

THE ACCESSIBILITY AND EFFECTIVENESS OF SOUTH AFRICAN CIVIL LOWER COURTS

by Llewelyn Curlewis* & Delano Abdoll**



Abstract

Although the Constitution of the Republic of South Africa, 1996 guarantees everyone the right of access to courts and civil justice, many people still find themselves in a position where they cannot access the South African justice system, specifically concerning civil legal matters. While this problem has been recognised by various academics, authors, and even Constitutional Court judges, the understanding of what this right means empirically has only recently been understood in relation to South Africa's civil justice system. This article, therefore, concentrates on the accessibility and effectiveness of South African civil courts. The focus is on civil lower courts given that most people who are exposed to the civil justice system do so by means of the Magistrates Courts only.

1 Introduction

As early as 2010 in an article titled 'Evidenced-Based Access to Justice', Abel underlined the concern that despite the call for evidence-based research having permeated the field of the criminal justice system,¹ a comparable evidence-based approach had been

* BLC, LLB, LLM (Procedural Law) (*cum Laude*), LLM (Labour Law), LLD (Criminal Law), Certificate in Forensic Accounting, University of Pretoria; LLM Commercial Law, University of South Africa; Advance Diploma from Arbitration Foundation of Southern Africa (AFSA) (*cum laude*); Attorney and Associate at Clarke & Van Eck Attorneys (Pretoria East). ORCID iD: 0000-0002-4950-4491.

** BA Law, LLB, LLM (Procedural Law), University of Pretoria; Candidate Attorney at Senekal Simmonds Corporate Lawyers (Bedfordview). ORCID iD: 0000-0001-7627-3775.

1 LK Abel 'Evidence-Based Access to Justice' (2010) 13(3) *JLASC* at 295.

notably absent from the many efforts to expand access to the justice system for people facing civil legal problems.² In her observation, Abel accurately identified that one of the reasons for this lack of evidence, particularly in relation to the civil justice system, was that no generally accepted metric for evaluating access to justice tools existed at the time.³

However, in 2016, the Open Society Justice Initiative (OSJI) and the Organisation of Economic Co-operation and Development (OECD) jointly hosted an expert workshop⁴ that was aimed to facilitate a roundtable discussion on how to define, measure, and evaluate access to justice and legal needs.⁵ With participants from around the world,⁶ including South Africa, having taken part in this event, the workshop went on to release a significant founding document, which it titled 'Understanding Effective Access to Justice – Workshop Background Paper'.⁷ The document highlighted that central to its purpose was the idea of laying down the groundwork for a more citizen-oriented access to justice framework, which could conceptualise and measure the legal needs of people who encountered the civil justice system.⁸

Because of these efforts, the OECD and Open Society Foundations developed the so-called 'Guide on Legal Needs Surveys and Access to Justice' tool, which was later published on 31 May 2019.⁹ The Guide was designed to support the effective implementation of target 16.3 of the United Nations Sustainable Development Goals,¹⁰ which seeks to 'promote the rule of law at the national and international levels and ensure equal access to justice for all'.¹¹ In essence, the Guide outlined a range of opportunities for countries to implement a more people-oriented approach, using legal needs-based indicators as metrics for measuring people's access to justice and civil courts.¹² Indeed, these developments have been instrumental to the reformulation of how access to justice in the context of people facing civil legal problems needs to be understood.¹³ Unfortunately, it is also clear that the general discourse surrounding South African people's

2 As above.

3 Abel (n 1) 297.

4 C Coxon 'International Workshop on measuring effective access to justice – an overview' 16 January 2017 <https://ukaji.org/2017/01/16/international-workshop-on-measuring-effective-access-to-justice-an-overview/> (accessed 5 May 2019).

5 As above.

6 As above.

7 OECD & Open Society Foundations 'Understanding Effective Access to Justice' 3-4 November 2016 <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf> (accessed 5 May 2019).

8 As above.

9 OECD & Open Society Foundations 'Legal Needs Surveys and Access to Justice' 31 May 2019 <https://www.oecd.org/gov/legal-needs-surveys-and-access-to-justice-g2g9a36c-en.htm> (accessed 18 January 2020) at 3 & 15.

10 As above.

11 OECD & Open Society Foundations (n 9) 3 & 15.

12 As above.

13 OECD & Open Society Foundations (n 9) 37.

access to courts remains almost exclusively comprised of inward-focused reflections by members of the legal profession only.¹⁴

It is against this background that this article seeks to analyse the current perspective on access to civil justice in South Africa. Firstly, the article considers the theoretical framework of section 34 of the Constitution of the Republic of South Africa, 199¹⁵6 concerning the civil legal problems faced by South Africans. Secondly, it offers a brief discussion on selected academic literature and jurisprudence relating to the accessibility and effectiveness of South African civil lower courts. Lastly, the article examines the findings of the 'Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries 2019' report (Global Insights Report¹⁶), which to date, provides the most recent empirical data on the everyday justice problems faced by South Africans who have come into contact with the civil justice system.

