

Challenges faced by citizens accessing legal representation in South Africa

By

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2015250638

Submitted in fulfilment of the requirements in respect of the Master's Degree qualification Governance and Political Transformation in the Department Governance and Political Studies in the Faculty of the Humanities at the University of the Free State

Date of submission: July 2017

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DECLARATION

I Nandipha Zweni declare that the Dissertation for the degree of Masters in Governance and Political Transformation of at the University of the Free State hereby submitted has not been previously submitted for a degree at this or any other University, that it is my original work, and that all the materials contained herein have been duly acknowledged.

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ABSTRACT

This study examines the role of the judicial system in the delivery of justice in South Africa. In doing so, it analyses the South African constitution and transformation that has taken place within the legal system and the considerations behind the constitutional recognition of access to justice in the current constitutional dispensation. It is noted that as the poor in South Africa exercise very little of their legal and constitutional rights; it might be attributed to lack of knowledge regarding their various options and, perhaps, many other factors. The major concern is that not enough people are receiving the same quality of legal representation afforded to those that make use of private practitioners.

KEY TERMS

Constitution, Judicial system, legal representation, legal aid, transformation, human rights, criminal cases, civil cases, access, indigent

DEDICATION

I would like to dedicate this dissertation to a few people, my late father for the love, pride and confidence that he always had in me and for always inspiring me to reach for the moon. I would like to dedicate this thesis to Almighty God for seeing me through the most laborious but, ultimately, rewarding experience of my life. I would also like to dedicate this work to my mother, who has always encouraged me to study further, my husband, who stood by me through it all. I love and appreciate you all more than words could possibly express. I acknowledge everyone's contribution. May God bless you all.

ACKNOWLEDGEMENT

I am greatly indebted to my supervisor, Helena Van Coller for her immense support during the writing of this dissertation and her patience with me over the last few years. Her dedication made it possible for me to believe in myself, and her comments made me work harder than I could have ever imagined. Thank you so much for encouraging me to keep on believing in myself. Your consistent valuable input encouraged me to do better, I am forever grateful for the generosity, prayers and emotional support. God bless you. I would also like to thank the Governance and Political Transformation team at the University of the Free State for your support during the course of my studies, your continued support has proved to be valuable and I appreciate you all.

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LIST OF ABBREVIATIONS

AGM	Annual General Meeting
CCMA	Commission for Conciliation, Mediation and Arbitration
CODESA	Conference for a Democratic South Africa
HSRC	Health Sciences Research Council
LASA	Legal Aid South Africa
LRC	Legal Resource Centre
NGO	Non-Governmental Organisation
RSA	Republic of South Africa
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UN	United Nations

CHAPTER 1

GENERAL OVERVIEW

1.1 Introduction

Justice and its interpretation signifies different things for different people, no single definition is superior to the next. Each individual's knowledge and personal opinions may be derived from their empirical experience of what justice entails. The question remains whether South Africa is doing enough for the whole population or is it only the wealthy that benefit from our judicial system? Cappelletti defines the right of access to justice as the right of every individual. This right requires the state to provide a means of dispute resolution that is equally accessible and socially just (Cappelletti, 1978:6).

Access to justice is widespread. According to the United Nations development programme an estimated four billion people internationally are excluded from accessing justice as a result of poverty (UNDP, 2008). Poverty and vast differences in cultures create difficulties in access to justice. These difficulties are not limited to rural areas but also prevail in urban living areas. It is a form of discrimination that affects more than social or economic matters (Bonhuys & Albertyn, 2007:93).

Formal adjudicators ought to administer the law based on principles of fairness and not on strict rules, and consider the disadvantaged as well as the citizen's legal needs. Budlender notes that for the poor, access to justice means that a party must be able to actively participate (Budlender, 2004). It is important for citizens to play a role in the process of law making, as the laws that govern the country will, in one way or another, affect them. Government's responsibility is to promote and protect the rights of all individuals in both civil and criminal matters, ensuring that there is no discrimination, whether based on gender, class, race, religion, culture or economic considerations (The Constitution of the Republic of South Africa, 1996).

"A system of justice that closes the door to those who cannot pay is not one deserving of the name" (Holness, 1991:129).

Holness (ibid.) highlights the importance of equal treatment for all, ensuring that those who are unable to afford justice are not treated differently to those who can. An efficient judicial system safeguards the promotion and protection of human rights; it is important

that each individual has access to justice and is able to bring a matter before a court for adjudication.

Access to justice can be critical to human existence, development and quality of life and fostering the spirit of equality. Consider: a mother attempting to gain support from the father of her child; a couple needing representation in a divorce dispute; a citizen being accused in a criminal crime case needing representation in a court; and a convicted prisoner wanting to appeal a previous sentence or conviction. These are all everyday situations and the South African disadvantaged find an ongoing hurdle is accessing justice.

