened and that too many tribunals were operating with different rules of procedure and without any uniformity.

> There are 70 different administrative tribunals in England and Wales, leaving aside regulatory bodies. Between them they deal with nearly one million cases a year, and they employ about 3,500 people. But of these 70 tribunals only 20 each hear more than 500 cases a year and many are defunct. Their quality varies from excellent to inadequate. Our terms of reference require them to be rendered coherent. So they have to be rationalised and modernised; and this Review has as its 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.[684]

Tribunals emerged in a haphazard manner and with no uniform structure or rules, hence they lacked coherence.[685] The specific areas of contention of some tribunals are '… political and social life, including social security benefits, health, education, tax, agriculture, criminal injuries compensation, immigration and asylum, rents, and parking'.[686]

The Leggatt report cited Wade and Forsyth regarding the clear difference in the operation of tribunals and courts:

> It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time ... In enforcing this rule the courts are underlining

[684] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015) 6.
[685] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015) 15.
[686] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015) 20.

> the difference between judicial and administrative processes. The legal rights of litigants are decided according to legal rules and precedents which are sometimes held to prevail over the court's own opinion. But if an administrative authority acts in this way its decision is ultra vires and void. It is not allowed to "pursue consistency at the expense of the merits of individual cases." This doctrine is applied even to statutory tribunals, despite their resemblance to courts of law.[687]

The essential difference in the operation of tribunals is that substance is more important than form in the hearing of disputes. Tribunals do not create precedents and decisions can differ from case to case.[688] Approximately fifteen years after the Leggatt report, the position of the tribunal system has improved because most of the recommendations were adopted. The report proposed a sophisticated system similar to the Australian model, except that it was not inquisitorial, but adversarial.[689]

4.2.3 Andrew Report

The Andrew Report made recommendations regarding civil justice reforms and legal aid reforms, which are interlinked to enhancing the tribunal system.[690] The pertinent aspects of the report aimed to reform civil justice, particularly in three ways:[691]

- ensure efficient court services;
- ensure cost-effective access to the civil justice system for people who could not otherwise afford it; and

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[687] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015) 74.

[688] W Wade & C Forsyth *Administrative law* (2004) 930-931; see P Leyland & G Anthony *Textbook on administrative law* (2013) 159.

[689] Sir A Leggatt 'Tribunals for users: One system, one service. Report of the Review of Tribunals' (2001) http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm (accessed 31 March 2015) 21, 25, 110.

[690] National Archives Report to the Lord Chancellor by Sir Middleton GCB (1997) Sir Peter Middleton's report on civil justice and legal aid reforms http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/middle/index.htm (accessed 15 June 2015 1 17 .

[691] National Archives Report to the Lord Chancellor by Sir Middleton GCB (1997) Sir Peter Middleton's report on civil justice and legal aid reforms http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/middle/index.htm (accessed 15 June 2015) 1.

- facilitate the development of logical and comprehensible structures and pressures for efficiency in all parts of the system, both public and privately managed.

When improving the civil justice system, the proposals of Lord Woolf are relevant to create access to justice: [692]

- a greater degree of control over cases by the court, which would allocate them to different tracks - including a new fast track - and actively manage the more complex ones;
- a range of procedural changes to promote settlement and eliminate unnecessary complexity; and
- a unified set of court rules to underpin the whole system.

A criticism of the tribunals was that the rules were indistinguishable from those of the courts.[693]

4.2.4 The 2004 White Paper

The White Paper accepted the recommendations of the Leggatt Report proposed by the Tribunal Service. The White Paper rejected the divisional structure of tribunals and proposed that the 10 largest tribunals be amalgamated into one, with the other, smaller tribunals joining at a later stage.

> The White Paper accepted most of the key recommendations in the Leggatt Report and proposed that all tribunals that were administered by central government departments should be brought together into a new Tribunals Service (TS), which would be an Executive Agency within the Department for Constitutional Affairs (DCA). It proposed that the TS should, in the first instance, be based on the ten largest tribunals and that other tribunals might join later. Although employment tribunals were given judicial autonomy within the TS, the arguments of those who believed that they should remain

[692] National Archives Report to the Lord Chancellor by Sir Middleton GCB (1997) Sir Peter Middleton's report on civil justice and legal aid reforms http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/middle/index.htm (accessed 15 June 2015) 1. Note that detailed recommendations dealing with access to justice are found in Chapter 5.
[693] National Archives Report to the Lord Chancellor by Sir Middleton GCB (1997) Sir Peter Middleton's report on civil justice and legal aid reforms http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/middle/index.htm (accessed 15 June 2015) 32.

outside the new service were overruled. The White Paper favoured a two-tier service but rejected the idea of a divisional structure that had been proposed in the Leggatt Report on the grounds that the limited number of jurisdictions that would be brought together in the new TS made this unnecessary. The White Paper was considerably more ambitious than the Leggatt Report in that it aimed not only to reform the organisation and operation of tribunals but also to improve the entire system of administrative justice. It emphasised the importance of improving first-instance decision making for administrative justice. However, although it attached considerable importance to feedback from the new, unitary, TS, it did not consider other ways of improving first-instance decision making.[694]

The White Paper focused on enhancing administrative justice. A drawback of the White Paper is that it did not propose other methods to improve decision-making.

4.3 Operation of the tribunal system

Section 2(3)(a) of the TCE Act provides that tribunals need to be accessible, proceedings should be fair, and they must be handled quickly and efficiently.[695] The members of the tribunals are required to be subject-matter experts and apply the law in cases to decide matters.[696] The tribunals should develop innovative methods to resolve disputes that are brought before them.[697] There are first-tier tribunals, upper tribunals, employment tribunals and the employment appeal tribunal.[698]

4.4 Jurisdiction

A variety of tribunals has arisen that specialise in a specific area of law. Below is a list setting out some of the aspects of jurisdiction:

- social security legislation
- employment
- taxation
- property rights
- immigration

[694] M Adler 'The rise and fall of administrative justice - A cautionary tale' (2012) 8 *Socio-Legal Review* 40-41.
[695] Section 2(3)(b)(i)-(ii).
[696] Section 2(3)(c).
[697] Section 2(3)(d).
[698] Section 2(4)(a)-(d).

- mental health
- allocation of pupils to schools

The funding for tribunals comes from the government budget, in that money is allocated to the operation of the tribunal.

4.5 Rules of Procedure

The rules of procedure that govern tribunals have been revised on numerous occasions.[699] The rules of procedure were replaced by the 'Model Rules of Procedure', which were made user friendly for parties without legal representation.[700] The tribunal system is flexible in that no binding precedent is created from tribunal to tribunal.[701] The rule is that there is an automatic right of appeal to a question of law that the tribunal has to consider.[702]

4.6 Tiers of the tribunal system

The Tribunal Service is a part of Her Majesty's Courts and Tribunal Service (HMCTS).[703] The HMCTS administers tribunals within the unified tribunal system (UTS).[704] The unified tribunal system brings cohesion and consistency to the two-tier tribunal approach of the first-tier and upper tribunals.[705] The decisions of the tribunal service need not be unanimous, but

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[699] W Wade & C Forsyth *Administrative law* (2004) 906. Note the Tribunal and Inquiries Act of 1958, which was repealed and replaced by the Tribunals and Inquiries Act 1971, which was also repealed and then followed by the Tribunals and Inquiries Act 1992.
[700] W Wade & C Forsyth *Administrative law* (2004) 929.
[701] P Leyland & G Anthony *Textbook on administrative law* (2013) 159. See also W Wade & C Forsyth *Administrative law* (2004) 930-931.
[702] W Wade & C Forsyth *Administrative law* (2004) 907.
[703] Ministry of Justice 'Administrative Justice and Tribunals: Final report of progress against the Strategic Work Programme 2013-2016 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/601481/administrative-justice-tribunals-final-progress-report.pdf (accessed 31 March 2015) 5.
[704] Ministry of Justice 'Administrative Justice and Tribunals: Final report of progress against the Strategic Work Programme 2013-2016 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/601481/administrative-justice-tribunals-final-progress-report.pdf (accessed 31 March 2015) 5. Note that this unified tribunal system is established under the Tribunals, Courts and Enforcement Act 2007.
[705] Ministry of Justice 'Administrative Justice and Tribunals: Final report of progress against the Strategic Work Programme 2013-2016 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/601481/administrative-justice-tribunals-final-progress-report.pdf (accessed 31 March 2015) 15.

should be majority decisions.[706] The tribunal service cannot reconsider decisions. The decision may be considered and quashed by the High Court.[707] If new evidence is discovered, the tribunal service could not reconsider its decision.[708] The exception[709] to the general rule is when a decision is given in ignorance.[710] Social security and employment tribunals may review their decisions.[711] The tribunal service gives written reasons for the decisions reached.[712]

4.7 Concluding observations of the United Kingdom

The United Kingdom model is useful for the South African context because it has a structure of rules that ensures anyone can access tribunals. It is a system that is constantly scrutinised to find ways in which it can be improved. The jurisdiction of the tribunals is diverse in the nature of matters heard. Tribunals are the preferred option in the UK, rather than courts, as they are accessible and efficient.[713] The United Tribunal System is constantly evolving to ensure that it is operating at its highest level in terms of cohesion, consistency and efficiency.

5. Concluding observations on the comparative study

5.1 Common trends amongst foreign systems

5.1.1 France

The most common trends displayed by the administrative tribunal systems are that they are tiered and enhance access to justice by reducing the loads on the court systems. A reason to

[706] W Wade & C Forsyth *Administrative law* (2004) 937.
[707] W Wade & C Forsyth *Administrative law* (2004) 938.
[708] W Wade & C Forsyth *Administrative law* (2004) 938.
[709] In JS v SSWP, the appellant appealed the decision of the First Tier Tribunal, and the Upper Tribunal held that the judge made errors of law and failed to provide sufficient reasons detailing the reason for the decision. As a result, the tribunal made a decision that the First Tier hear the appeal with a new panel of members who did not make the initial decision.
[710] W Wade & C Forsyth *Administrative law* (2004) 938.
[711] W Wade & C Forsyth *Administrative law* (2004) 938.
[712] W Wade & C Forsyth *Administrative law* (2004) 938-941.
[713] H Genn 'Tribunals and informal justice' (1993) 56 *The Modern Law Review* 395-397.

approach the third tier of appeal is to quash the decision of the lower tribunals. Lastly, the decisions are perceived to be fair as they balance all the interests concerned. Some of the decisions are discussed to illustrate the tiered procedures as well as the nature of the matters, for the purposes of the thesis a collation of a detailed set of facts will not be engaged as it is not relevant to the thesis discussion.

The case of *Ms A and Succession of Gary A*[714] illustrates a matter being heard before three tiers (tribunal, administrative appeal court and the Conseil d'État) before it was finalised. The matter was heard by the Administrative Tribunal of Nice relating to reduced penalties and income tax contribution. Thereafter, an appeal was lodged with the Administrative Appeal Court of Marseilles, which dismissed the judgment of the Administrative Tribunal of Nice and replaced it with a judgment that the legality of the tax procedures was valid. There was a petition to the Conseil d'État to quash[715] the decision of the Administrative Appeal Court of Marseilles, but the appeal failed, hence the judgment of the Appeal Court stood.

This was an example of both trends, namely a matter being heard at the third instance and being granted justice on the third attempt. Judgment was granted in favour of the people to be compensated by the State, which contributed to access to justice. In *SAS Constructions Mécaniques de Normandie*,[716] the simplified joint stock company of Construction Mécaniques requested that the Administrative Tribunal of Caen order the State to pay compensation for losses that it suffered because of the exposure of its employees to asbestos. The Administrative Tribunal of Caen dismissed the application. The Administrative Court of Appeal dismissed the appeal. The Conseil d'État quashed the judgment of the Administrative Court of Appeal and replaced it with a judgment that the State compensate the company.[717] This illustrates that the Conseil d'État balances the interests of all parties in

[714] No. 360426.
[715] The company, LG Services, requested that the Administrative Tribunal of Paris discharge the additional contributions of corporation tax and additional contributions imposed on it for financial years. The Administrative Court of Appeal of Paris dismissed the appeal. The judgement of the Paris Court of Appeal was quashed and the case was referred to the Administrative Court of Appeal of Paris. The State had to pay compensation in the amount of EUR 3 500 pursuant to the Code of Administrative Justice.
[716] No. 342468.
[717] MAIF and Association Centre Lyrique d'Auvergne: the Mutuelle assurance des instituteurs de France (MAIF) and the Centre Lyrique d'Auvergne association requested the Administrative Tribunal of Clermont-Ferrand to order the municipality of Clermont-Ferrand to pay the MAIF the sum of EUR 5 000 for the insured amount as

reaching a reasoned judgment.