2 The theoretical framework of section 34 of the Constitution

In order to consider the constitutional right of access to courts in South Africa,¹⁷ which includes the right of access to justice, one must first interpret and have due regard to the provisions of section 34 of the Constitution,¹⁸ which states that:¹⁹

[e]very person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or other independent and impartial tribunal or forum.

An important consequence of this section 34 right is that by insisting on the resolution of legal disputes by fair, independent, and impartial

14 See HJ Erasmus 'Historical Foundations of The South African Law of Civil Procedure' (1991) *The South African Law Journal* at 276; D McQuoid-Mason 'Access to justice in South Africa' (1997) 17 *Windsor Y.B Access Just.* 230 at 2; G Budlender 'Access to Courts' (2004) 121 *SALJ* at 341; A Pillay 'Accessing Justice in South Africa' (2005) *Florida Journal of International Law* at 463; P Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* at 355; J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *SAJHR* at 216; R Kelbrick *Civil Procedure in South Africa* (2012) at 17; M Nyenti 'Access to justice in the South African social security systems: Towards a conceptual approach' (2013) 46 *De Jure* at 906; D McQuoid-Mason 'Access to Justice in South Africa: Are there Enough Lawyers?' (2013) 3(3) *Onati Socio-legal Series* at 564; J Dugard 'Closing the doors of justice: An examination of the constitutional court's approach to direct access, 1995-2013' (2015) 31 *SAJHR* at 112-113; and C Theophilopoulos 'Constitutional transformation and fundamental reform of civil procedure' (2016) 1 *TSAR* at 91.

15 Constitution of the Republic of South Africa, 1996 (Constitution).

16 World Justice Project 'Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries' 2019.

17 *Nedbank Ltd v Thobejane and Similar Matters* 2019 (1) SA 594 (GP) (Thobejane) para 33.

18 B Bekink *Principles of South African constitutional Law* (2012) at 389.

19 Constitution (n 15) sec 34.

institutions, it prohibits the resort of self-help,²⁰ which in turn, fosters respect for the rule of law.²¹

2.1 The status of the right

Like all rights and freedoms entrenched in the Bill of Rights of the Constitution, the right of access to courts through the operation of section 34²² is only susceptible to change or removal through the requirements of section 74 of the Constitution.²³ To add to this, authors Garth & Cappelletti have also advocated that, essentially, the right of access to courts should be regarded as the most basic human right.²⁴

2.2 The structure and nature of the right

The structure of section 34 of the Constitution was recently considered in *Nedbank Ltd v Gqirana NO and Another and Similar Matters*.²⁵ In this case, the Court identified three components being central to the right of section 34, namely:²⁶

- (i) the right for disputes to be decided before a court;
- (ii) the right to a *fair* public hearing; [and]
- (iii) that where appropriate the court may be replaced by an independent, impartial tribunal or forum.

Whilst different dissections of the right have been recognised,²⁷ it is the second component of the right, ‘the right to a *fair* public hearing’, that is most significant to the nature of section 34, which is somewhat a topic of debate. The upshot being that the right may apply to both civil and criminal litigation, depending on one’s interpretation of the provisions thereof.

The Constitutional Court has, however, clarified the position to some extent in *S v Pennington and Another*²⁸ and *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of*

20 I Currie & J De Waal *The Bill of Rights Handbook* (2013) at 711.

21 Thobejane (n 17) para 44. See also *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) para 11.

22 *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2020] 1 All SA 52 (SCA) para 18. See also S Vettori ‘Mandatory mediation: An obstacle to access to justice?’ (2015) 15(2) *African Human Rights Law Journal* at 356.

23 Constitution (n 15) sec 74.

24 BG Garth & M Cappelletti ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* at 185.

25 2019 (6) SA 139 (ECG) (*Gqirana NO*).

26 *Gqirana NO* (n 25) para 44.

27 See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) 529 (CC) para 211.

28 1997 (4) SA 1076 (CC) para 46.