This study will explore issues such as the quality of legal service, affordability of representation, inherent discrimination and exclusion, whilst highlighting the effectiveness of service delivery within South Africa's biggest state funded law firm Legal Aid South Africa (LASA). This will be done by analysing case studies and data and opinions of the judiciary.

1.2 Research problem

The right to access to justice using legal representation and the principles of good governance are essential in order to ensure fairness and equality within South Africa's justice system. With a focus on LASA, this research will seek to address the challenges faced by South African citizens in accessing affordable legal representation whether it is for civil or criminal matters. This research will further analyse the principles of good governance as a tool for promoting development within the country's justice system. The objective is to foster decision-making processes that address and cater to the needs of all South African citizens, especially the indigent.

In order to deal with the research problem comprehensively, the following specific research questions will be addressed, focused on and discussed:

- What are the typical obstacles identified when accessing legal representation in South Africa?
- What are the current industry practices and research advancements geared at resolving these obstacles?
- Are South Africa's' indigent citizens better off than they were during the apartheid system?

1.3 Research aims and objectives

The main objective of this study is to analyse the relationship between state-funded legal representation and the challenges faced by citizens accessing these organisations. The objective is to identify the role that good governance plays in accessing Justice in South Africa and in promoting good legal services to the indigent. More specifically the study will aim to address issues relating to law and good governance.

1.4 Research methodology and design

The study will be qualitative in nature with the investigation relying predominantly on legislation and secondary sources, mostly comprising of desktop research. Case studies, opinions of the Judiciary, personal observations, journal sources, newspaper articles, news and annual reports will be used, along with consolidated reports from one of South Africa's biggest state-funded law institutions, LASA. Qualitative research allows both the exploration and the understanding of the content and progress of the research.

The main objective of this study is to explore the extent to which citizens who make use of legal representation obtain access to justice in South Africa. The use of descriptive research in this study will provoke predominantly questions related to the research problems in order to understand the current state of access to legal representation in South Africa by South African citizens; questions such as why this is happening need addressing/exploration. It is all very well to have theories as to why there appears to be inherent inequalities within South Africa's justice system but research serves to either support or denounce these theories.

Qualitative research will be used in this study with the underlying philosophical assumption being interpretive, the goal being to describe and understand phenomena within the parameters of qualitative research (Babbie & Mouton, 2010:80.) Through the use of the interpretive paradigm meaning versus measurement will be addressed (Reeves & Hedeberg, 2003:32).

Interpretivism is based on the fact that most of the knowledge that we have is acquired. The different factors that develop our knowledge include social phenomena - such as language - consciousness and the communicative things we interact with in our environments. The interpretive theory focuses on understanding occurrences, events and/or facts through people who share similar experiences. This implies that, meaning and understanding are facilitated by interpretation.

1.5 Benefits of the study

The following are some of the benefits that may result from the study:

1. The study can aid in addressing issues that are not always visible within an organization, often inherent, underlying problems. An example of this type of problem is discrimination based on social status or public perception.
2. The study may lead to an understanding of the difficulties faced by legal practitioners in the public sector in their attempts to increase access to justice for poor South Africans
3. The study may provide insight into the dynamics facing the South Africa poor. This can provide an analysis of issues to be addressed instead of addressing them in isolation.

1.6 Limitations of the study

The major limitation of the study was not having been able to obtain consolidated reports from the main legal institutional which forms the main content of this dissertation. A state institution, LASA did not provide requested reports that would have provided greater insight into the perceptions of assisted clients. The lack of reports made it impossible to comment on feedback as to how organizations could improve its service delivery process. These reports were requested, but were declined 'due to the nature of the information' in them.

1.7 Structure of the chapters

Chapter 1 of this document provided a brief background to the study and set out the aims, relevance and purpose of the study. It also provides the conceptual framework, research questions and methodological approach adopted for the study.

Chapter 2 provides a comprehensive review of the concept of good governance. Some of the issues included are: human rights in light of access to justice, government and its role in governance and perspectives on governance in accessing justice.

Chapter 3 investigates LASA, its constitutional mandate, the means by which applicants qualify for legal aid and the mechanisms of providing the services they are mandated to provide.

Chapter 4 provides a review of South Africa's transformation within the legal sector, particularly addressing the issues currently presenting as obstacles for South African people, particularly disadvantaged communities.

Chapter 5 presents the findings emanating from this study; it presents case studies addressing everyday issues relating to legal representation and access to justice.

Chapter 6 provides some recommendations for the challenges arising from restricted access to justice as discussed in the previous chapters. It provides an overall conclusion to the study's findings.

CHAPTER 2

OVERVIEW OF GOOD GOVERNANCE

2.1 Introduction

This chapter will review the theories and practices associated with good governance; the application of which forms the cornerstone of the delivery of legal services to disadvantaged persons. In order to give context to our legal framework, the study will examine a brief history of law as it developed to the point where it is currently applied in South Africa. A vital aspect of this whole process is that disadvantaged people have a right to such services. In fact, it is a basic human right and as such we will discuss human rights. In this chapter the researcher will discuss theories, practice and different perspectives of good governance, particularly associated with access to justice. The practice of good governance is a critical element in the decision-making process within an organisation. The chapter will also address how the application of human rights and government can help improve good governance in organisations.