An example of a party seeking the decision of the lower tribunals to be quashed can be found in *The Company Les Editions Neressis*,[718] which requested the Conseil d'État to quash the decision of the Data Protection Commission in relation to collecting and processing the personal data of people that is published on a competitor's website. Further, it wanted to order the Data Protection Commission to pay compensation in terms of the Code of Administrative Justice. The petition of the Company les Editions Neressis was dismissed.[719]

An ideal example of balancing all the parties' interests to deliver a fair judgment can be found in *Minister of Agriculture, Food and Forestry v Mr B*.[720] Mr B requested the Administrative Tribunal of Bordeaux to order the State to compensate him for the harm caused. The Tribunal dismissed the request. The Administrative Court of Appeal of Bordeaux quashed[721] the judgment of the Tribunal and ordered the State to pay damages, together with capitalised interest, to Mr B. The Conseil d'État dismissed the appeal and ordered that the State shall pay damages[722] to Mr B in relation to the Code of Administrative Justice.[723]

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compensation for harm suffered, and to indemnify MAIF against all orders that could be made against it for compensation for the harm suffered. The Administrative Tribunal of Clermont-Ferrand dismissed the application. The Administrative Appeal Court of Lyon dismissed the appeal. The Conseil d'État made the decision that the decision of the Lyon Administrative Court of Appeal be quashed and the matter was referred to the Administrative Court of Appeal of Lyon. The municipality of Clermont-Ferrand had to pay MAIF and the Centre Lyrique d'Auvergne the sum of EUR 1500 in terms of the Code of Administrative Justice.

[718] No. 384673.

[719] The Municipality of Chatillon-Sur-Seine requested that the Administrative Tribunal of Dijon quash the multiple decisions of the municipal council; the Tribunal quashed the deliberation No. 2011-106 and dismissed the other submissions. The Administrative Court of Appeal dismissed the appeal. The Conseil d'État quashed the decision of the Administrative Court of Appeal and referred the case back to the Administrative Court of Appeal.

[720] No. 384884

[721] Company Applicam; In the Nord-Pas-De-Calais Region, the company Rev&Sens requested the precontractual interlocutory proceedings judge of the Administrative Tribunal of Lille to cancel the procedure commenced by the Nord-Pas-de-Calais region; the judge of the Administrative Tribunal cancelled the disputed procurement contract procedure. The order issued by the Administrative Tribunal of Lille was quashed by the Conseil d'État.

[722] The Company Tonin requested that the Administrative Tribunal of Nimes order the municipality of Saint-Saturin-les-Apt to compensate for the harm caused from the extension of the duration of a construction project on the property complex named 'Les hameaux d'Amelie'. The Administrative Tribunal of Nimes ordered compensation of EUR 18 152 to be paid. On appeal to the Administrative Court of Appeal, the judgement was dismissed. On appeal to the Conseil d'État, the appeal of the company Tonin was dismissed and the company was ordered to pay compensation in the amount of EUR 3 000 in terms of the Code of Administrative Justice Act.

5.1.2 Australia

Another trend displayed by the administrative tribunal systems assessed are that they are tiered and enhance access to justice by reducing the caseloads of the court system. A reason to approach the third tier of appeal is to quash the decision of the lower tribunals. Lastly, the decisions are perceived to be fair in balancing all interests concerned.

A good example of a tribunal trying to balance the interests of the parties concerned can be found in *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC*,[724] in which the Tribunal ruled on the meaning of the word "costs" and of "disbursements incurred for the purposes of the proceeding", in that it extended to the costs of non-lawyers that are considered to be 'professional advocates' under section 62 of the Victorian Civil and Administrative Act 1998. The Tribunal also has the power to award costs in favour of an unrepresented person to compensate for lost wages/salary and for travelling expenses incurred.[725] *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC*[726]illustrates the tiers of hierarchy of the tribunal hearing a matter of the third instance. In *Connolly v Greyhound Racing Victoria Stewards (Review and Regulation)*,[727] the Tribunal ordered that the Greyhound Racing Appeals and Discipline Board decision made on 12 June 2015 be set aside. In substitution thereof, an order was made that the applicant be disqualified for a total period of ten years, with five

[723] *Minister of the Economy and Finance vs Mr A* requested that the Administrative Tribunal of Bordeaux quash the decision of 15 July, when the Minister of the Budget, Public Accounts and the Civil Service refused to revise his retirement pension plan. The Administrative Tribunal of Paris dismissed his request. The Administrative Court of Bordeaux quashed the judgement and instructed the Minister to revise the pension plan. On appeal, the decision of the Administrative Court of Appeal was quashed and the State was ordered to pay compensation in the amount of EUR 10 0000, and the Minister did not have to revise the pension plan.

[724] [2004] VCAT 2188, 18 VPR 171.

[725] *Bomvic Pty Ltd v Yarra CC*, e in terms of the clause that governs licenced premises to sell or consume alcohol, considered the whole use of the land to consume alcohol and not just a limited aspect. It was not about a permit to extend the hours of operation or a permit for a change in licence. The permit was not triggering an event, but for a more general use of land to sell or consume liquor. Therefore, conditions had to fairly and reasonably relate to this wider and more general use. See also *Ella Ingram v QBE Insurance (Australia) Ltd* in which the tribunal held that the respondent contravened the Equal Opportunity Act 2010 and that the applicant was entitled to compensation in the amount of $4 292.48 for economic loss and $15 000 for non-economic loss.

[726] [2004] VCAT 2188, 18 VPR 171.

[727] [2016] VCAT 1180.

years of that period of disqualification to be suspended subject to the applicant's good behaviour during that total period of disqualification.[728]

5.1.3 United Kingdom

Another important trend of the administrative tribunal systems are that they are tiered and enhance access to justice by reducing the caseloads of the courts. A reason to approach the third tier or second tier of appeal is to quash the decision of the lower tribunals. Lastly, the decisions are perceived to be fair in balancing all interests concerned.

An example of a matter heard before a second tier by first moving through the channels of the first tier is the following: The Upper Tribunal, which hears appeals of administrative decisions, dealt with a case that was heard in the Information Tribunal of *IB v Information Commissioner*.[729] The matter concerned the appellant appealing the decision of the first-tier tribunal. The appeal was dismissed and the decision of the appellant who was found to be a vexatious litigator was upheld. It is important to note that the Information Tribunal and certain other tribunals, such as the Employment Tribunal in the United Kingdom, are categorised as courts, as their function is of a judicial nature. The court commented on the function of the powers of the tribunal:

> But the precise boundary does not matter, as under section 58(1) of the Freedom of Information Act 2000 the First-tier Tribunal has to decide if the decision of the Information Commissioner was in accordance with law. That clearly puts it on the judicial side of the line, wherever it may be drawn. And the same is true of the overwhelming majority of the jurisdictions of the First-tier Tribunal and Upper Tribunal.[730]

[728] In *Oliver v Racing Victoria Limited*, Damien Oliver was found guilty of reckless riding in breach of the Australian Rules of Racing 137(a). The Decision of the Racing Appeals and Disciplinary Board was affirmed by the Tribunal. The application of review for liability was dismissed. See also *Kavanagh & O'Brien v Racing Victoria Limited*, in which the appeals were successful, as the decision against the stewards (licenced trainers) were set aside and vacated, as the stewards were charged and a percentage of their prize money was held by Victoria Racing as a condition imposed, which was discharged on appeal.
[729] [2012] AACR 26 (*IB v Information Commissioner* [2011] UKUT 370 (AAC)) para 22.
[730] [2012] AACR 26 *(IB V Information Commissioner* [2011] UKUT 370 (AAC)) para 22

Once again, the judicial function, nature and powers of the Information Tribunal are akin to those of courts. Although it is called a 'tribunal', its true nature is that of a court and it has the effect of the latter category.

> The Information Tribunal as considered by Davis J was very much at one extreme of the spectrum of the range of courts. I have taken account of the wide range of cases that come before the First-tier Tribunal and the Upper Tribunal both across their chambers and specifically in their information right jurisdiction. My overall impression on both counts is that these tribunals are courts for the present purposes. They are, generally although not exclusively, bodies that have to interpret and apply the law to the cases before them, for the purposes of which they have procedural powers that are similar to those possessed by the ordinary courts, albeit adjusted to the particular needs of tribunals.[731]

An example of balancing the interests of the parties is found in the case of *Road Angels Non-Fault Accident Management Limited v The Office of Fair Trading*,[732] which was an appeal related to the refusal of granting a standard licence. The Consumer Credit Appeals Tribunal reversed the decision and granted the standard licence and excluded a trading licence, therefore balancing the interests of the parties.

An example of a matter heard before the second tier is *The Secretary of State for Defence v LA*,[733] which was an appeal to the Upper Tribunal (second tier). For the appeal to be successful, the Secretary of State would have to overcome two hurdles, namely:

> First, the Secretary of State must show that 'the making of the decision concerned involved the making of an error on a point of law' (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). Second, the Secretary of State must additionally show that it is appropriate for the Upper Tribunal to intervene in the case management decisions of the

[731] [2012] AACR 26 *(IB V Information Commissioner* [2011] UKUT 370 (AAC)) para 34. See also In the case of *R v First-tier Tribunal* an application to set aside the consent order. The decision was held by the Administrative Appeal Tribunal (upper tribunal) that the decision was granted to be taken on review, but the aspect of the consent order still stands, as the procedure was not irregular.
[732] [2008] Consumer Credit Appeals Tribunal.
[733] 2011 UKUT 391 AAC.

> First-tier Tribunal before their effect on the outcome of the appeals before the tribunal is known.[734]

The judge remarked:

> I accept that there is the potential for the effort required of parties to become disproportionate. As Knight Bruce V-C recognised in Pearse v Pearse (1846) 63 ER 950 at 957: Truth, like all good things, may be loved unwisely-may be pursued too keenly-may cost too much. …[735] The First-tier Tribunal has sufficient powers to prevent its proceedings imposing an excessive burden on one party.[736]

The Tribunal recognised that the balancing act of ensuring fairness for both parties was a challenging exercise.

It is necessary to have sight of the rules of first-tier and upper tribunals in relation to the rules of evidence and the objectives of the tribunal to understand its deliberations and considerations:

> '2 Overriding objective and parties' obligation to co-operate with the Tribunal
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes-
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) Avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) Ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) Using any special expertise of the Tribunal effectively; and

[734] 2011 UKUT 391 AAC para 8.
[735] 2011 UKUT 391 AAC para 22.
[736] 2011 UKUT 391 AAC para 22.

(e) Avoiding delay, so far as compatible with proper consideration of the issues.'[737]

These are the important aspects that the tribunal considers in reaching a decision; it is a fair checklist that ensures fairness and justice is achieved.

'15 Evidence and submissions

(2) The Tribunal may-

(a) admit evidence whether or not-

(i) the evidence would be admissible in a civil trial in England and Wales; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where-

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or practice direction; or

(iii) it would otherwise be unfair to admit the evidence

(3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose.'[738]

[737] 2011 UKUT 391 AAC para 9.
[738] 2011 UKUT 391 AAC para 9.

The consideration of evidence is important, because it is a procedural aspect that is fulfilled and that also contributes to the fairness of the reasoned decision.[739] The appeal was dismissed and permission to appeal to the Court of Appeal was granted.[740]

5.2 Findings of the comparative study

The findings of the comparative study are as follows:

- The common aspect of the age of the administrative tribunals is that they are well established.
- The model for all the tribunals has been improved upon as time has progressed.
- The federal Constitution is in Australia. France is a Republic and UK is a Unitary Constitution.
- All the countries are interrelated to each other in a certain manner.
- Rules of procedure are relaxed.
- Rule of evidence is relaxed.
- Tribunals are cost efficient.
- Tribunals are effective.
- Tribunals create access to justice.
- Global trend and popularity of the tribunal systems.
- Impartiality, independence and transparency are common principles of interconnectedness that all tribunals display.
- Tribunal decisions are subject to review or appeal.
- Tribunal decisions do not create precedent.
- Tribunals can handle a heavy caseload.
- Tribunals are user friendly.

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[739] The Secretary of State for the Home Department and Mohamed Issa Salim the appellant's appeal was allowed on asylum and human rights grounds. However, the immigration judge in the First-tier tribunal had materially erred in law and the appeal is dismissed and replaced the original decision in that the appeal should never have been allowed.

[740] 2011 UKUT 391 AAC para 26.

- Models of these tribunal systems work well for each jurisdiction.
- There is no clear definition of a tribunal and, in certain jurisdictions they are judicial, while in other jurisdictions they are non-judicial.

The findings of the comparative study are represented in a tabulated form below.

UK, Australia, France
Objectives:
Cost effectiveness: The tribunals are cost effective and the complexity or simplicity of the matter is proportional to the costs spent.
Speedy resolution of matters: Disputes are resolved expeditiously.
Promotion of the rule of law: The tribunals promote the rule of law in the interpretation and resolution of disputes.
Simplified procedures: The procedures are simplistic and user friendly.
Informality and flexibility: The tribunals are informal and flexible in hearing and resolving disputes, as it is substance over form.
Features:
Constitutional structure: The UK constitutional structure is unitary, Australia is a federal state and France is a republic.
Approximate age: The UK tribunal system began in 1958. The Australian tribunal system began in 1971, and the French tribunal system began in 1799.
Review/Appeal: The tribunals' decisions are subject to appeal or review.
Rules: The rules are comprehensive and user friendly.