South Africa t/a The Land Bank and Another.²⁹ The cases are authorities for the proposition that section 34 of the Constitution is an embodiment of a right that exists for the benefit of civil litigants only.³⁰ Certainly, in the context of the second component of the right, it is not entirely difficult to support this conclusion on the basis that contrary to section 35 of the Constitution; ‘The right embodied in s[ection] 34 is a right to a fair public hearing, [and] not a right to a trial’.³¹

2.3 The application of the right of access to courts in relation to civil legal problems

Insofar as the application of the right of access to courts in relation to civil legal problems is concerned, there are mainly three legal questions that this article seeks to address namely; (i) who are the beneficiaries of the right; (ii) which courts would most individuals use to exercise this right; and (iii) how will one determine when a civil litigant achieves meaningful access to courts in terms of the right? In turn, an answer to each of these questions is presented below.

2.3.1 *The beneficiaries of the right*

The first legal question aims to identify the beneficiaries of the right of access to courts. The necessary starting point is the ordinary wording of section 34, which clarifies that the right of access to courts is available to ‘everyone’, and not ‘every citizen’ or ‘every person’. This interpretation was specifically confirmed in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*³² where the Constitutional Court held that: ‘[if] the Constitution provides that a constitutional right is available to “everyone” it should be given its ordinary meaning’.³³

Similarly, in *Tetty and Another v Minister of Home Affairs and Another*,³⁴ Mthiyane J emphasised that:³⁵

... the Constitution has placed South African law on the sound basis that every individual who comes before the Courts in this country, whether

29 2011 (3) SA 1 (CC) para 38.

30 See T Bekker ‘The Late Amendment of Pleadings – Time for a New Approach? *Randa v Radopile Projects* CC 2012 (6) SA 128 (GSJ)’ 2017 *Obiter* at 81.

31 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* 2011 (3) SA 1 (CC) para 38 (own emphasis).

32 2004 (4) SA 125 (CC) para 26.

33 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) paras 26-27.

34 1999 (3) SA 715 (D) 729B-729C.

35 As above.

high or low, rich or poor, alien or local, is entitled to enjoy the benefits flowing from the supremacy of the Constitution.

It is therefore apparent from these judgments alone that section 34 of the Constitution applies not only to South African citizens but to everyone who finds themselves within South African borders, for example, visitors, and undocumented migrants.³⁶

2.3.2 *The hierarchy of South African courts*

The second legal question concerns the accessibility of the most approached civil courts. In this regard, section 166 of the Constitution makes mention of five categories of courts,³⁷ which are recorded as follows:³⁸

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts;
- (d) the Magistrates' Courts; and
- (e) any other court established or recognized in terms of an Act of Parliament (for example Small Claims Courts which are established in terms of the Small Claims Court Act, 61 of 1984).

However, this is not to say that every category of courts is directly accessible to persons who encounter civil legal problems. Instead, it is the use of further legal principles, such as the rules of jurisdiction, that guide individuals and practitioners in establishing an appropriate court to remedy specific legal problems.³⁹

More importantly though, is the category of civil lower courts, given that most people who come into contact with the civil justice system will do so through Magistrates Courts only. To quote authors Anleu & Mack directly the vast majority of citizens who come into contact with the judicial system will usually have their case considered (and most likely *only* considered) in a lower court.⁴⁰

36 *Sharenisa v Minister van Veiligheid en Sekuriteit en Ander* (2394/2009) [2010] ZAFSHC 149 para 18.

37 Bekink (n 18) 391.

38 Constitution (n 15) sec 166.

39 See D van Loggerenberg 'Civil Justice in South Africa' (2016) 3(4) *BRICS Law Journal* at 125-147 for an in-depth discussion on the South African court structure, judicial hierarchy, and alternative civil dispute resolution mechanisms.

40 SR Anleu & K Mack 'Magistrates, Magistrates Courts, and Social Change' (2007) 29(2) *Law & Policy* at 183-184.

In fact, even the Department of Justice and Constitutional Development has acknowledged that special attention must be given to the Magistrates Courts,⁴¹ particularly concerning ‘the levels of access the indigent have to justice, and how accessible courts are to ordinary citizens’.⁴²

Thus, to formulate an answer to this particular question without stressing the extent to which civil lower courts are used by individuals would simply be misplaced. To this end, it is accepted that prospective litigants in South Africa are most likely to exercise their right of access to courts in the Magistrates Courts only. Whether this right is exercised properly and effectively is a question we consider next.

2.3.3 *Meaningful access to courts*

The question of ‘what is meaningful access to courts, and how does one determine when a litigant has achieved it?’⁴³ is specifically addressed in the case of *Turner v Rogers*.⁴⁴ Decided in 2011, the United States Supreme Court held that:⁴⁵

[A] litigant does not have meaningful access to the courts if all he can do is file initial papers or walk into the courthouse door. [Instead] for a litigant to have meaningful access, he must be able to identify the central issues in the case and present evidence and arguments regarding those issues.