Good governance indicates “a participative manner of governing that functions in a responsible way based on the principles of efficiency, legitimacy and consensus for the purpose of promoting the rights of individual citizens and the public interest, thus indicating the exercise of political will for ensuring the material welfare of society and sustainable development with social justice” (Muthith, 2007:4). This research seeks to address good governance in terms of the effective service delivery of Legal representation to South Africans.

The fundamental pursuit of governance is to oversee public matters particularly governing states and policing of local, regional, national and international organisations at all levels. This is a pursuit as universal and as old as civilisation. In Africa, as everywhere, good governance fosters and promotes democracy just as has happened in Europe, the United States of America and other modern democracies. An underlying requirement of good governance is the rule of law.

In order to improve the livelihoods of the disadvantaged, good governance practices and service delivery are important fundamentals of governing a developing country. In the context of this study service delivery refers to the continuous process whereby accessible and affordable legal representation is accessed by citizens. According to

the UNDP a lack of services and an insufficiently cooperative operating environment has a direct influence on the demands required by people e.g. services and amenities.

This Chapter will provide an overview of the meaning of important concepts relevant to this study such as human rights and government.

2.2 Human rights and South African law

South Africa contains a transforming society, a society that is emerging from a repressive apartheid era. Before South Africa's democracy the basic human rights of all South Africans were not equally respected, this included many violations of the human rights of mainly Black, Indian and Coloured South Africans.

The history of South African law provides context to the importance of Human Rights and illustrates just how far the law in South Africa has progressed. The history of South African law is not derived from a single source, such as Roman Classical, English, Roman Dutch or even Traditional law. South African laws did however emerge with contributions from all these aforementioned laws (Kleyn D, 1998:44).

The researcher believes that it is necessary to explore the History of how South African law came to be what it is in present day, this will assist to establish the roots of our legal system.

2.2.1 Cape of Good Hope and slaves

In 1662 Jan van Riebeeck landed at the Cape of Good Hope to establish refreshment post for the Verenigde Oostindische Compagnie (VOC); this established a platform for the subsequent economic development of the country. At that time the Cape had a small population of Khoikhoi and San, who had populated the area for at least a thousand years.

The history of South African law is complex and initially emanates from its Dutch colonists. Dutch law itself developed over centuries. Around 900 AD the Netherlands had no comprehensive legislation. Following the collapse of the Eastern Frankish Empire, German common law was then applied by the courts (Lee, 1961:10). Roman law played a crucial role as it merged itself into customary law, and where customary law could not be applied, Roman law was utilised. (Hahlo, 1968:21).

The Dutch lost the colony at Cape Town to the British in 1795. At that time slavery was legal in the Cape and slaves Verenigde Oostindische Compagnie were imported from countries including India, Malaysia and East Africa. From this mixture the coloured population emerged (Kahn, 1968: 567-568). 1795 the Cape came under British rule but ultimately the Cape was returned to the Dutch Batavian Republic.

During the 1680s Huguenots arrived. They were of French extract and held Protestant views, which was in conflict with the Roman-Catholic kingdom that was France in those days. Over time the population of South Africa increased and became more and more diverse as settlers arrived from Europe and Africa.

In 1806 the British once again occupied the Cape, thereafter legal processes and all documents were prepared in English (Lee, 1961:3). Throughout South Africa the application of British legal processes applied only to territories over which the British had control. Other areas were under Dutch settler control, and others under the control of black leaders, these various peoples applied legal systems appropriate to their heritage.

The Colebrooke-Bigge Commission (1823) proposed the gradual replacement of the legal system and subsequently, in 1828, English criminal and civil law were introduced. At this time the only lawyers who were permitted to practice were those who had been admitted to the bars in Scotland, England or Ireland (Zimmerman, 1983:11). Often where English lawyers were unsure of Roman-Dutch law, reference to English law was made. This created conflicts as the courts did not recognise any difference between the two legal systems (Zimmerman, 1983). Chief Justices Sir William Burken and William Menzies promoted movements countering Roman-Dutch law. In 1828 and 1843 the Cape's Criminal and Civil procedures were taken over.

2.2.2 Liberal changes

In 1910, following the Boer war, South Africa was given a constitution by its British governors, and was proclaimed the Union of South Africa. Roman-Dutch law was replaced by English law. Following this, in 1912, predominantly black leaders formed the South African National Congress. This later became the African National Congress (ANC) – which is currently the political party in power and governing South Africa. (Cameron & Trehwella, 1994:10).

Phillip of Leyden was a Lecturer at the University of Leiden during the 14th and 15th centuries. His work and that of legal academics such as Wielandt, Damhouder and Everardus became popular in South Africa; Damhouder was popular for his theories on criminal law.