Evidence: In the UK and Australia, the evidence presented before the tribunal is a combination of oral and written evidence (documentary, pleadings and affidavits), whereas in France it is written rather than oral.
Access to justice: The tribunals are accessible to people to hear their disputes in a quick, efficient, transparent forum.
Global popularity: Tribunals are popular across the globe for their method of resolving disputes expeditiously, rather than in a court.
Deficiencies: In Australia, the thrust of enforcement of the tribunal decisions is undermined by the courts. In France, tribunals make short judgments. In the UK, there are numerous tribunals and some are judicial whilst others are non-judicial.
Remedies: The court in Australia should reverse the decision of taking away the thrust and enforcement of tribunal decisions. In France, longer judgments should be considered when it is necessary for complex cases dealing with the interpretation of legislation and creation of jurisprudence. In the UK, there should be demarcation between judicial and non-judicial tribunals.

Part 5: Access to Justice in the Tribunal System

Chapter 6: Enhancement of access to justice in the SA tribunal system

6.1 Introduction

Prior to the French Revolution in 1789, access to justice was considered from within an individualistic silo, with ignorance of the lack of accessibility to justice by the working class in terms of costs and resources.[741] The advent of the French Constitution of 1946, and the growth of the working class, contributed to a change, with access to justice having to be inclusive and with it being classified as a basic human right.[742] This transformation has been encapsulated as the three waves of transformation to overcome the well-known barriers of access to justice.[743] The first wave was from 1965 to the 1970s, and relates to the enhancement of legal aid in an attempt to overcome the barriers.[744] There was a general improvement in legal aid, in that it was state funded instead of legal services being offered pro bono, and stringent requirements were applied in order to qualify for legal aid.[745] This wave addressed the barrier regarding costs for litigants who did not have adequate representation. In the 1970s, the second wave was the representation of diffuse interests, which was also known as a revolution in civil procedure.[746] The second wave made provision for class actions in public interest law, which previously had no place in traditional civil procedure. This transition is reflected by Cappelletti and Garth as:

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[741] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 183-185. See also M Cappelletti & B Garth 'Access to Justice as a Focus of Research' 1 *Windsor Yearbook of Access to Justice* (1981) ix.

[742] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 183-185

[743] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 186-195. The barriers consist of cost of litigation, relative party capability, special problems of diffuse interests.

[744] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 197

[745] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 197-199. See also R Sainsbury & T Durkin 'Access to Justice: Lessons from Tribunals' in A.A.S Zuckerman & R Cranston *Reform of Civil Procedure* Essays on *'Access to Justice'* (1995) Clarendon Press Oxford.

[746] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 209

> The traditional conception of civil procedure left no room for the private, non-governmental protection of diffuse interests. Litigation was seen as merely a two-party affair, aimed at settling a controversy between -the parties about their own individual rights. Rights tending to belong to a group, to the public or to a segment of the public did not fit well into that scheme. The laws of standing, the rules of procedure, and the roles of the judges were simply not designed to facilitate private enforcement of the rights of diffuse interests.[747]

Collective social interests were now provided for in terms of civil litigation and procedure. The improvement of legal aid and the protection of class action litigation led to the third wave of a new approach for access to justice.[748] The third wave incorporated both the preceding waves, which created the dimension of an overhaul of the old lens of looking at access to justice. The consequence of the overhaul was a redesign of the rules of procedure to ensure the balance of power between litigants and a reform of the legal system.[749] This third wave of the mid-1970s was befitting creating an expansive aspect of reform in terms of procedure, structure, incorporating dispute resolution mechanisms, together with radically innovative ideas for the continuous reform of civil procedure.[750] Cappelletti and Garth summarise this wave succinctly as:

> This approach, in short, is not afraid of comprehensive, radical innovations, which go much beyond the sphere of legal representation. Further, this approach recognizes the need to relate and adapt the civil process to the type of dispute.[751]

One of the innovative techniques that was proposed was the forming of tribunals to address disputes and conflict to reduce the workload of the courts. Another recommendation was to

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[747] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 209. See also M Cappelletti 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' 56 *The Modern Law Review* (1993) 282.

[748] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 222. See also M Cappelletti 'Social and Political Aspects of Civil Procedure-Reforms and Trends in Western and Eastern Europe' 69 Michigan Law Review (1970-1971) 847 and M Cappelletti 'Theoretical Approach to Law and A Practical Programme for Reform' 109 South African Law Journal (1992) 22

[749] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 222-224

[750] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 222-225

[751] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 225

simplify the law for the users in order to enhance access to justice in tribunals, courts and ADR mechanisms.[752]

Access to justice is a right that is entrenched in the Constitution, and this right is facilitated through courts and tribunals.[753] Tribunals in South Africa enhance access to justice in that the procedures are informal, flexible and quicker than courts. The procedures are simplistic and user friendly if the parties do not possess legal representation. Legal representation is not required to approach the tribunals. In addition, the costs are minimal for tribunal members to hear the matter. The aim of this chapter is to illustrate that access to justice is enhanced through the tribunals by the adoption of foreign tribunal systems, which advance access to justice in the tribunal system of South Africa. The creation of a harmonised tribunal system in South Africa is the ideal model to contribute to the developments of access to justice in a cohesive and consistent tribunal system. All these improvements and enhancements will contribute to a unified tribunal system that is efficient and effective.

2. Access to justice in the SA tribunal system compared to foreign systems

2.1 The French system

The French tribunal system is tiered. The three tiers consist of the tribunal, appeal tribunal and the Conseil d'Etat, the final forum for hearing matters of third instance. This tiered approach ensures that matters are heard fairly and that the parties are afforded an opportunity to appeal the decision. The structure of the South African tribunals is different, in that each tribunal has its own tiered system. The judicial review is subject to the court, namely the high courts and the superior courts. The South African tribunals do not possess an internal process of judicial review, with the exception of the Competition Appeals Court. A tiered system with its own judicial review processes will serve the benefit of eradicating any burden on the court system. The Conseil d'Etat will correct any mistakes that the lower forums have made in deliberating on matters, thereby ensuring fairness and effectiveness. The South African tribunals offer the opportunity to appeal or review decisions to the court for rectification should any error of law or fact have occurred.

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[752] M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1977-1978) 22 *Buffalo Law Review* 286-287.
[753] See section 3.2.2 of this thesis.

2.2 The Australian system

The Australian tribunal system consists of three tiers. The first tier is the commission/board, the second tier is the tribunal and the third tier is the appeal tribunal. The decisions of the tribunal are subject to the courts for enforcement. This takes away the thrust and power of the tribunal. A positive aspect is that the tribunal systems are amalgamated in each territory and province in Australia. The South African tribunal system will benefit from an amalgamated tribunal system such as the Australian system, because it provides a one-stop place that is user friendly and with all resources in one place, which will stimulate cohesion and consistency. The lack of enforcement is similar to the case with South African tribunals. This is a major drawback, as the power and thrust of the tribunal is taken away and there is dependence on the court system for enforcement, which increases costs, time and the caseload of the courts.

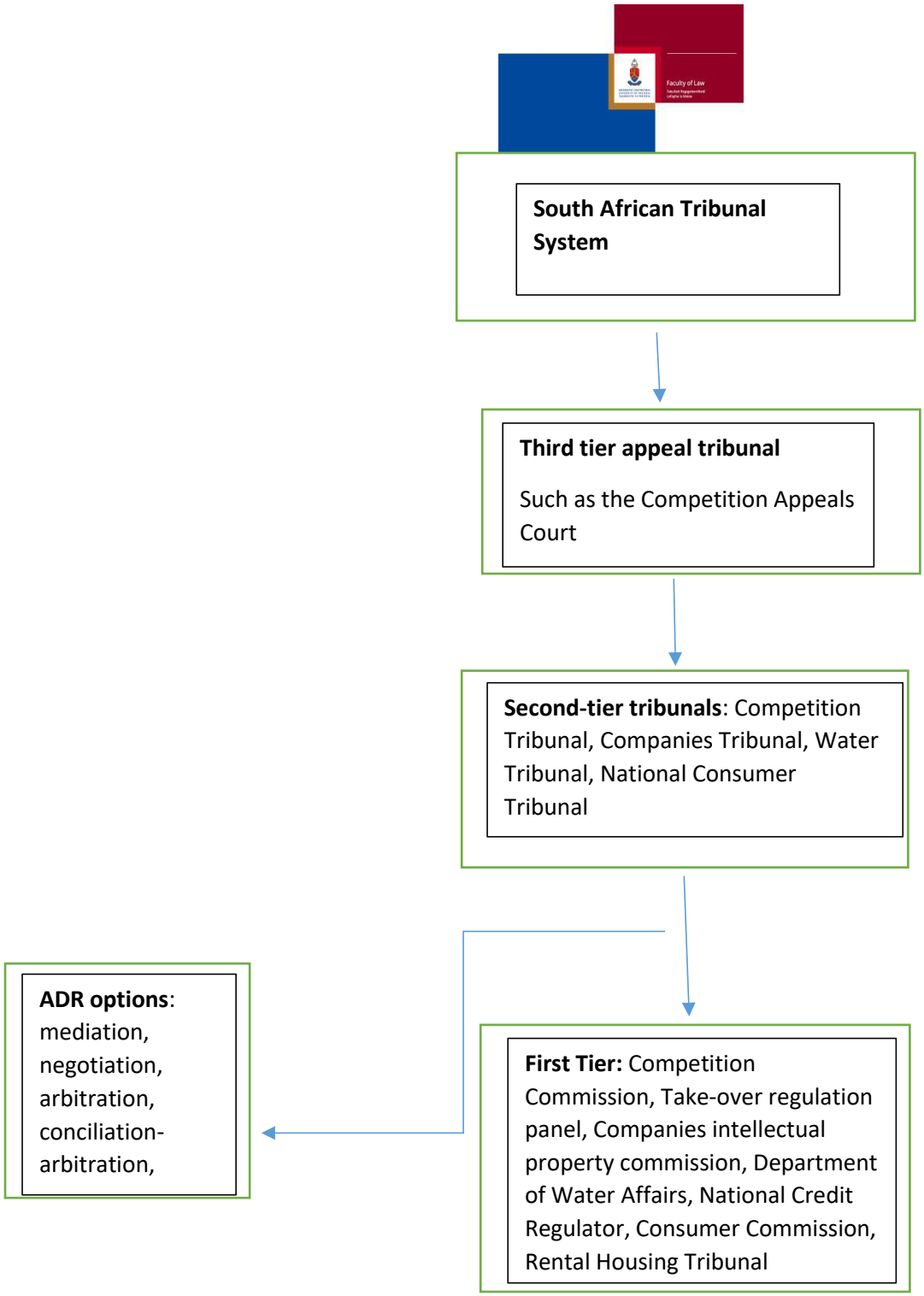
3.3 The UK system

The United Kingdom tribunal system consists of two tiers. The first tier is the tribunal and the second tier is the upper tribunal. The United Kingdom has a unified tribunal system, namely different tribunals that form a unified system and that operate in unity and cohesion. This is convenient for the users. The United Kingdom tribunal system has enforcement mechanisms. If there are tribunals that are not part of the tribunal system, innovative methods are found to join the unified tribunal system to prevent a few tribunals operating in a disconnected manner against the tribunal system. The unified tribunal system is analysed annually by the Minister in order to improve the system to ensure higher efficiency and user satisfaction. It is a system that, through constant reformation and improvement, works well under the circumstances. This is an ideal system for South Africa in respect of enforcement and the unified system. South African tribunals are disconnected from each other. There are many similarities between the tribunals in this study that provide the basis for a unified tribunal system. This unified tribunal system can only improve over time, because joint resources, joint intellectual capacity and a common place of operation will strengthen the system to operate at its full potential.

3. The South African Tribunal System (SATS)

The proposed South African Tribunal System will include all tribunals under one umbrella in each province. The South African Tribunal System would also be tiered in order to allow for first tiers, second tiers and third tiers, where applicable. Judicial review to the courts would always be available as part of the administrative justice aspect, although it would not be encouraged if there were no grounds for it. The South African Tribunal System would have a unified set of rules so that there is no duplication, but a consistent set of rules that is flexible, informal and easy to apply by a layperson. The South African Tribunal System would allow for the enforcement of all decisions in that, if there was contempt of an order, there would be consequences for the tribunal to enforce the contempt without having to approach the court system. Similarly to the system in the United Kingdom, the Minister would review the tribunal system to reform and improve it if there was a budget surplus to allow for this. The possible problems that could arise would be that money would have to be invested to ensure the smooth running of a unified system, and a building would have to be provided to house the different tribunals. In any creation of a new system, financial cost implications are a consequence, which requires government to allocate taxpayers money to achieve the goals. However, this would be an investment for the people of South Africa in the long term, as they would have an efficient and effective system to resolve their disputes.

A diagrammatic illustration of the proposed South African Tribunal System and the tiers of its hierarchy is provided below.



The tiers illustrate how many times the matter has been heard before the members of the tribunal system. The Rental Housing Tribunal is a forum of first instance when hearing tenancy dispute matters. The South African Tribunal System would provide a platform for all types of ADR mechanisms to be facilitated and encouraged, namely conciliation, mediation, arbitration, negotiation, conciliation-arbitration, mediation-arbitration.