The definition of meaningful access to courts is strikingly similar to that posited by Budlender, who stated that the right of access to courts, even in South Africa, means more than ‘the legal right to bring a case before a court’.⁴⁶ Budlender’s argument in this regard was that, to bring a case before a court, a prospective litigant must:⁴⁷

... have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and present it to court.

41 Department of Justice and Constitutional Development ‘Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state’ 09 February 2012 <https://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf> (accessed 26 September 2019) at 27.

42 As above.

43 LK Abel ‘*Turner v Rogers* and the Right of Meaningful Access to the Courts’ (2012) 89(4) *Denver University Law Review* at 805.

44 564 US 431 (2011).

45 As above.

46 Budlender (n 14) 341.

47 As above. See also J Bamberger ‘Confirming the Right to Meaningful Access to the Courts in Non-Criminal Cases in Washington State’ (2005) 4 *Seattle Journal for Social Justice* at 389-390 where the author lists five requirements as opposed to four.

Put differently, access to courts meant that only right bearers who are properly capacitated to access the formal justice system would be 'legally empowered to pursue, claim and enforce their civil rights'.⁴⁸ Alternatively, absent the assistance of a lawyer or legal representative, an individual's right of access to courts would, most probably, not be exercised in any meaningful way.⁴⁹ One example that encapsulates the scenario of why the right to effective access to courts is so desperately needed in civil justice systems is *Airey v Ireland*.⁵⁰ At a time when legal aid was not available in Ireland for people facing civil legal problems, the European Court of Human Rights considered it 'most improbable' that a person in Ms Airey's position would be able to present her case both properly and effectively.⁵¹

This equally remains the position in South Africa, save for the fact that, contrary to the rights of detained⁵² and accused persons,⁵³ there is no specific constitutional right to the services of a legal representative at the state's expense for civil litigants who cannot afford it.⁵⁴ Needless to say that if ordinary people, whether rich or poor, are not able to bring a case before a court and present it both properly and effectively,⁵⁵ there lies a real risk that their civil legal rights will not be protected and/or vindicated in any meaningful way.⁵⁶

3 Literature review and case law interpretations

The next part of this article seeks to critically analyse the basis upon which academics, authors, and even Constitutional Court judges claim that 'most South Africans do not have effective access to justice'.⁵⁷ In doing so, it considers the rationale behind the so-called 'majority claim' whilst determining the practical extent to which evidence-

48 N Leach 'The Paralegal and the Right of Access to Justice in South Africa' LLD dissertation, University of Western Cape, 2018 at 25.

49 See *Bangindawo and Others v Head of the Nyanda Regional Authority and Another; Hlantlalala v Head of the Western Tembuland Regional Authority and Others* 1998 (2) SACR 16 (TK) 277D-277G.

50 (1979) 2 EHRR 305.

51 Budlender (n 14) 340.

52 Constitution (n 15) sec 35(2)(c).

53 Constitution (n 15) sec 35(3)(g).

54 McQuoid-Mason (n 14) 3.

55 Budlender (n 14) 355.

56 J Brickhill 'The right to a fair civil trial: The duties of lawyers and law students to act *pro bono*' (2005) 21 SAJHR at 294.

57 P de Vos 'Marikana funding case hints at larger problems with gaining access to justice' 17 October 2013 <https://constitutionallyspeaking.co.za/marikana-funding-case-hints-at-larger-problems-with-gaining-access-to-justice/> (accessed 3 May 2018).

based research is absent from most, if not all, academic literature and case law interpretations.

3.1 Literature review

To date, very little empirical research has been undertaken to assess how many people in South Africa have meaningful access to courts, let alone the category of Magistrates Courts only.⁵⁸ Instead, what one finds is a trail of statements made by academics and authors that are generally not supported by empirical data and/or statistical information. These types of statements often give rise to issues of ambiguity which, for the most part, makes it extremely difficult for readers to understand whether the levels of people's access to courts have improved at any given stage.

For example, if one considers the statement made by de Vos in 2009, where he states that 'most South Africans, as a practical matter, do not have access to our courts'⁵⁹ and compares it to Hodgson's statement made in 2015, which claims that 'people, the majority of whom do not have easy access to the legal profession, and the law',⁶⁰ one will immediately recognise that neither of these statements is supported by statistical information. This, of course, creates several problems. One such problem concerns how one is meant to differentiate between the measurement of access and/or the lack of access referred to in de Vos' and Hodgson's statements. Surely, the number of persons associated with the term 'majority' as in 2009, cannot be compared to the 'majority' referred to in 2015. Another problem in this regard is that neither of these statements clarify with any certainty whether the term 'majority' entails 50.01% of the general population or a percentage that leans closer towards 99.99% of the general population? After all, the difference between the two is substantial.