The development of South African law stemmed from the laws of the Province of Holland. This decision was reached when Heeren Zeventien who controlled the Verenigde Oostindische Compagnie (VOC) were asked to define the law that would be applied in the Cape. Following various widespread political, economic and military action by the ANC, in 1994 democratic elections were held, which put the current government in power. In the period 1994 to 1996 the final constitution was written.

2.2.3 The Republic of South Africa

Following the Second World War, the Nationalist party took power and implemented the system of apartheid – which discriminated against - and prejudiced - black (and other) citizens. English laws were considered of lesser consequence from 1945. The 1950s saw a movement to counter the influence of English law in South Africa (Kleyn, 1998:44). In 1952 the term Roman-Dutch law was used by the author Simon van Leeuwen as a subtitle for his work “Paratitia Juris Novissimi”. Roman law was welcomed differently in different parts of the Netherlands (Hostsen, 1977:215).

The Republic of South Africa was declared on 31 May 1961 with Judges being left to decide which laws should prevail (Zimmerman, 1983:12-14). South African law then developed and comprised of at least five layers: Tribal law, Islamic law, statutory law, English law, Roman-Dutch law and Roman law.

During the apartheid years, certain South African laws were instruments of oppression, a means of recognising and facilitating the use of wide discretionary power that was used for deliberately discriminatory ends. The inherent limitations of judicial review were linked to the doctrine of parliamentary sovereignty; a doctrine of constraint on the pre-democratic judiciary, hindering the courts from testing original legislation on substantive grounds.

There were also other, self-imposed factors constraining the judiciary. South African administrative law had been affected deeply by the constitutional revolution of the 1990s namely the advent of a supreme, justiciable democratic constitution containing

a full-scale Bill of Rights and many other safeguards. That revolution promised not merely reform but “transformation”; change of a fundamental and dramatic nature, This transformation will be discussed in chapter 4.

2.3 Human Rights

What are human Rights? There is no universal meaning or definition of Human Rights. The United Nations (UN) has however described Human Rights as rights every human being has, inherent in nature, and without which we cannot live as human beings (United Nations, 1987). The availability of effective judicial remedies is one of the ways to ensure the protection of Human Rights. Poverty, unemployment and inequality remain the biggest threats to democracy in South Africa. The eradication of these threats can assist to facilitate human development (Mubangizi J.C, 2013:130). To quote the former Secretary General of the United Nations Kofi Annan

“Human Rights are the foundation of human existence and co-existence; that Human Rights are unusual, indivisible and interdependent; and that Human Rights at the heart of all that the United Nations aspires to achieve in peace and development, Human Rights are what made us human, they are the principles by which we create the sacred home for human dignity.”

Good governance is fundamental to the promotion of Human Rights. Section 34 of the constitution states that “Everyone has the right to have any dispute that can be resolved by the law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or form”. The emphasis on Human Rights is to highlight the importance of enforcing access to justice as a basic human right. It is further endorsed by article 8 of the Universal Declaration of Human Rights (UDHR), 1948 that emphasises that effective access to justice can be seen as the most basic requirement, the most basic human right of a system which purports to guarantee legal rights.

Human Rights as previously stated are an important set of values and without good governance the protection of Human Rights cannot be sustainably managed. A conducive, enabling environment is required for the implementation of Human Rights.

In the last twenty years the concept of good governance has been used extensively. There are two approaches to good governance, the academic approach and the donors approach. The former is centered on the various ways in which authority and

power relations are structured in a given society and the latter emphasises the role that state structures play in ensuring economic, social and policy equity and accountability through open policy processes. The academic approach involves all instruments through which policy makers exercise legal rights with the objective of achieving political, economic, cultural and social objectives (Our Global Neighbourhood, 1995, n.p).

Good governance in South Africa is a crucial component in alleviating poverty and inequality and in ensuring that service delivery in the country is developing and transforming. The failure and success of both a country and an institution is strongly dependent upon the way in which it is governed. From the perspective of this study, the good governance by legal institutions plays an important role in the development of the country.

2.4 Government

Government is a system of social control whereby a specified group in society has the right to make and enforce laws – often guided and limited by a constitution. Government devolves power to three institutions that govern the affairs of the country, namely: the executive; the legislature and the judiciary. (Williams,2009:22). Considering the meaning of government in this context, assists in evaluating the current theory of governance and public administration. Government is vital as it is the instrument through which the country becomes empowered.

Government is a distinct entity and is self-directing, limited only by the constitution. The legislature has powers and responsibilities to perform oversight over the functioning of the executive, and to facilitate public participation and to make laws. The executive is entrusted with powers to propose and implement government policies whereas the judiciary is responsible for interpreting the laws and regulations of the country (Williams, *ibid*).

An effective and efficient government is vital in the implementation of good governance, to ensure the implementation of important services. For the purposes of this study, this includes access to legal aid. The competence and capacity of responsible government institutions is important for good governance and for development. In the chapter to follow the actions and capability of LASA will be

discussed to assess whether or not the institution is equipped to meet the legal demands of the South African public.