4. Adopting ADR mechanisms in tribunals

All the tribunals would provide ADR to facilitate a resolution at an earlier stage if possible. The Companies Tribunal, Rental Housing Tribunal and Water Tribunal would make use of ADR mechanisms, such as negotiation. The Rental Housing Tribunal utilises mediation to assist the parties to resolve the dispute. The Companies Tribunal provides for ADR processes, which the parties may agree upon, and does not limit the types of resolution, provided they are agreed. The NCT and Competition Tribunal do not make use of ADR mechanisms at all. There are other types of ADR that can be utilised, such as online ADR, mediation, arbitration, mediation-arbitration, conciliation-arbitration, conciliation and negotiation. These are all different methods to seek earlier resolution of a dispute in an informal manner, with the exception of arbitration, which is a more formal forum. All the tribunals in this study should employ these ADR techniques and mechanisms to save time and costs in resolving matters sooner rather than later. It is apparent from the diagrammatic representation that an ADR forum incorporated into the South African Tribunal System would be beneficial in enhancing access to justice, efficiency, effectiveness and expediency. Alternative dispute resolution is not just a trend, but is the way forward to resolve disputes through innovative methods that are robust and dynamic.

5. Enhancing access to justice in tribunals

Each tribunal in this study has the potential to be improved in some respect, and some tribunals require more improvement than others. The Rental Housing Tribunal can be improved by allowing for appeal mechanisms and not just review of its decisions. The Rental Housing Tribunal as part of a unified tribunal system will ensure consistency in the application of its rules and decisions. This will guarantee that more users will use the tribunal system, as it will be perceived as more credible, instead of being perceived as a forum for tenants, The case load of the tribunals in a unified system will be small in comparison to the court systems. The more efficient and trusted a system, the more users it will attract, and this will have a domino effect to decrease the caseload of the courts. All the tribunals in this study do not have enforcement mechanisms in relation to enforcing the decisions, responsibility rests with the courts. This poses an unnecessary burden on the courts, as it increases the court load, costs and time. The lack of enforcement mechanisms

amounts to access to justice being denied. All the tribunals will benefit from a rationalised, unified set of rules that is flexible, relaxed and simple to use, as this will enhance access to justice.

6. A unified tribunal system and its procedures

The practical implications of a unified, harmonised tribunal system means that this proposal would take years to implement. It would need the approval of the legislature and the government. Legislation would have to be promulgated to allow for the existence of a unified tribunal system that allows for all the tribunals to exist under one umbrella. The resources of the government would have to be invested in the singular source and these will have to be filtered to the divisions of the tribunals within the system. The more demand by the users of tribunals means that members cannot be part-time but would need to be full-time, which means an increase in budget and salaries and the employment of more staff. The staff would need additional training in order to operate the system as effectively and efficiently as possible. This would benefit the proposed unified tribunal system, as currently the members possess a vast array of knowledge. Sometimes, one member of a tribunal may have one or more areas of generalist expertise, whereas specialist and expertise training would ensure that everyone is on the same intellectual platform in the deliberation of disputes and matters.

7. Concluding observations on the function of access to justice in the SA tribunal system

It is submitted that the proposal of a unified tribunal system will enhance access to justice by addressing the issues that this thesis has exposed in relation to the current tribunals, which operate in a disconnected network. In the political climate that we live in, each tribunal has its role and significance in relation to socio-economic and constitutional rights. The Rental Housing Tribunal ensures the balancing and protection of rights between the tenant and the owner. The Companies Tribunal ensures the protection of the rights of companies in relation to freedom of operation and association within the confines of corporate governance. The National Consumer Tribunal ensures the balancing of rights between the consumers and suppliers/creditors. The Water Tribunal ensures that water-

usage rights such as licenses are enjoyed by all people of South Africa, and are not sourced to only a privileged few. Within the arena of climate change, water-usage rights are valuable, as water is a scarce commodity nationally because of the droughts suffered throughout the country. The Competition Tribunal balances the rights of competing companies in the market to prevent and prohibit price fixing, colluding, unfair practices and prohibited practices not aligned with the fairness, transparency and openness of competitive practices within the commercial market. Addressing the shortcomings of each tribunal by forming a unified, harmonised tribunal system will ensure the cohesion and effectiveness of tribunals in South Africa.

Part 6: Conclusion and Recommendations

Chapter 7: Conclusion of the study

1. Introduction

The research statement of this thesis was that the tribunals in this study operate in a disconnected manner from each other. This statement proved to be true, as the tribunals each has its own set of rules, mode of operation and pro forma applications, along with independent budgets and its own tribunal website; most tribunals publish their decisions, except for the Rental Housing Tribunal.[754] The drawback of all the South African tribunals included in the study was that the tribunals was powerless in relation to the enforcement of decisions.[755] The users had to approach the High Court or another court for the enforcement of the tribunal decisions should a party default. This is a major drawback in many respects, as it contributes to an already overburdened court system, and incurs more costs and takes more time.[756] All these aspects culminate in the proposed replacement and reformation of tribunals in a South African Tribunal System that is harmonised and unifies all the tribunals in a coherent and consistent place.[757] This study has illustrated that importing the aspects of efficiency, effectiveness and enhancing access to justice from mainly the United Kingdom's tribunal system is an ideal fit for a unified tribunal system in the South African context.[758]

2. Impact of the comparative study in a South African context

The comparative study was important because it illustrated the manner in which the tribunals in South Africa can be improved to operate at an optimal level.[759] The common trends amongst the comparative systems were that they were tiered, they balanced the rights of the parties to give fair and reasoned decisions, and they enhanced access to justice by reducing the court caseload by hearing the matters.[760] The tribunals operated independently and impartially from the court systems. Each foreign country chosen had a

[754] Refer to Chapter 4, which discusses each tribunal and its shortcomings in depth.
[755] Refer to Chapter 4, which discusses each tribunal and its shortcomings in depth.
[756] Refer to Chapter 4, which discusses each tribunal and its shortcomings in depth.
[757] Refer to Chapter 4, for a discussion of all the tribunals included in this study, and Chapter 6, which discusses enhancing access to justice through a unified tribunal system.
[758] Refer to Chapter 5, which discusses the foreign tribunal systems included in this thesis.
[759] Refer to Chapter 5, which discusses the foreign tribunal systems included in this thesis.
[760] Refer to Chapter 5 of this thesis.

particular impact in discussing a unified, harmonised tribunal system for South Africa. Australia has a unified system in each territory across the states in the country.[761] A similar system could operate in South Africa, as the country has nine provinces and each province could have its own tribunal system, with all tribunals under one operational umbrella. The tribunal system of the United Kingdom was most ideally suited to the South African situation, due to its enforcement mechanisms and the fact that all the tribunals are amalgamated and unified in one system of operation.[762] The French system is a successful tribunal system that many European and Asian countries have adopted. It operates purely from an administrative angle in that decisions on appeal have their own specialised administrative appeal court that hears the matters, and the place of last instance is the Conseil d'Etat. There is no mixing of matters between tribunals and courts in relation to judicial review, as the judicial review and appeal are subject to their own hierarchy and tiers, ensuring the independence of each system.[763] In order for this concept to be included in the South African system, legislation would need to be enacted and amended to provide for independence from the courts and the creation of administrative tiers that are not subject to the courts. Overall, the foreign systems had achieved efficiency in that there operating mechanisms fully supported the administration and users of the system. Furthermore, the systems operated in a coherent, logical manner that enhanced access to justice as cases were heard as speedily as possible.

3. Proposal for a reformed tribunal system

The proposal of a reformed tribunal system is based on the findings of the study of the South African tribunals.[764] A unified, harmonised tribunal system will address the shortcomings of the tribunals included in this study to ensure efficiency and mechanisms to enforce decisions. The unified tribunal will ensure that there are enforcement mechanisms, which net effect will ensure more matters are heard because this will provide power to the decisions of the tribunal. The proposed reformed tribunal system will ensure coherence and consistence through rationalised rules. Financial resources will be amalgamated to ensure

[761] Refer to Chapter 5 of this thesis.
[762] Refer to Chapter 5 of this thesis.
[763] Refer to Chapter 5 of this thesis.
[764] Refer to Chapter 6 of this thesis.

that there is a single budget for spending on all the needs of the system. Tribunals are for people to use in an informal and flexible manner, in contrast to the rigid court systems, which are expensive due to the need for lawyers. The tribunal system does not require legal representation, therefore cutting the costs for users significantly.[765] A unified system ensures the uniformity in the procedures, coalesce of resources and the publication of all the decisions on the website to ensure transparency.

3.1 Uniform rules of procedure

The rules of the tribunal system will accordingly have to be rationalised.[766] The rules must be flexible, informal and relaxed,[767] and should be drafted in simple language that is understandable for the users of the tribunal.[768] The High Court rules as the default rules of the tribunal create formality that does not necessarily assist the tribunals, though there is the aspect of practicability and consistency, which are strengths. There must rather be a cautious approach, to enforce flexibility through the rules rather than formality to speedline the processes and not cause hindrances. By having the high court rules as the default also provide for rigidity and do not assist the fluidity and flexibility of tribunal procedures.Perhaps simplistic rules are the preferred choice, that allows flexibility and informality.The tribunals utilise court cases in interpreting legal principles, and are established for the people to fully access their rights in a way that balances the rights and interests of all parties.

3.2 ADR mechanisms in tribunals

Alternative dispute resolution mechanisms are a trend to solve disputes quicker in an informal, cheap and efficient manner.[769] The employment of ADR techniques in the tribunal system will ensure that matters are disposed of quicker and will alleviate the burden on the courts.[770] ADR mechanisms are innovative and easier for the parties to approach their

[765] Refer to Chapter 4 of this thesis.
[766] Refer to Chapter 4 of this thesis.
[767] Refer to Chapter 4 of this thesis.
[768] Refer to Chapter 4 of this thesis.
[769] Refer to Chapter 6 of this thesis.
[770] Refer to Chapter 6 of this thesis.

problems from angles that they never contemplated.[771] Furthermore, ADR methods ensures that there are no backlogs on the tribunal caseload as an opportunity is provided for matters to be dealt with in a robust and creative manner. ADR is the way forward in the resolution of disputes to ensure amicable relationships between parties. ADR is are techniques employed to remove the conflict and tension from the dispute to find a lasting solution in the best interests for both parties, which will assist the tribunal system in finalising disputes and ensuring no backlog of cases.

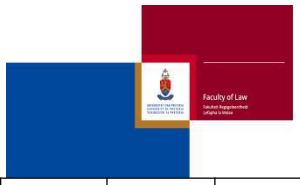
3.3 Addressing the shortcomings of the tribunal system

The shortcomings of the tribunal system are that it cannot provide a quick fix for the tribunals discussed in this study. It will take time for the implementation of the proposed tribunal system. There are key stakeholders from whom buy-in is required for such a system to come into existence, namely the members of the tribunal, government, the Members of the Executive Committee, the President and the legislature, to name a few. Legislation would need to be promulgated and amended to make provision for a harmonised tribunal system. Despite the process required to initiate the recommended changes as proposed by this thesis, this should not deter government and legislature from implementing change. Change and reformation are required constantly to address the ever-changing needs of society.[772]

The table below measures the tribunals discussed against the most important aspects to illustrate their functionality.

	France	UK	AUS	CT	COT	RHT	WT	NCT
Independent	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Coherent	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Professional	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes

[771] Refer to Chapter 6 of this thesis.
[772] M Cappelletti 'Fundamental guarantees of the parties in civil litigation: Comparative constitutional, international and social trends' (1972-1973 25 *Stanford Law Review* 703.



Cost-effective	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
User-friendly	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Unified system	Yes	Yes	Yes	No	No	No	No	No
Importance of decisions	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Enforcement of decisions	Yes	Yes	No	No	No	No	No	No

Key: UK - United Kingdom & Northern Ireland; CT- Competition Tribunal, COT - Companies Tribunal, RHT - Rental Housing Tribunal, WT - Water Tribunal, NCT - National Consumer Tribunal.

The table illustrates that the South African tribunals fare dismally in relation to the enforcement of their decisions. Despite any shortcomings of procedures regarding the implementation of a unified harmonised tribunal system, the strengths outweigh government doing nothing. There is a need for government to act swiftly to realise the model as proposed by this thesis.

3.4 The SATS

The South African Tribunal System is proposed to be three tiered.[773] The first tier will comprise the forums of first instance and the second tier the tribunals of second instance.[774] The third tier is the specialised court of third instance that reviews or hears the appeals of the tribunal of second instance.[775] The proposed South African Tribunal System will be a harmonised system that possesses enforcement mechanisms, offers expertise training for the tribunal members, has a set of rationalised, model rules, and all matters will be dealt with in one place, making it convenient, coherent and consistent for its users. The shortcomings of the tribunals are all addressed in the proposed South African Tribunal System model.

[773] Refer to Chapter 6 of this thesis.
[774] Refer to Chapter 6 of this thesis.
[775] Refer to Chapter 6 of this thesis.

4. Recommendations

The recommendations for the tribunal system to the Department of Justice and Constitutional Development are as follows:

The harmonised tribunal system requires a set of rationalised model rules for the tribunal system to operate as efficiently and effectively as possible. The decisions of the tribunal system should be archived in a singular data for easy user access. The grounds of jurisdiction that the tribunal system possess must be clear, so that the High Court does not possess concurrent jurisdiction with the tribunal system as this will defeat the jurisdiction of the tribunal, as people may still approach the High Court first instead of the tribunal system. The chairpersons and members that are appointed for the tribunal system should conduct proceedings in the most efficient and effective manner. The future pooling of the resources of the tribunal system ensures the high functioning of all the tribunals within the system. The decisions of the tribunal system should be written in the same format across all tribunals within the harmonised system to ensure consistency. The ADR forums should be created within the tribunal system to facilitate the resolution of disputes. The tribunal system should be constantly evaluated in relation to the procedure, operation and rules of the tribunal system to ensure that methods are improved and enhanced continuously to eradicate any inefficiency that could arise over a period of time, alternatively to address teething problems of the system that will inevitably arise.