58 L Botha & A Kok 'An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2019) 19 *African Human Rights Law Journal* at 322.

59 P de Vos 'Without access to court there is no rule of law' 7 June 2009 <https://constitutionallyspeaking.co.za/without-access-to-court-there-is-no-rule-of-law/> (accessed 26 September 2018).

60 TF Hodgson 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy' in M Bishop & A Price (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 190.

Furthermore, when discussing the level of access that people have to the legal profession, one must appreciate the fact that South Africa does not have enough legal practitioners to service the entire population.⁶¹ To this extent, one needs only to consider the fact that a few years ago:⁶²

[South Africa only] had 25 283 practising attorneys and 2 915 advocates at the Bar ... [which is] a total of just over 28 000 ... legal practitioners [who] have to render services to a country with a population of [approximately] 55,7 million people. That means that [based on these numbers] there's just under 2000 people to 1 practising legal professional.

What is even more telling is that contrary to the statistical information provided above, most academic literature only mentions, generally, how many people have access to the legal profession or the courts. In addition, many authors fail to specify which courts, if any, are considered accessible or inaccessible to ordinary people. It is thus as if the determination of which court a particular author is referring to is something left to the imagination of the readers themselves.

Notably, these are only some of the reasons why empirical legal data which deals with the accessibility, and effectiveness of South African civil courts remains absent from academic literature.

3.2 Case law interpretations

Perhaps the most significant Constitutional Court case which dealt with the importance of the right of access to courts is *Mohlomi v Minister of Defence*.⁶³ Decided in 1995, when the right of 'access to a court' was still protected under section 22 of the interim Constitution of the Republic of South Africa Act 200 of 1993,⁶⁴ the Court had already recognised that:⁶⁵

... most persons [were] either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons ... [t]heir rights in terms of s[ection] 22 are thus, ... infringed.

61 Department of Justice and Constitutional Development 'Keynote Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP at an international Conference on Access to Justice, Legal Costs and other interventions, hosted by the South African Law Reform Commission at the Garden Court Marine Parade, Durban' 1 November 2018 https://www.justice.gov.za/m_speeches/2018/20181101-LegalCosts_dm.html (accessed 16 January 2020).

62 N Manyathi-Jele 'Latest statistics on the legal profession' 23 July 2015 <https://www.derebus.org.za/latest-statistics-legal-profession/> (accessed 8 May 2018).

63 1997 (1) SA 124 (CC) (*Mohlomi*).

64 Interim Constitution of the Republic of South Africa Act 200 of 1993.

65 *Mohlomi* (n 63) para 14.

The question that possibly arises is, what have our courts done since the handing down of this judgment? According to Du Toit, it would seem that the Constitutional Court has only worsened the position for ordinary persons by passing formalistic rulings which fail to consider the practical difficulties of gaining access to civil courts.⁶⁶

A classic example of this is the Constitutional Court case of *Bernstein and Others v Bester and Others NNO*,⁶⁷ where Ackermann J remarked, *inter alia*, that ‘in order to have substance and be meaningful, the right of access to court must imply the right of access to a fair judicial process’.⁶⁸ While the Court acknowledged that rights should ‘have substance and be meaningful’,⁶⁹ it failed to appreciate that without a litigant’s ability to gain access to a court, the right to a fair judicial process cannot be meaningful, to begin with.

Likewise, in *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)*,⁷⁰ the Constitutional Court merely accepted the proposition that the purpose of section 34 ‘was to ensure that persons have the right to have their disputes determined fairly by a court of law until final determination, which includes a right of appeal’.⁷¹

Again, it is not that section 34 of the Constitution does not include a right of appeal, however, it is simply noticeable that apart from the right of appeal, the right of access to justice as the gateway to the right is still not recognised under South Africa’s judicial authority.

Thus, from these two cases, one might agree with Du Toit’s contention that the Constitutional Court’s interpretation of the right of access to courts has been far less progressive than one would intend it to be.⁷² Having said this, it is not to say that the Constitutional Court has never considered the practical difficulty of people gaining access to courts. In fact, in *Public Servants Association Obo Ubogu v Head of the Department of Health, Gauteng and Others*,⁷³ the Constitutional Court specifically emphasised that section 34 of the Constitution guarantees everyone the right to access the courts.⁷⁴ Whether that ‘access’, in terms of section 34, is infringed or not, is

66 Linette du Toit *Assessing the Performance of South Africa’s Constitution: Chapter 5. The Performance of the Judiciary* (2016) at 15.