“... the greater the quantity of the political goods being delivered, the higher the level of governance” (Rotberg & West, 2004:5).

2.4.1 Governance

An articulate description of governance is by Williams (2009:22) who claims that:

“...the term ‘governance’ has emerged as a compelling descriptor of a more interactive and symbolic relationship, it describes, in effect the creation of partnerships”. Williams further maintains that the notion of governance is “...grounded in a collective action approach to problem solution.” And that it “...involves integrating stakeholders and communities to resolve complex and messy public problems by including not only the state but many independent organizations...” (Williams, *ibid.*).

Governance includes all societal actors within and outside the domain of the state and within and outside the borders of a country, and includes civil society, NGOs, etc. It can be regarded as an alliance between the state and the non-state actors such as: academia, business, state actors and civil society. During the apartheid system, governance was highly centralized and fragmented along racial lines. The apartheid government aimed to systematically curtail the extent to which 'non-Europeans could have benefits (economic, social, political and others) from the resources of the country.

The Group Areas Act No.41 of 1950 (as amended) restricted the permanent presence of Africans and other races in urban areas by means of a ‘pass system’ that was used as a fundamental benchmark for inflow control, alienating Africans and others from where economic activity took place (Republic of South Africa, Act 108 of 1996).

2.4.2 Perspectives on governance

A central focus of political philosophers both classic and modern are the political processes and management and the discovering of patterns of political activities motivated to influence institutional decision-making processes for social change in a meaningful way. Various approaches of governance reveal that the classification of governance poses a problem for researchers seeking to obtain a simple and common definition. The common denominator lies in the understanding of the said governance that refers to the setting, application, and enforcement of rules, (Kjaer, 2004:10).

The South African Organization for Economic Cooperation and Development (OECD) has elaborated on, and published extensively on governance in the public sector. The OECD associates good governance with public sector reform and explores eight major characteristics of good governance, which are:

“Participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law”.

These eight major characteristics of good governance are designed to ensure that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard and dealt with in decision making (OECD, 2001). According to Vyas-Doorgapersad and Ababio (2010:413) specific principles apply to good governance. The two principles that will be highlighted in this chapter are public participation and the rule of law. (This does not imply that the other principles are not important).

The specific principles include:

Responsiveness and Sensitivity to the needs of the public by Government Administrators;

Transparency: The delivery of Information that relates to Government that is accurate;

Effective and Efficient: Ensuring optimal utilization of available resources to ensure that optimal service delivery is provided;

Equality: All members of society to be afforded equal opportunities to improve their livelihoods;

Professionalism: Enhancing capacity and Morale of Government Administrators to promote and facilitate productivity;

Vision: a clear strategy and vision in all processes of development with the inclusion of the citizens in this vision;

Participation which incorporates the ability for citizens to voice their opinions in decision making processes, Participation has been defined as “the direct involvement or engagement of ordinary people in the affairs of planning, governance and overall

development programs at local or grassroots level” (Williams, 2009: 197). Participation is most relevant when considering participatory governance, and it is suggested that:

“...the task of running public affairs is not solely entrusted to government and the public administration, but involves co-operation between state institutions and civil society groups” (Friedman, 2006: 4).

Rule of law refers to the fair and impartial enforcement of the law.

Access to justice is one of the pillars of the rule of law. The lack of access to justice undermines the rule of law resulting in citizens not able to voice their opinions, challenge inherent discrimination thus not be able to exercise their rights, therefore that is why it is essential to ensure access to justice, ensuring impartiality and integrity. Steps should be taken towards universal access to justice; it is important that there be recognition of disadvantaged and vulnerable citizens. Where there is an authentic, democratically elected government, one must question how poor and other marginalised population groups remain side-lined and powerless.

Generally, the rights to access to justice themselves are enshrined in customary international law and are usually incorporated into national laws and constitutions, yet they do not necessarily always benefit the vulnerable and poor sectors of society. South Africa is a classic example of such a state.

Good governance “...entail[s] not only reform of the public services, efficiency and cost effectiveness of public agencies but also ensure[s] participation of the poor, marginalized and the under-represented” (Rajesh & Ranjita, 2002:10). Good governance cannot be well apprehended without conceptualizing the criteria established for measuring the said good governance. (UNDP, 1995). These characteristics and principles may facilitate in monitoring decision makers and policy makers in an effort to eliminate overall bad governance.

2.5 Summary of chapter 2

In view of the afore-mentioned literature, for the purpose of this study, governance will be treated as the relationship between the government, governing state institutions, civil society and NGOs. ‘Governance’ has emerged as a compelling descriptor of a more interactive and symbolic relationship. (Williams 2009: 22) argues that the notion of governance is “...grounded in a collective action approach to problem solution.” And

that it "...involves integrating stakeholders and communities to resolve complex and messy public problems by including not only the state but many independent organizations..." (Williams, *ibid.*).