5. Concluding observations

It is submitted that, through the analysis and critical discussion of the tribunals, the objectives of this thesis were met.[776] The thesis adequately addressed the gap in knowledge in relation to tribunals in South Africa and the disconnected manner in which they operate, and addresses these shortcomings by establishing a unified tribunal system.[777] To implement this system will take time, as all the relevant stakeholders will have to be on board for the establishment of the tribunal system. The difficulty in creating and reforming a system is that it takes time. With all the challenges that confront tribunals, the future

[776] Refer to Chapter 1 and Chapter 4 of this thesis.
[777] Refer to Chapter 1 of this thesis.

amalgamation of the tribunals will serve to eradicate the current problems and expose a whole set of new challenges that will afford us the opportunity to address and enhance justice further. No system is without flaws, but every system requires constant attention and reform to assist in weeding out the challenges and advancing their efficiency. A unified tribunal system is indeed the way forward for South Africa.

Annexure: Tribunal Statistics in this Study

Statistical Data: Key Findings and Graphic Illustrations

Key Findings of Statistical Data (Descriptive analysis of case management against the output and budget surplus).

The efficiency equation is the percentage of cases heard, whilst adding the surplus budget illustrates the output for the year, which measures the overall productivity of the below-mentioned tribunals.

Rental Housing Tribunal

Key	X1=Cases referred for hearings	X2=number of cases heard	X3=Accumulated surplus in operation of tribunal		X4= Chairperson	X5=Deputy Chairperson	X6=Members of Tribunal		Rental Housing Tribunal
Year	X1	X2	X3	% of cases heard	X4	X5	X6	Staff	
2011-2012	440	310	0	70,5%	1	1	6	8	
2012-2013	842	259	0	30,8%	1	1	6	8	
2013-2014	507	330	0	65,1%	1	1	5	7	

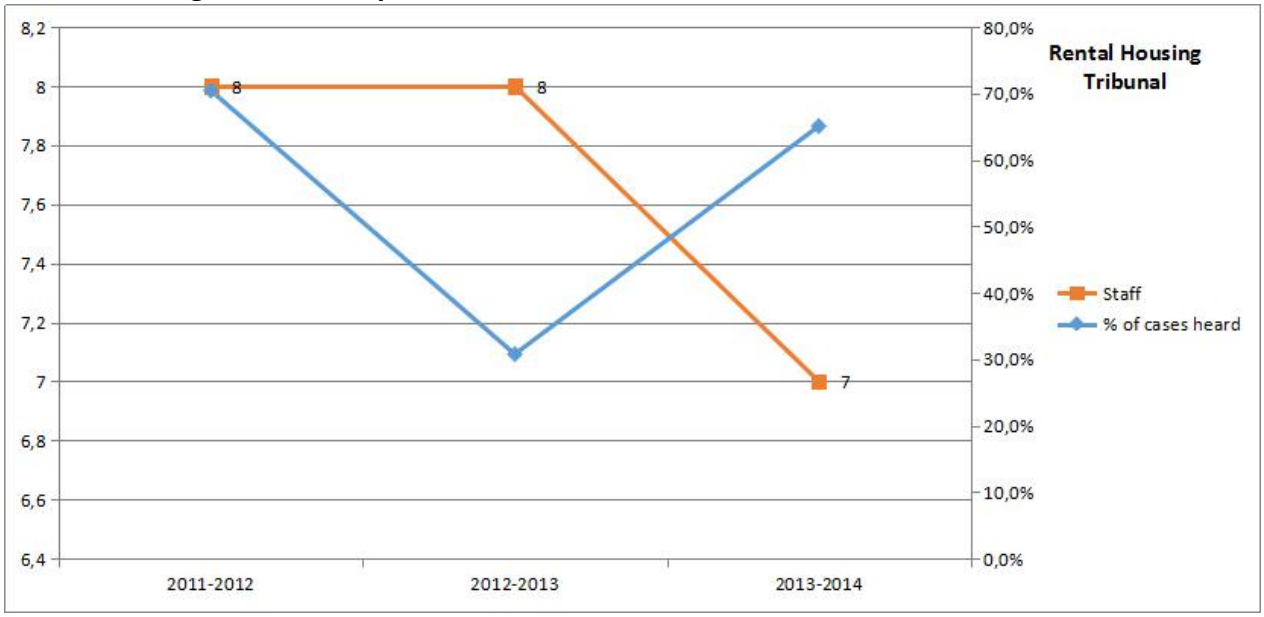
Descriptive Statistics of Rental Housing Tribunal Table

The Rental Housing Tribunal table above provides the data for 2011 to 2014. The percentage of cases referred for hearing in 2011/2012 and what was actually heard during that year was 70.5%. This figure decreased to 30.8% in 2012/2013, and during the course of 2013/2014 it increased to 65.1% The number of cases almost doubled in 2012/2013, in that there were 842 cases as opposed to the 440 cases referred in 2012/2013. Thereafter, the number of cases referred during 2013/2014 decreased, which accounts for the percentage increase in cases heard, even through there was one less staff member to hear the matters. There was no accumulated surplus in the operation of the tribunals, which means that the budget allocated was utilised fully. The number of staff was maintained at eight for the periods 2011/2012 and 2012/2013, but decreased to seven in 2013/2014.

If we presume that each member is allocated the same number of cases, which are divided by the number of members, 38.8, 32.4 and 47.1 cases were heard respectively in 2011/2012, 2012/2013 and 2013/2014. These figures therefore illustrate the efficiency of each member.

Overall, the figures illustrate that the Rental Housing Tribunal was efficient, as its case load was managed effectively in that cases were heard and disposed of and the budget was fully utilised.

Rental Housing Tribunal Graph



Descriptive Statistics of Rental Housing Tribunal

The graph above plots the percentage of cases heard during a specific period, together with the number of staff members. It illustrates that, although there was a one less staff member, the efficiency of cases heard still increased from 2012/2013 to 2013/2014. This thus illustrates that productivity can still increase, despite having one staff member less. However, it should be noted that, since the number of cases decreased, this also eased the work load on the staff, who were able to manage with one less staff members. It is important to consider that the tribunal hears a few hundred cases, which is not a large number in comparison to the court system.

Statistical Data: Key Findings and Graphic Illustration

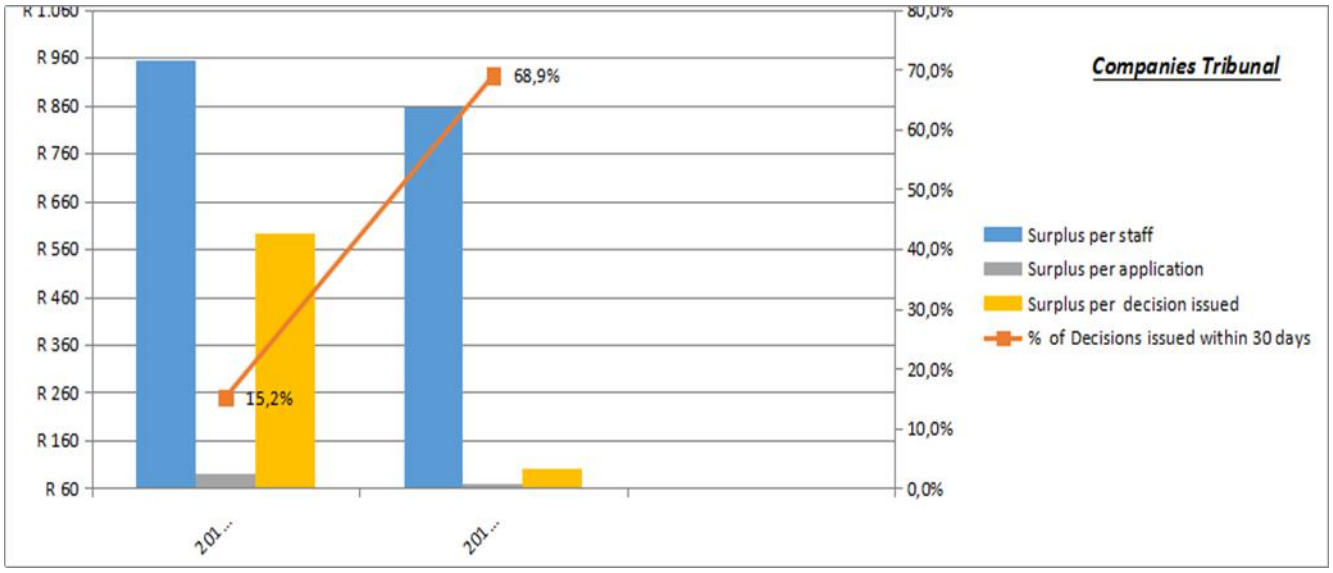
Key	X1= Name Dispute	X2= SECs 72(5)	X3=Extension of time to convene the AGM	X4=Directors' Dispute	X5=Change to the financial year end	X6=S2(3) exemption	X7=Review of CIPC decision	X8=Access to records (company disclosures	X9=substituted service	X10=Holding of an AGM	X11=Adr	X12=Company restoration (section 83)	X13=Accumulated surplus in operation of tribunal	X14=Tribunal support staff	X15= Members of Tribunal	X16=Deputy Chairperson	X17= Chairperson		X18=Decisions issued within 30 days	X19=Decisions not issued within 30 days	X20= Not allocated and no decisions	X21=Total matters received					Companies Tribunal
Period	X1	X2	X3	X4	X5	X6	X7	X8	X9	X10	X11	X12	X13	X14	X15	X16	X17	Staff	X18	X19	X20	X21	Surplus per application	Surplus per staff	Surplus per decision issued	% of Decisions issued within 30 days	
2012-2013 (7mths of operation)	118	58	10	4	1	0	0	0	0	0	0	0	R17 179	4	12	1	1	18	29	62	100	191	R 89,94	R 954	R 592	15,2%	
2013-2014	190	76	7	8	5	1	3	2	1	1	1	1	R20 559	10	12	1	1	24	204	92	0	296	R 69,46	R 857	R 101	68,9%	

Companies Tribunal Table

Descriptive Statistics of Table

The Companies Tribunal table gives the data for the period 2012 to 2014. The total number of matters before the Companies Tribunal in the first seven months of operation was 191, and in the next year, 2013/2014, it was 296 - an increase of 54.97%. The surplus per application was R89.94 in 2012/2013 for seven months of operation, and in 2013/2014 it was R69.46 and had decreased by R20.48. The surplus per staff member was R954 for 2012/2013, which decreased by R97 to R857 in 2013/2014. The surplus per decision issued in 2012/2013 was R592, which decreased by R491 to R101 in 2013/2014. Decisions issued within 30 days amounted to 15.2% in 2012/2013 and 68.9% in 2013/2014, which was an increase of 53.7%.

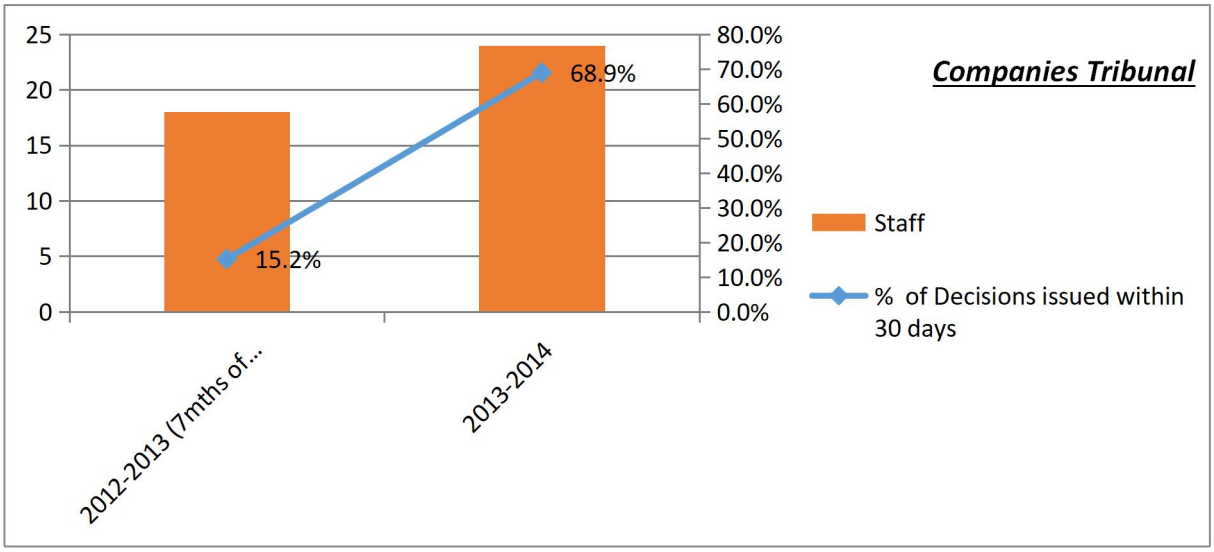
Companies Tribunal Graph



Descriptive Statistics

The graph above plots the surplus per staff member, surplus per application, surplus per decision issued and percentage of decisions issued within 30 days. It illustrates that the surplus per staff member decreased from 2012/2013 to 2013/2014. The surplus per application also decreased from 2012/2013 to 2013/2014. The surplus per decision issued decreased from 2012/2013 to 2013/2014, while the percentage of the decisions that were issued within 30 days increased from 2012/2013 to 2013/2014.