67 1996 (2) SA 751 (CC).

68 *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 103.

69 As above.

70 1996 (4) SA 331 (CC).

71 *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC) para 10.

72 du Toit (n 66).

73 2018 (2) SA 365 (CC).

74 *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) para 67.

the type of legal question which, ironically, none of our courts have been able to address.⁷⁵

4 Data analysis and interpretation

One of the limitations recognised in this article is that there is no exclusive empirical data on people's interactions with civil lower courts and civil justice. Furthermore, the findings of the Global Insights Report only offers a broad perspective as to how people in South Africa seem to deal with their everyday justice problems.⁷⁶ Apart from this, there is also very little research dedicated to the interface between the accessibility and effectiveness of the Magistrates Courts concerning civil legal problems.⁷⁷

Therefore, this section insubstantially analyses the Global Insights Report, which provides the most recent empirical data on the everyday justice problems faced by South Africans. In this regard, the findings of the Access to Justice 2019 report are taken directly from the General Population Poll conducted for the World Justice Project Rule of Law Index 2017-2018.⁷⁸ This means that before an analysis of the Access to Justice 2019 Report is considered, one must first take note of the findings contained in the World Justice Project Rule of Law Index.⁷⁹

75 See *Msila v Government of South Africa and Others* 1996 (1) SACR 365 (SE) 368-369; *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd* (No 1) 1997 (4) SA 908 (W) 917-919; *Ernst & Young and Others v Beinash and Others* 1999 (1) SA 1114 (W); *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) paras 11-20; *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC) paras 5-6; *De Beer NO v North-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) paras 10-15; *Van der Walt v Metcash Trading Ltd* 2002 (4) 317 (CC) para 14; *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO, New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) para 30; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 68; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 334-335; *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma And Another v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC) para 61; *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) para 15; and *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* 2014 (12) BCLR 1465 (CC).

76 World Justice Project (n 16).

77 Anleu & Mack (n 40) 183.

78 World Justice Project Rule of Law Index 2017-2018 (Rule of Law Index).

79 As above.

4.1 World Justice Project Rule of Law Index: South Africa

4.1.1 Introduction

The first global study which systematically and comprehensively measured the accessibility and effectiveness of South African civil courts is the Rule of Law Index.⁸⁰ In that study, South Africa ranked 35th out of 113 countries for civil justice.⁸¹

Recognised as the seventh factor of the Rule of Law Index,⁸² civil justice entailed the measuring of seven sub-factors that contributed towards South Africa's global ranking.⁸³ The factor scores, which South Africa obtained for civil justice, included the following:⁸⁴

Table 1:⁸⁵

| Factor 7: Civil Justice | | |
|--------------------------------|--|------|
| 7.1 | Accessibility and affordability of civil courts, including whether people are aware of available remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers | 0.46 |
| 7.2 | Whether the civil justice system discriminates in practice based on socio-economic status, gender, ethnicity, religion, national origin, sexual orientation, or gender identity | 0.48 |
| 7.3 | Whether the civil justice system is free of bribery and improper influence by private interests | 0.70 |
| 7.4 | Whether the civil justice system is free of improper government or political influence | 0.65 |
| 7.5 | Whether civil justice proceedings are conducted, and judgments are produced in a timely manner without unreasonable delay | 0.54 |
| 7.6 | The effectiveness and timeliness of the enforcement of civil justice decisions and judgments in practice | 0.65 |
| 7.7 | Whether alternative dispute resolution mechanisms (ADRs) are affordable, efficient, enforceable, and free of corruption | 0.77 |

80 As above.

81 Rule of Law Index (n 78) 38.

82 P Pleasence & N Balmer 'Measuring the Accessibility and Equality of Civil Justice' (2018) 10 *Hague Journal on the Rule of Law* at 258.

83 Rule of Law Index (n 78) 38.

84 Rule of Law Index (n 78) 13 & 17.

85 As above.

By measuring South Africa's civil justice factor score in accordance with the accepted definitions used for each subfactor, the study concentrated on:⁸⁶

- (i) whether ordinary people could resolve their grievances peacefully and effectively through the civil justice system;
- (ii) whether the civil justice system is accessible; affordable; and free of discrimination, corruption and improper influence;
- (iii) whether court proceedings are conducted without unreasonable delays, and if decisions are enforced effectively; and
- (iv) the accessibility, impartiality and effectiveness of ADR mechanisms.