Governance of an organisation requires collaboration between all affected parties. Specifically examining LASA, although the institution is governed by an elected board of directors, when decisions pertaining to the organisation are being addressed, the views of the government - who funds the organisation - must be taken into consideration, along with client feedback and legal practitioner concerns. The next chapter will investigate LASA and its constitutional mandate.

CHAPTER 3

LEGAL AID SOUTH AFRICA

3.1 Introduction

Studying the challenges faced by South Africans seeking legal representation from organisations such as LASA is significant in that it allows us to explore the dynamics of our current access to the justice system and to evaluate whether or not state funded organisations such as LASA compete with lawyers acting *pro bono* in private practice. The study will aid in ensuring that current challenges are addressed and intervention measures are suggested in order to ensure that those who can't afford to pay for their legal representation get the best possible access to justice.

The Constitution addresses the promotion of a judiciary that is diversity imperative. The country's constitution, section 174 (2) addresses the need for a judiciary that reflects the gender and racial composition of South Africa; this diversity would allow for a widely different range of viewpoints to be brought into the adjudication process (McCrudden, 1986, n.p). This will enhance the quality of decisions made in order to ensure that the judiciary functions more efficiently in addressing the needs of South African citizens. This, in order to facilitate greater access to justice.

Advocate Nazeer Cassim, an advocate practicing at the Johannesburg bar, informs that a conference on promoting a liberal constitution, addressed the failure of South Africa's justice system. It stated the fact that the ratio of advocates serving people was not at an appropriate level. It also covered the exorbitant cost of legal fees, especially when compared to those of other countries. Cassim attributed these issues to the country not having the same access to resources such as education. He stated that:

"...once litigation is not accessible to the average South African the system fails, if the system fails more and more people lose respect for the law and the structures that uphold the law and order, and if that system fails then we've got problems". (Helen Suzman Foundation, 2013, n.p).

According to Cassim, a starting point for intervening in the judicial process is the acceptance that the system has failed and needs to be changed.

The concept of universal access to justice goes beyond mere access to institutions (that assist in resolving various disputes) in that it should be defined in a manner that takes into consideration the ways in which access is denied (Baxi, 1999:4). According to Statistics South Africa (23 July 2015), South Africa's population is approximately 54 million, 50% of whom reside in rural areas. There are almost 22 400 lawyers practicing and 5 600 candidate attorneys. There is approximately one lawyer for every 2 273 people in South Africa after taking into consideration that only a few lawyers operate in rural areas, i.e. those governed by tribunal authorities (De rebus, 2014, n.p).

The true extent of the gap may never be fully ascertained, but analysis of elements such as these shed some light into the country's current disparities. Although outdated, a national survey that was conducted in 2001 by the Human Sciences Research Council examined South African's levels of satisfaction and dissatisfaction with to the country's post-apartheid governance. Respondents in this survey were requested to "judge their relative degree of trust in a variety of institutions, including the national government, police and court system". (Human Sciences Research Council, 2001).

This comparative study reflects that the people expressed trust in the courts slightly more than the police and the local police station, courts being at 45%, police at 40% and the local police station at 39%. This gives us an indication of how courts fall short, (even if they are slightly above the police and local police-stations.) Although this may be seen as mere public opinion, that does not diminish its relevance.

Lippmann (1992:47) wrote on public opinion

"... as each of us lives and works on a small part of the earth's surface, moves in a small circle and of the acquaintances know only a few intimately, of any public event that has wide effect we see at best only a phase and an aspect, inevitably our opinions cover a bigger space, a long road of time, a greater number of things than we can directly observe. They have therefore to be pierced together out of what others have reported and what we imagine".

LASA is not the only organisation geared at providing legal advice and representation for those less fortunate. The apartheid system resulted in the development of a vibrant community of NGOs whose interests lie with the public interest in legal representation (Legal Resource Centre, 1996). In the 2014/15 financial year, 44,895 new matters

were taken on by LASA, representing a 0,2% growth from the previous year (LASA, 2015).

One such organisation is the Legal Resource Centre (LRC) a NGO established in 1979. It assists communities and individuals by offering practical help, help that they would otherwise not be able to obtain. The LRC, much like LASA, is not able to assist everyone especially because it, unlike LASA does not receives state funds but is effectively funded by money from local and overseas organisations.

It is important to note that South Africa is not limited to these two organisations but with every law clinic, or NGO providing such a service, comes individual problems and requirements for aid as well as the inherent inequalities. Where organisations rely on external funding, lies there is always the problem of what will happen if such funding ceases.

A charter, which was adopted by the Law Society in December 2007, states that "the law profession undertakes to recognise the ethical obligation to carry out *pro bono* work and develop and enhance the *pro bono* system with a view to making it compulsory for all practitioners". It is unfortunate that the final legal services charter requires the profession to undertake *pro bono* work with a view to making it compulsory but does not actually contain that mandatory requirement.