Companies Tribunal graph



Companies Tribunal Descriptive Statistics

The graph above plots the staff and percentage of decisions issued within 30 days. It illustrates that the number of staff increased from 2012/2013 to 2013/2014, which was a contributory factor to the percentage of decisions issued within 30 days rapidly increasing in from 2012/2013 to 2013/2014. The Companies Tribunal is a fairly new tribunal that has only been operational since 2012. However, statistics reveal that the tribunal was a slow starter, using the first seven months to acclimatise, while in its second year it dealt with decisions expeditiously and efficiently and started operating with a surplus.

Statistical Data: Key Findings and Graphic Illustrations
Competition Tribunal Table

Key	X1=large merger	X2=Procedural	X3=intermediate merger	X4=restrictive practice	Consent Orders	Interim relief applications	Total	X5=decisions issued	rate	X6=Total value of administration penalties	X7=Accumulated surplus in operation of tribunal	Competition Tribunal			X10=Tribunal Members (full-time)	X11=Tribunal Members (part-time)	X12=Total Members	X13=Chairperson	X14=Deputy Chairperson	X15=Departmental heads	X16=Case Managers	X17=Registry	X18=Corporate Services	
Year	X1	X2	X3	X4				X5	% of Decision issued	X6	X7	Surplus per Application	Surplus per decision issued	Surplus per staff	X10	X11	X12	X13	X14	X15	X16	X17	X18	Staff
2008-2009	102	23	2	13	nil	nil	140	111	79,3%	R303million	R3 004	R 21,46	R 27,06	R 91,03	2	4	10	1	1	3	4	3	5	33
2009-2010	52	23	0	10	nil	nil	85	71	83,5%	R292million	R1 529	R 17,99	R 21,54	R 46,33	2	4	10	1	1	3	4	3	5	33
2010-2011	55	30	1	30	nil	nil	116	115	99,1%	R787 million	R1 854	R 15,98	R 16,12	R 46,35	2	4	10	1	1	3	9	4	6	40
2011-2012	81	38	6	5	27	1	158	156	98,7%	R549 million	R3 106	R 19,66	R 19,91	R 77,65	2	4	10	1	1	3	9	4	6	40
2012-2013	145	40	15	12	14	0	226	124	54,9%	R732million	(R1 452)	-R 6,42	-R 11,71	-R 36,30	2	4	10	1	1	3	9	4	6	40

Descriptive Statistics of Table

The Competition Tribunal table provides data for the period 2008 to 2013. In 2008/2009, the total number of matters before the Competition Tribunal was 140 disputes and, in 2009/2010, it decreased to 85. The percentage ratios for the data are reflected as follows: a decrease of 39.28% and, in 2010/2011, an increase of 36.47% to 116, in 2011/2012 an increase of 36.20% to 158, and in 2012-2013 an increased of 43.04% to 226.

In 2008/2009 the percentage of decisions issued against the total matters before it was 79.3%; this increased by 4.2% 2009/2010 to 83.5%, by 15.6% in 2010/2011 to 99.1%. In 2011/2012 it decreased by 0.4% to 98.7%, and in 2012/2013 by 43.8% to 54.9%.

In 2008/2009 the total value of administration penalties issued was R303 million. It decreased by R11 million to R292 million in 2009/2010, increased by R495 million to R787 million in 2010/2011, decreased by R238 million to R549 million in 2011/2012, and increased by R183 million to R732 million in 2012/2013.

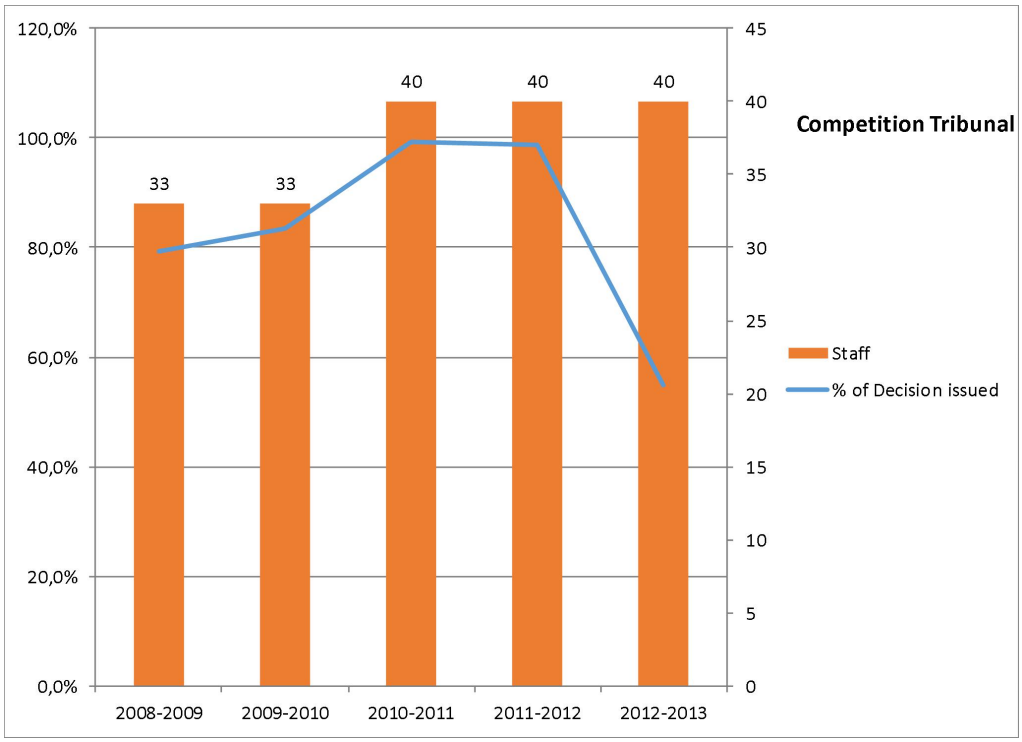
The accumulated surplus in the operation of the tribunal in 2008/2009 was R3 004. In 2009/2010 it decreased by R1 475 to R1 529; in 2010/2011 it increased by R325 to R1 854; in 2011/2012 it increased by R1 252 to R3 106; and in 2012/2013 it decreased by R4 558 to a deficit of -R1 452.

The surplus per application in 2008/2009 was R21.46. It decreased by R3.47 to R17.99 in 2009/2010; decreased by R2.01 to R15.98 in 2010/2011; increased by R3.68 to R19.66 in 2011/2012; and decreased by R26.08 to a deficit of -R6.42 in 2012/2013.

The surplus per decision issued in 2008/2009 was R 27.06. In 2009/2010 it decreased by R5.52 to R21.54; in 2010/2011 it decreased by R5.42 to R16.12; in 2011/2012 it increased by R3.79 to R19.91; and in 2012/2013 it decreased by R31.62 to a deficit of -R11,71.

The surplus per staff member in 2008/2009 was R 91.03. It decreased by R44.70 to R 46.33 in 2009/2010; increased by R0.02 to R46.35 in 2010/2011; increased by R31.30 to R77.65 in 2011/2012; and decreased by R113.95 to a deficit of -R36.30 in 2012/2013.

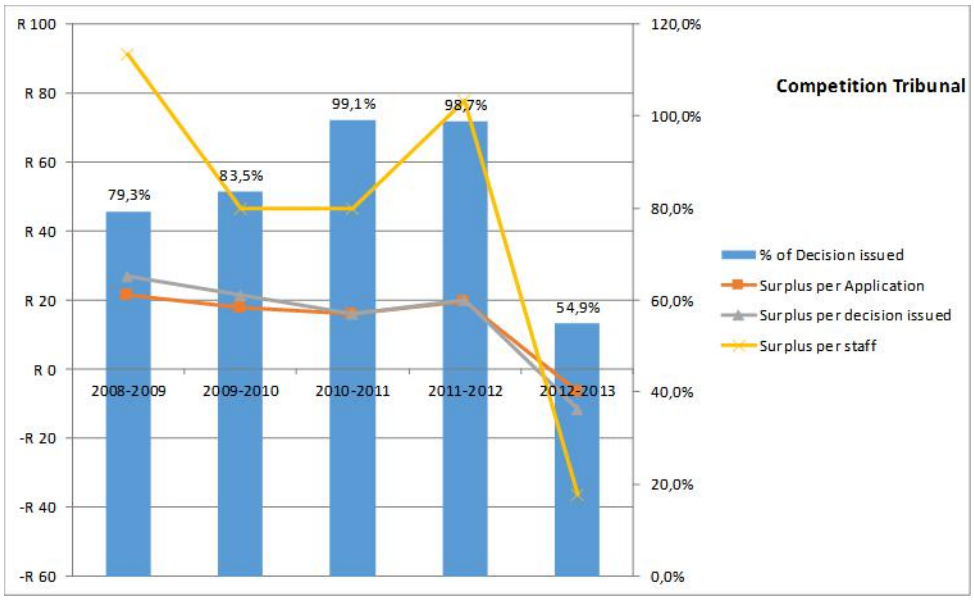
The Competition Tribunal is effective in the manner in which it disposes of matters. The penalties it issues to the value of hundreds of millions of rand illustrates its value and productivity in terms of its output according to the administrative penalties that it orders. The tribunal functioned at a surplus for four years and, in the fifth year, functioned at a minimal deficit. The fines increased in the last year, but the productivity of the number of decisions finalised decreased significantly. It is submitted that a mitigating factor was that the case load increased and the number of staff members did not increase. This means that the administrative penalties increased, but the work also increased, meaning that the staff were working harder due to the higher workload, resulting in only half of the matters being finalised.



Competition Tribunal Graph

Descriptive Statistics

The graph above plots the staff and percentages of decisions issued. It illustrates that staff numbers remained the same for a period of two years. This then increased in the third year and remained constant for two years. The percentage of decisions issued increased in the second year, then remained constant in the third and fourth years and decreased in the fifth year.



Competition Tribunal Graph:

Competition Tribunal Descriptive Statistics

The graph plots the percentage of decisions issued, the surplus per application, the surplus per decision issued and the surplus per staff member. It illustrates that the percentage of decisions issued increased in the last three years, decreased slightly in the fourth year and decreased significantly in the fifth year. The surplus per application and surplus per decision issued followed the same pattern, in that they decreased for three years, increased slightly in the fourth year and decreased again in the fifth year. The surplus per staff member decreased in the second year and remained constant for the third year, increasing in the fourth year and decreasing significantly in the fifth year.

Key	X1= Applications received	X2=Consent order applications	X3=Completed	% of Complete Consent order	X4=incomplete	X5=non-consent order applications	X6=completed non-consent	% of Completed non-consent order	Completed non-consent order	X7=incomplete non-consent	X8=Accumulated surplus in operation of tribunal	X9=Members of Tribunal	X=1=Chairman	X1=1=Support staff	X12	% of Completion (Consent & Non - Consent order)	Surplus per staff	Surplus per completed non-consent order applications	Surplus per completed cases((Consent & Non - Consent order)	Surplus per application received (Consent & Non - Consent order)	National Consumer Tribunal
Year	X1	X2	X3		X4	X5	X6			X7	X8	X9	X1	X11	X12						
2008-2009	26	4	1	25,0%	3	22	10	45,5%	0,6	12	-868 384,0	3	1	12	1	42,31%	-R 51 081,41	-R 86 838,40	-R 78 944,00	-R 33 399,38	
2009-2010	488	454	204	44,9%	250	34	21	61,8%	1,2	13	-369 298,0	3	1	12	1	46,11%	-R 21 723,41	-R 17 585,62	-R 1 641,32	-R 756,76	
2010-2011	1382	1358	935	68,9%	423	24	20	83,3%	0,6	4	1 970 137,0	8	1	23	1	69,10%	R 59 701,12	R 98 506,85	R 2 062,97	R 1 425,57	
2011-2012	2205	2143	1711	79,8%	432	62	51	82,3%	1,2	11	-1 132 113,0	11	1	28	1	79,91%	-R 27 612,51	-R 22 198,29	-R 642,52	-R 513,43	
2012-2013	4193	4072	3467	85,1%	625	121	84	69,4%	2,0	37	2 479 693,0	11	1	28	1	84,69%	R 60 480,32	R 29 520,15	R 698,31	R 591,39	
2013-2014	5386	5315	4143	77,9%	1172	71	44	62,0%	1,2	27	4 507 672,0	11	1	25	1	77,74%	R 118 622,95	R 102 447,09	R 1 076,59	R 836,92	

Statistical Data: Key Findings and Graphic Illustrations

National Consumer Tribunal Table

Descriptive Statistics of Table

From the Table, it can be seen that the percentage of completed, consented applications increased consistently from 2008/2009 to 2012/2013, and decreased by 7.2% in 2013/2014.