Overall, South Africa's factor score for civil justice as framed by these considerations was recorded at 0.61.⁸⁷

4.1.2 Research design and methodology

Whilst appreciating that the empirical data used for South Africa's measurement of civil justice by the World Justice Project is arguably the first of its kind, the data source used for the study was collected during the year 2016 using a sample of 1 000 participants who engaged in face-to-face interviews.⁸⁸ In this context, the World Justice Project collected data from the public using a General Population Poll questionnaire, which included 153 perception-based questions and 191 experience-based questions, along with socio-demographic information on all respondents.⁸⁹ The greatest advantage of the questionnaire and polling methodology employed by the World Justice Project was that it provided first-hand information on the lived experiences and perceptions of ordinary people regarding a range of pertinent rule of law questions.⁹⁰

Paying specific attention to South African people's access to civil justice, the General Population Poll questionnaire modules were appropriately translated into local languages and used a probability sample of 1 000 respondents in three cities, namely Johannesburg, Cape Town, and Durban.⁹¹

86 Rule of Law Index (n 78) 38.

87 Rule of Law Index (n 78) 131.

88 Rule of Law Index (n 78) 163.

89 As above.

90 Rule of Law Index (n 78) 157.

91 As above.

4.2 Global Insights on Access to Justice 2019: South Africa

4.2.1 *Access to justice module*

Unlike the Rule of Law Index, the Global Insights Report provides a more specialised profile for South African people’s access to justice, using a nationally representative probability sample of 1 014 respondents in the country.⁹²

In an attempt to deepen the evidence base for inclusive measures of access to justice, the World Justice Project developed a separate survey module that focused on people’s legal needs.⁹³ Comprising of 128 of the 340 questions contained in the General Population Poll survey, the access to justice module⁹⁴:

... was designed to capture data on how ordinary people deal with their legal problems, highlighting the most common legal problems, respondents’ assessment of their legal capability, and sources of help.

Conducted in 101 countries and jurisdictions around the world, the Global Insights Report offers a country profile for South Africa using a nationally representative probability sample of 1 014 respondents. In collecting the data contained in South Africa’s profiled report, the study was conducted in 2018 using face-to-face interviews as the research methodology.

4.2.2 *How to read the country profiles*

An important aspect of the Global Insights Report relates to how one should interpret each of the country profiles. According to the report, each profile consists of six parts. Described briefly, each of these parts are understood as follows:⁹⁵

Table 2:

| | |
|---------------------------------|--|
| Part 1: Legal Problems | This part of the profile shows the percentage of those surveyed who experienced any legal problems in the last two years. |
| Part 2: Legal Capability | This part of the profile shows the percentage of respondents who knew where to get advice and information; could obtain all the expert help they wanted; and were confident they could achieve a fair outcome. |

92 World Justice Report (n 16) 4.

93 As above.

94 As above.

95 World Justice Report (n 16) 11.

| | |
|--------------------------------|--|
| Part 3: Sources of Help | This part of the profile shows the percentage of respondents who reported obtaining information, advice, or representation to help them better understand or resolve their legal problems. |
| Part 4: Problem Status | This part of the profile shows the percentage of respondents whose problems are ongoing or who are still in the early stages of dealing with their problems. |
| Part 5: Process | This part of the profile shows the percentages of respondents who felt that the process followed to resolve their legal problem was fair as well as those who gave up along the way. |
| Part 6: Hardship | This part of the profile is broken down into specific categories of difficulties experienced by respondents who encountered a legal problem in the last two years. |

4.2.3 South Africa

In light of the above, the results for South Africa for 2018 are summarised below.

Part 1: Legal Problems

Fifty percent of the 1 014 respondents who were surveyed in the Global Insights Report experienced a legal problem in the last two years, being 2016-2018. For purposes of convenience, the incidence by type of problems is ranked from the most to least common:⁹⁶

Table 3:

| | |
|-----------------------------|-----|
| Consumer | 25% |
| Land | 10% |
| Citizenship & ID | 9% |
| Housing | 9% |
| Family | 7% |
| Money & Debt | 6% |
| Employment | 3% |
| Education | 2% |
| Citizenship & ID | 2% |
| Public Services | 2% |
| Accidental Illness & Injury | 1% |
| Law Enforcement | 0% |

96 Word Justice Report (n 16) 96 & 121.

Part 2: Legal Capability

Of the 507 respondents who experienced a legal problem over the last two years, 62% knew where to get advice and information; 49% felt they could get all the professional legal help they wanted; and 59% were confident they could achieve a fair outcome.⁹⁷