A proposal by the charter to introduce mandatory *pro bono* work would have its drawbacks, as it may not result in better representation of the poor, as clients would be at an advantage if served by practitioners who are willing and not as a result of being forced by the charter (Cramton, 1991: 1113-1139).

"In principle *pro bono* work should be voluntary, but given the situation of access to justice in South Africa, I think it should be mandatory, we have such a constitutional crisis. I believe that the legal profession can't have a monopoly on the legal system without giving back to the community" (Kruse,2009, n.p).

Practical solutions to enhance access to justice were discussed at a conference held in July 2011 where Chief Justice Moegeng made a firm commitment to put mechanisms in place and to monitor their implementation. (Access to Justice Conference, July 2011). These resolutions are necessary to unlock challenges that have the potential to undermine the nourishment and transformational goals of our constitutional democracy.

3.2 Legal aid mandate and structure

In 1969 a national legal scheme was introduced by the Legal Aid Act 22 of 1969. It established what we know today as LASA, formally the Legal Aid Board. The board was given complete discretion as to how it would go about offering legal assistance to indigent people. Initially a decision had been made to use a referral system, where applicants were referred to private attorneys 'Judicare' as opposed to making use of salaried lawyers. For 25 years LASA operated using this system but around 1990 the board persuaded the Minister of Justice to assess the feasibility of a public defender system appropriating R2,5 million for such a purpose. This would enable the organisation to employ legally qualified persons to represent indigent accused, (LASA Guide, 2014:23).

In 1969 the Legal Aid Bill was established, with the purpose being to establish a statutory entity now known as LASA. Subsequently that bill was replaced by Legal Aid South Africa's Act 39 of 2014 on the 1st March 2015. This was done so as to assure proper governance (De Rebus, Jan 2015, n.p).

Since LASA's establishment has been funded almost exclusively by Parliament with the use of public funds and these funds have increased markedly over the years (LASA Report on activities, 1996). But even with these increases, LASA does not have sufficient funds to provide aid to everyone that requires it. This is problematical as there is also a requirement that the indigent must meet in order to qualify for legal aid.

An overview of the LASA organisational structure can be viewed on the organisational chart adapted from the LASA guide 2014 (Appendix 1). The organisation is governed by a board of non-executive members who are drawn from diverse backgrounds. The board members are appointed by the Minister of Justice and Constitutional Development, with an allocated term of 3 years. Once a board member's term has expired, their contracts may be re-evaluated for re-appointment (LASA Guide, 2014).

3.3 Qualifying criteria

In order to qualify for legal aid, applicants have to meet the requirements set out in the organisation's means test. This test assists in identifying clients that are considered as indigent. Indigent has been defined by the Oxford dictionary as meaning "very,

extremely poor". As a result of the Act not defining 'indigent person' the means test use by LASA is revised occasionally. (LASA Guide, 2014).

Annexure C is an example of the LASA application completed by prospective clients and in the event that an applicant's means test is exceeded, then Annexure L would be utilised, as legal aid would then be refused. In the event that legal aid has been refused the client is advised that they have the option to appeal the decision. To pass the means test the applicant's gross monthly income and net assets must be in accordance with the test requirements. (LASA Guide, 2014:75).

3.4 Legal aid delivery system

On the 2nd of March 1971 legal aid was applied throughout the Republic of South Africa. As previously mentioned, during the first 20 years of legal aid's existence it made use of the Judicare system, which is the use of private legal practitioners in Legal Aid cases. These practitioners are then compensated under tariffs set out in the Legal Aid Guide (Legal Aid Guide, 2014).

The National Office of LASA is based in Braamfontein, Johannesburg, South Africa and this is regarded as its principle place of business. The organisation has 64 Justice Centres and 64 Satellite Offices all over the Republic of South Africa. These centres are responsible for the delivery of legal aid services, with the typical centre comprising of a civil section, a criminal section and a section for advice staffed with paralegals. (LASA Guide, 2014:103).

The LASA Justice Centres are located in areas accessible to the general public in order for the indigent to be able to access the services and be assisted. There are however instances when the person is not able to reach a Justice Centre such as cases where they cannot afford the transportation. In such instances the advice line may be used.

The call centre was established in 2010 so that clients can call for any legal advice that they require. The call centre is manned primarily by paralegals, but in the event that the advice needed goes beyond the scope of the paralegals knowledge, the matter is then escalated to the relevant professional.