The individual productivity of each member for completed consent applications increased over the period of six years. In 2008/2009 it was at 0.06%, and increased by 11.94% to 12% in 2009/2010. It increased by 16.33% to 28.33% in 2010/2011, increased by 13.4% to 41.73% in 2011/2012, increased by 42.83% to 84.56% in 2012/2013, and increased by 24.47% to 109.03% in 2013/2014.

The percentage of non-consent applications that were completed over a period of six years varied. In 2008/2009 it was 45.5% and in 2009/2010 it was 61.8% - an increase of 16.3%. In 2010/2011 it increased by 21.5% to 83.3%; in 2011/2012 it decreased by 1% to 82.3%; in 2012/2013 it decreased by 12.9% to 69.4%; and in 2013/2014 it decreased by 7.4% to 62%.

The individual non-consent applications per staff member was 0.06% in 2008/2009. In 2009/2010 it increased by 1.14% to 1.2%; in 2010/2011 it decreased by 1.08% to 0.06%; in 2011/2012 it increased by 0.12% to 1.2%; in 2012/2013 it increased by 0.8% to 2%; and in 2013/2014 it decreased by 0.8% to 1.2%.

The overall percentage of completed consent and non-consent applications for 2008/2009 was 42.31%. This increased in 2009/2010 by 3.8% to 46.11%; increased by 22.99% to 69.10% in 2010/2011; increased by 10.81% to 79.91% in 2011/2012; increased by 4.78% to 84.69% in 2012/2013; and decreased by 6.95% to 77.74% in 2013/2014.

The accumulated surplus in the operation of the tribunal for 2008/2009 was a deficit of -R868 384.00, in 2009/2010 it was a lesser deficit of -R369 298.00, having decreased by R499 086, in 2010/2011 it was a surplus of R1 970 137.00 after an increase of R2 339 435, and in 2011/2012 it was a deficit of -R1 132 113.00, having decreased by R3 102 250.00. In 2012/2013 there was a surplus of R2 479 693.00, an increase of R3 611 806.00, and in 2013/2014 there was a surplus of R4 507 672.00, an increase of R2 027 979.00.

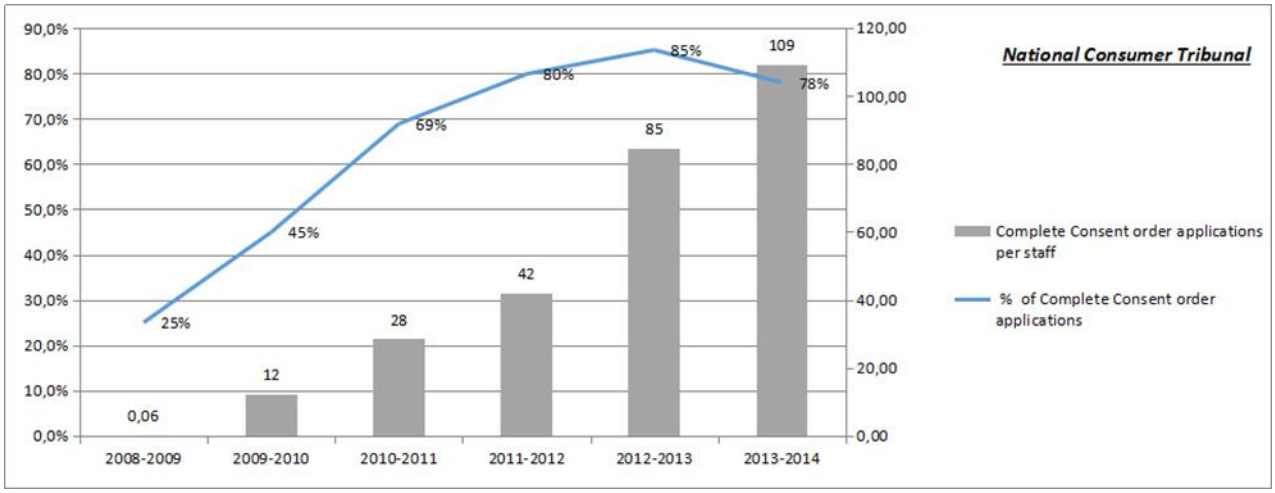
The accumulated surplus per staff member in 2008/2009 was a deficit -R51 081.41 and in 2009/2010 it was a deficit of -R21 723.41, which was a decrease of R29 358. In 2010/2011 there was a surplus of R59 701.12, which was an increase of R81 424.53, and in 2011/2012 there was a deficit of -R 27 612.51, after a decrease of R87 313.63. In 2012/2013 there was a surplus of R60 480.32 after an increase of R88 092.83, and in 2013/2014 there was a surplus of R118 622.95 after an increased of R58 142.63.

Surplus per non-consent applications in 2008/2009 was a deficit of -R86 838.40. There was a deficit of -R17 585.62 in 2009/2010, after a decrease of R6 925.78; a surplus of R98 506.85 in 2010/2011 after an increase of R116 092.47; a deficit of -R22 198.29 in 2011/2012 after a decrease of R120 705.14; a surplus of R29 520.15 in 2012/2013 after an increase of R51 718.44; and a surplus of R102 447.09 in 2013/2014 after an increase of R72 926.94.

Surplus per completed cases of non-consent applications and consent applications showed a deficit of -R78 944.00 in 2008/2009. This decreased by R77 302.68 to a deficit of -R 1 641.32 for 2009/2010. There was an increase by R3 704.29 to a surplus of R 2 062.97 for 2010/2011, and decrease of R2 705.49 to a deficit of -R642.52 for 2011/2012. In 2012/2013 there was a surplus of R698.31 after an increase of R1 340.83, and in 2013/2014 thjere was a surplus of R1 076.59 after an increase of R378.28.

Surplus per application of non-consent and consent applications received showed a deficit of -R33 399.38 in 2008/2009. This decreased by R32 642.62 to a deficit of -R756.76 in 2009/2010; increased by R2 182.33 to a surplus of R1 425.57 in 2010/2011; decreased by R1 939 to a deficit of -R 513.43 and in 2011/2012; increased by R1 104.82 to a surplus of R591.39 in 2012/2013; and increased by R245.53 to a surplus of R836.92 in 2013/2014 .

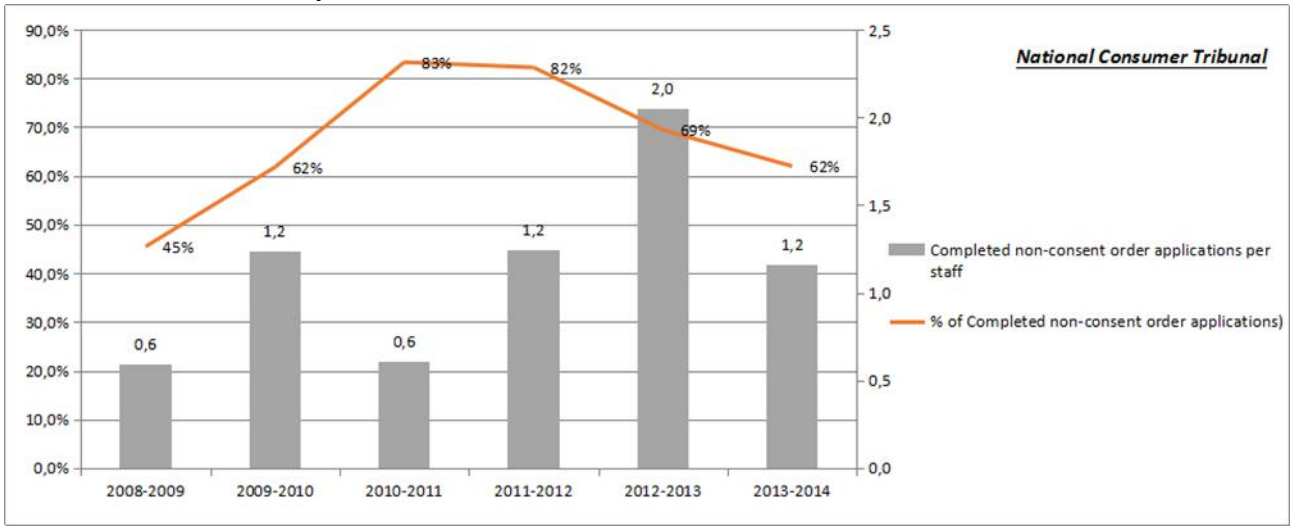
National Consumer Tribunal Graph



Descriptive Statistics

The graph plots percentages of complete consent order applications per staff member. It illustrates that there was a steady increase in the percentage of complete consent applications and that the staff also worked harder individually; however, in the last year there was a decrease in the number of applications per staff member.

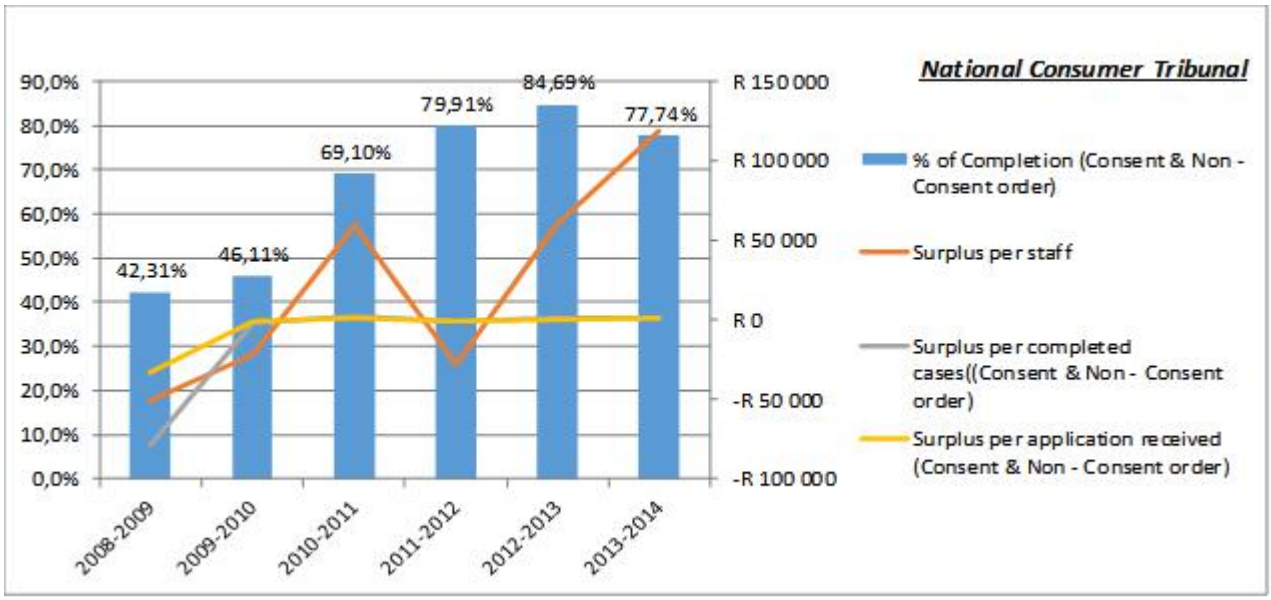
National Consumer Graph



National Consumer Tribunal Descriptive Statistics

The graph above plots the completed non-consent order applications per staff member. It illustrates that the completed non-consent order applications increased for a period of

three years, and then, from 2011/2012, started to decrease for a period of three years. The number of completed non-consent applications per staff member increased and decreased the next year, repeating the same trend for six years.



National Consumer Tribunal Graph

National Consumer Tribunal Descriptive Statistics

The graph above plots the percentage of completion of orders, surplus per staff member, surplus per completed cases and surplus per application received. The graph illustrates that the percentage of completion of both consent and non-consent orders rose steadily for a period of five years, and then started to decrease. The surplus per staff member increased for three years, then decreased in the following year and increased again for the latter two years. The surplus per completed application and per applications received increased for the first two years and remained constant for the remaining four years.

Overall, the productivity of the National Consumer Tribunal is fair and it operates with a surplus, meaning that not all the money in the budget is utilised. It has a fair caseload and matters are heard and disposed of in an effective and efficient manner.

Statistical Data: Key Findings and Graphic Illustrations

The number of staff members remained the same over a number of years. The case load varied. However, the number of cases that were heard were relatively low in comparison to the other tribunals. The Tribunal did not seem to be popular among users deducing from the caseload, as the highest number of matters heard in a year was only twenty in an eight-year period.