Part 3: Sources of Help

Thirty-seven percent of the respondents who experienced a legal problem over the last two years were able to access help.⁹⁸ The type of advisor reported by these respondents was recorded as follows:⁹⁹

Table 4:

| | |
|---------------------------------------|-----|
| Friend or Family | 40% |
| Lawyer or Professional Advice Service | 25% |
| Government Legal Aid Office | 17% |
| Court or Government Body or Police | 16% |
| Religious or Community Leader | 11% |
| Other Organisation | 8% |
| Civil Society Organisation or Charity | 6% |
| Health or Welfare Professional | 6% |
| Trade Union or Employer | 4% |

Part 4: Problem Status

On the one hand, 39% of respondents stated that their problems were done and fully resolved, however, on the other hand, 20% of respondents gave up on pursuing any action further to resolve the problem.¹⁰⁰

Part 5: Process**Table 5:**¹⁰¹

| | |
|------|--|
| Fair | 67% of respondents felt the process followed to resolve the problem was fair, regardless of the outcome. |
|------|--|

97 World Justice Report (n 16) 96.

98 As above.

99 World Justice Report (n 16) 96.

100 As above.

101 World Justice Report (n 16) 92.

| | |
|----------------------|--|
| Time | On average, it took respondents 2.8 months to solve the problem. |
| Financial difficulty | 17% said it was difficult or nearly impossible to find the money to solve the problem. |

Part 6: Hardship

Fifty-four percent of respondents experienced hardships throughout this process. The types of hardships experienced included:¹⁰²

Table 6:

| | |
|-----------------|--|
| Health | 36% experienced a physical or stress-related illness. |
| Economic | 24% experienced loss of income, employment, or the need to relocate. |
| Interpersonal | 22% experienced a relationship breakdown or damage to a family relationship. |
| Substance Abuse | 10% experienced problems with alcohol or drugs. |

4.3 Analysis and interpretation

In analysing the factor scores which South Africa obtained in the Rule of Law Index, one immediately recognises that the lowest score with regard to civil justice related to the accessibility and affordability of South African civil courts. The research findings also indicated that the highest score for civil justice related to the country's accessibility and efficacy of alternative dispute resolution mechanisms.

Apart from this, the definitions of the various sub-factors for civil justice as contained in the Rule of Law Index provide a detailed response to the main research questions posed in this article, namely: (i) how to measure concepts such as 'access to courts' and 'access to justice'; and (ii) how to attribute the results of these measurements to a South African legal context.

It is, therefore, no surprise that the civil justice indicators, which were identified by the Rule of Law Index, provided a very strong basis for the development of the access to justice survey module,¹⁰³ which was also a key component to the Global Insights Report.

Furthermore, South Africa's ranking as 35th out of 113 countries around the world is something that our country should not overlook.

¹⁰² As above.

¹⁰³ See World Justice Project 'Access to Justice Module – WJP General Population Poll 2018' 2018 https://worldjusticeproject.org/sites/default/files/documents/WJP%20General%20Population%20Poll_Access%20to%20Justice%20Module_2018.pdf (accessed 24 January 2020).

Nevertheless, we can only hope that the country's position with regard to civil justice as per future World Justice Project studies will strengthen over the next few years.

Additionally, the findings of the Global Insights Report, as set out in paragraphs 3.3.3.1 to 3.3.3.6 above, offers meaningful insight into the perspectives and/or experiences of ordinary South Africans with the highlights of these insights being that: (a) exactly 50% of all respondents who were surveyed did not experience a legal problem over the last two years; (b) the most commonly encountered legal problem related to issues of consumerism; and (c) of those who did experience a legal problem over the last two years, almost half felt that they could get all the professional legal help they requested.

5 Conclusion

This article has offered a critical analysis and evaluation of South African civil lower courts. It has also elaborated on several legal issues, which clarify the theoretical framework of the right of access to courts in relation to civil legal problems. In doing so, it firmly established, amongst other things, that all persons in South Africa, whether rich or poor, alien and foreign, are entitled to access to civil lower courts and civil justice.

In addition, the research demonstrated that central to academic literature and case law interpretations is the lack of reliable evidence-based research which accounts for the practical experiences and/or perceptions of ordinary people. While international studies such as the Rule of Law Index and Global Insights Report have offered meaningful insights into the country's civil justice system, there remains a theoretical issue in that such projects do not clarify whether the scope of civil courts encompasses all categories of courts. Accordingly, this particular issue gives rise to possible innovations for creating specific metric tools such as the General Population Poll Access to Justice Module, which focuses on and caters for civil Magistrates Courts only.