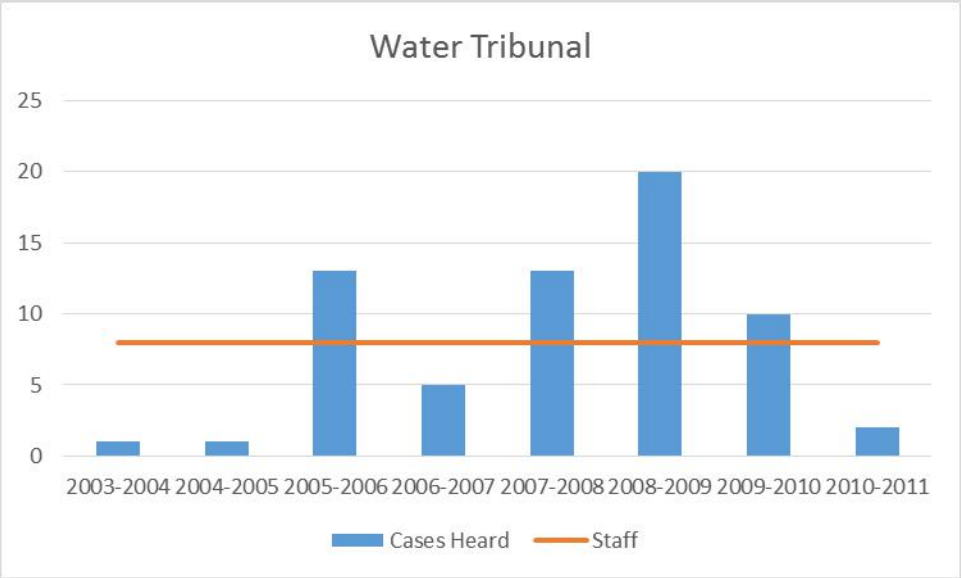
Key	X1=Number of cases heard	X2=Cases settled by agreement	Percentage of cases settled over heard	X3=Number of tribunal members	X4=Chairperson	X5=Deputy Chairperson	X6=Additional Members	X7=Registrar	X8=Tribunal Clerk	X9=Total Staff	X10=Accumulated surplus in operation	Water Tribunal
Year	X1	X2		X3	X4	X5	X6	X7	X8	X9	X10	
2003-2004	1	0	0	6	1	1	4	1	1	8	0	
2004-2005	1	0	0	6	1	1	4	1	1	8	0	
2005-2006	13	0	0	6	1	1	4	1	1	8	0	
2006-2007	5	0	0	6	1	1	4	1	1	8	0	
2007-2008	13	1	7,69	6	1	1	4	1	1	8	0	
2008-2009	20	1	0,05	6	1	1	4	1	1	8	0	
2009-2010	10	1	0,1	6	1	1	4	1	1	8	0	
2010-2011	2	0	0	6	1	1	4	1	1	8	0	

Water Tribunal Table

Descriptive Statistics of Table

The table illustrates the number of staff, and that the Water Tribunal did not hold a surplus budget. The table further also illustrates the few disputes that were settled by agreement.

Water Tribunal Graph



Descriptive Statistics

The graph above illustrates that the staff remained the same over a significant period of eight years. The number of cases that were heard by the tribunal increased from 2005, although they then decreased and then increased to the same level as 2005 in 2007. Once again there was an increase in the number of cases - to 20, followed by a decrease to 10 in 2009, after which the number dwindled to less than five in the year 2010. This case load trend over a period of eight years illustrates that the Water Tribunal is not a forum of choice to hear appeals, disputes or applications.

The impact of courts

Tribunals were formed to ease the case load of courts in that courts are overburdened with many matters. It is a known fact that trial court rolls are backlogged, because a trial date sometimes has to be obtained as far as two years in advance. The statistics of this study are evident of the court's heavy case burden in relation to civil cases.

Descriptive statistics of civil district courts

The table below gives the data for civil cases in the District Court for 2010/2014. In 2010, the number of civil summonses issued for debt was 1 292 504. This decreased by 241 063 to 1 051 441 in 2011; decreased by 147 086 to 904 355 in 2012; decreased by 111 584 to 792 771 in 2013; and decreased by 25 811 to 766 960 in 2014.

The percentage of civil judgments that were recorded for debt was 52.6% in 2010; it decreased by 4.4% to 48.2% in 2011; decreased by 1% to 47.2% in 2012; decreased by 2.7% to 44.5% in 2013; and decreased by 4% by 40.5% in 2014 .

The value of civil judgments recorded for debt in 2010 was R6 578.7 million. This decreased by R1 430.8 million to R5 147.9 million in 2011; decreased by R469.4 million to R4 678.5 million in 2012; increased by R83 million to R4 761.5 million in 2013; and decreased by R640.9 million to R4 120.6 million in 2014.

It is apparent from the statistics that the court process of issuing summonses to recover a civil debt has decreased. This means that fewer people approach the district court to claim monies owing to them. Despite the decrease in litigious matters, the case load for civil judgments in the district court is still quite high. It is submitted that the option of tribunals and ADR seems to be the preferred choice in the district court.

Table of Civil Judgments in the District Court

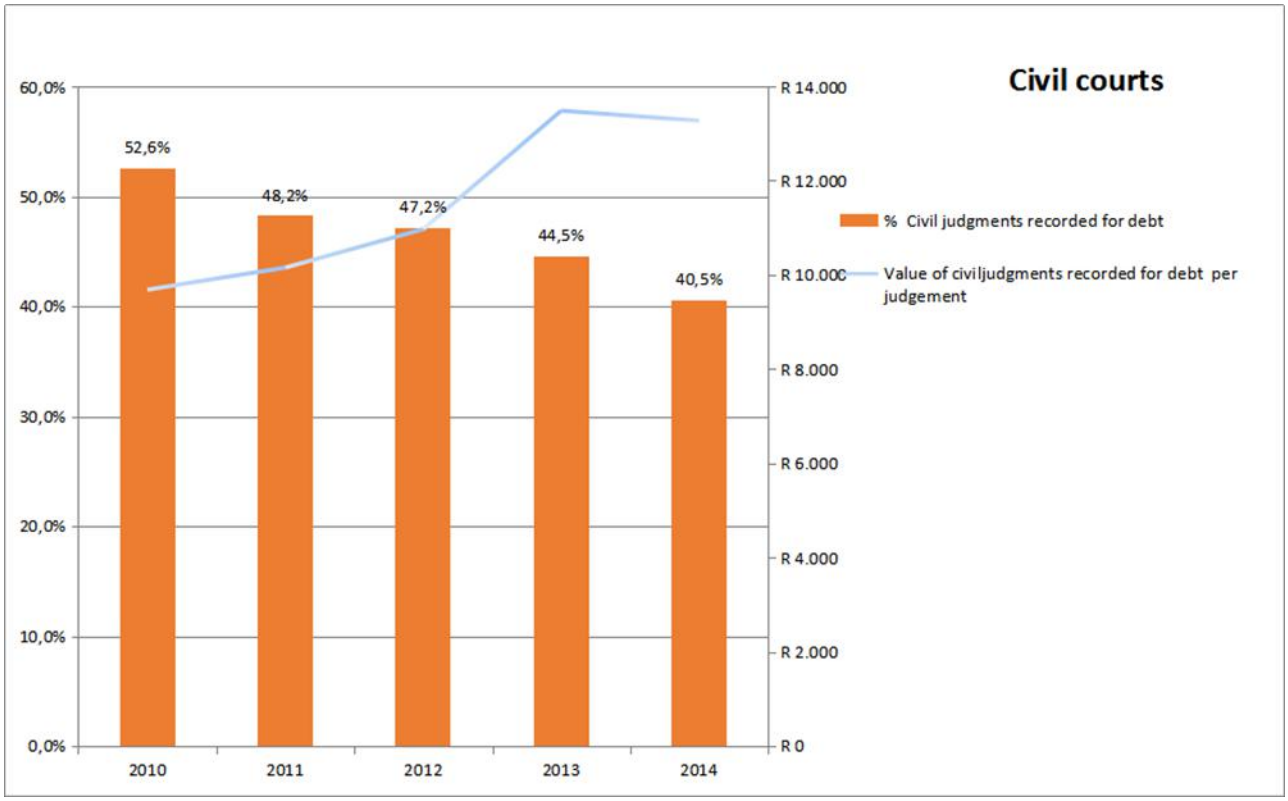
Key	X1=No of civil summonses issued for debt	No of civil judgments recorded for debt	Value of civiljudgments recorded for debt in R million	Findings of District Civil Courts re debts		
Year	X1	X2	X3		% Civil judgments recorded for debt	Value of civiljudgments recorded for debt per judgement
Jan-10	96758	48175	487,5		49,8%	R 10 119,36
Jan-11	80939	42018	421,3		51,9%	R 10 026,66
Jan-12	73550	35347	315,5		48,1%	R 8 925,79
Jan-13	54083	25685	323,7		47,5%	R 12 602,69
Jan-14	58173	26498	312,8		45,6%	R 11 804,66
Jan-15	49235	21251	273,1		43,2%	R 12 851,16
Feb-10	118331	59491	631,8		50,3%	R 10 620,09
Feb-11	98677	44163	456,5		44,8%	R 10 336,71
Feb-12	89325	42239	402,5		47,3%	R 9 529,11
Feb-13	59813	28087	414,7		47,0%	R 14 764,84
Feb-14	59627	26370	402,7		44,2%	R 15 271,14
Mar-10	117570	61036	642		51,9%	R 10 518,38
Mar-11	105172	47904	502,7		45,5%	R 10 493,90
Mar-12	96698	41495	361,2		42,9%	R 8 704,66
Mar-13	59437	26679	393,5		44,9%	R 14 749,43
Mar-14	61543	26708	383,8		43,4%	R 14 370,23
Apr-10	107775	61933	532		57,5%	R 8 589,93
Apr-11	80291	38963	383		48,5%	R 9 829,84
Apr-12	73192	29935	311,5		40,9%	R 10 405,88
Apr-13	72003	29629	388,6		41,1%	R 13 115,53
Apr-14	59092	24520	294,5		41,5%	R 12 010,60
May-10	124630	60608	520,6		48,6%	R 8 589,63
May-11	90174	50578	463,6		56,1%	R 9 166,04
May-12	86107	36894	413,9		42,8%	R 11 218,63
May-13	72696	33378	426,1		45,9%	R 12 765,89
May-14	63921	26108	338,8		40,8%	R 12 976,87
Jun-10	109004	62013	578,7		56,9%	R 9 331,91
Jun-11	85745	45128	478,9		52,6%	R 10 612,04
Jun-12	79213	34760	404,5		43,9%	R 11 636,94
Jun-13	65729	26600	357,2		40,5%	R 13 428,57
Jun-14	68693	27659	327		40,3%	R 11 822,55
Jul-10	108367	70250	651,1		64,8%	R 9 268,33
Jul-11	90517	44854	457,6		49,6%	R 10 201,99
Jul-12	74692	39353	440,2		52,7%	R 11 185,93
Jul-13	78908	32217	411,5		40,8%	R 12 772,76
Jul-14	78501	28514	350,3		36,3%	R 12 285,19
Aug-10	111498	53799	508,2		48,3%	R 9 446,27
Aug-11	95199	41706	438,3		43,8%	R 10 509,28
Aug-12	71753	37824	472,2		52,7%	R 12 484,14
Aug-13	74884	30148	448,4		40,3%	R 14 873,29
Aug-14	69544	25865	323		37,2%	R 12 487,92
Sep-10	122169	58318	595,2		47,7%	R 10 206,11
Sep-11	90185	42316	401,6		46,9%	R 9 490,50
Sep-12	69527	33512	399,8		48,2%	R 11 930,05
Sep-13	68824	30550	402,3		44,4%	R 13 168,58
Sep-14	67579	24684	333,7		36,5%	R 13 518,88
Oct-10	101227	54747	564,6		54,1%	R 10 312,89
Oct-11	84223	42526	419,9		50,5%	R 9 873,96
Oct-12	71848	36823	459,1		51,3%	R 12 467,75
Oct-13	77135	35381	450,5		45,9%	R 12 732,82
Oct-14	75466	27393	377,1		36,3%	R 13 766,29
Nov-10	97819	51262	476,3		52,4%	R 9 291,48
Nov-11	89631	39717	405		44,3%	R 10 197,14
Nov-12	70537	35268	414,1		50,0%	R 11 741,52
Nov-13	66603	32377	438,2		48,6%	R 13 534,30
Nov-14	65066	25534	382,2		39,2%	R 14 968,28
Dec-10	77356	37592	390,7		48,6%	R 10 393,17
Dec-11	60688	27131	319,5		44,7%	R 11 776,20
Dec-12	47913	23060	284		48,1%	R 12 315,70
Dec-13	42656	22408	306,8		52,5%	R 13 691,54
Dec-14	39755	20745	294,7		52,2%	R 14 205,83

Year	X1=No of civil summonses issued for debt	No of civil judgments recorded for debt	Value of civiljudgments recorded for debt in R million	Findings of District Civil Courts re debts	% Civil judgments recorded for debt	Value of civiljudgments recorded for debt per judgement
2010	1292504	679224	R 6 578,70		52,6%	R 9 686
2011	1051441	507004	R 5 147,90		48,2%	R 10 154
2012	904355	426510	R 4 678,50		47,2%	R 10 969
2013	792771	353139	R 4 761,50		44,5%	R 13 483
2014	766960	310598	R 4 120,60		40,5%	R 13 267

Summary Table

Civil District Court Graph

The graph above plots the percentage of civil judgments recorded for debt and the value of civil judgments recorded for debt per judgment. The percentage of civil judgments recorded for debt decreased in the five-year period. The value of the civil judgments recorded for debt increased over the five-year period.



Civil Court Graph

The graph above plots the percentage of judgments recorded for debt and the value of civil judgments recorded for debt per judgment. The percentage of civil judgments recorded for debt decreased over the four years. The value of civil judgments recorded for debt per judgment increased over the four years.

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