During the financial year of 2013/2014 a total of 334 631 clients were assisted with general advice and 61 275 of those clients were assisted through the use of the call centre. (LASA Annual Report, 2015)

LASA along with co-operative partners strive to render services to a wider group of qualifying indigent clients. These partners are usually university law clinics and NGOs that have an agreement, which is facilitated through LASA providing funding to the co-operative partner in order for the partner to increase their staff component. These partnerships provide legal services that are vital, particularly in matters pertaining to children and land matters. The law clinics provide legal services and also facilitate the training of legal staff, particularly practitioners, with an interest in servicing their communities

3.5 Necessity for the right to counsel

In a 1988 case study discussed by Professor Ogletree, a black South African man by the name of Paulus Mthwana was detained following the break-in of a house in Durban, KZN. Paulus was charged with housebreaking with the intent to steal (Ogletree, 1995:98-99). During his court proceedings when the accused was asked by the Magistrate whether he would require the representation by legal counsel, Mthwana replied that he would engage with legal representation should he be released, but that he would he also first need to consult with his family in order to raise the necessary funds needed to pay for the attorney (Ogletree, 1995:98-99).

The Magistrate refused to release the accused on bail and to lower his bail amount, resulting in the accused being detained until such a time that he had to stand trial. The Prosecutor contacted the LASA board on behalf of Paulus, yet the accused's application was denied and the details as to why his application was denied were not divulged.

The important question in this matter is whether or not having legal representation would have impacted on Mthwana's case in any way. Had Mthwana received legal representation, this attorney would have been able to cross-examine the state's witness on several grounds pertaining to their reliability (Ogletree, 1995:98-99).

The aid of legal representation would have enabled Mthwana's defence to question the reliability of the fingerprint expert attending to the case in an effort to raise doubts about the manner in which the fingerprints were lifted at the scene of the crime, cross-examination of the complainant could have revealed a lack of certainty regarding how many people other than the defendant could have possibly touched the stolen goods, all this could have assisted the defendant in casting doubt on the states evidence

against him. Owing to lack of experience and training Mthwana was unable to effectively cross examine the reliability of the charges brought against him.

S v Ntuli 1991 (1) SA 1218 is an example of discrimination in the attainment of justice a case different from that of Paulus Mthwana. In this individual case, one of the parties had legal representation, while the other had been imprisoned without legal assistance. The Constitutional Court sought to address the validity of a law that differentiated between two parties in the case and maintained that this form of treatment amounted to a violation of the right to equality and equal protection of the law. Equal treatment requires similar judicial treatment.

The Constitutional Court highlighted in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the fact that South Africa's democratic order seeks organised and fair avenues of resolution of disputes by courts or other independent and impartial tribunals. It is indeed vital to a society like South Africa, deeply founded on the rule of law. This is fundamental to the stability of an organized society.

3.6 Summary of chapter 3

The establishment of LASA sought to address the need for the vulnerable to have legal representation and a fair trial. The indigent are not able to incur the costs of private legal representation therefore they are afforded representation that is subsidised by the South African Government.

CHAPTER 4

TRANSFORMATION WITHIN THE LEGAL SECTOR

4.1 Introduction

What is transformation? According to Oxford dictionary it means 'A marked change in form, nature or appearance'. In the organisational context, the business dictionary refers to transformation as a process of radical and profound change that re-aligns an organisation into a new direction and level, with little to no resemblance to the past. In the context of this study, transformation will be explored in relation to the methods of access to justice that exist and the country's current state of affairs.

The apartheid regime, under a system of Parliamentary sovereignty, benefited from the law as it was used to impose racial oppression and discrimination. Before 1994, the distribution of justice departments was uneven which had only 11 departments, which were all dependent on race gender and geographic location. It comprised of a judiciary consisting mostly of white men and as a result of this and laws such as the pass laws, segregation laws and detention without trial, the justice system prior to 1994 was an unequal one (The Presidency, 2011, n.p).

Achievements that have taken place subsequent to 1994 include the restoration of an equitable rule of law in South Africa by putting in place the legislation required to create the processes laid down by the Constitution. New institutions to support constitutional democracy were established (such as the Public Protector), to administer judicial functions and in order to restore respect for the law and the justice system. All this led to the establishment of a number of new legislative measures.

Since 1994, 1294 new acts were passed by Parliament, and of those acts 148 of them were attributed to the justice sector, promoting the eradication of crime and corruption and broadening access to justice. Transformation continued with the rebuilding of various bodies that had already been in existence. These bodies were then transformed in line with the Constitution, and one of these boards was LASA, taking over the function of the Legal Aid Board (The Presidency, 2011, n.p).

Justice Masipa at a presentation at the Johannesburg Attorneys' Association AGM held on 9th September (2015) discussed the transformation of the legal environment. She began her address by saying that South Africans are still struggling with the

concept of transformation 20 years into democracy, adding that this was alarming because South Africa has one of the most progressive constitutions in the world.

Justice Masipa went on further to say that “Transformation is different things to different people and perhaps that is where the difficulty lies. People might consider the growth in numbers of the legal profession and not worry. Other people may look at the quality of legal representation and feel dissatisfied” (Kriel, 2015:9).

4.2 Addressing the issues

4.2.1 The cost of legal services

Poverty impacts on access to justice and results in the inability to meet the costs of legal representation (This inability is also due the high cost of legal services and other problems in receiving legal assistance from LASA.). Studies on South Africans’ average salary indicate that the average South African household would have to save a week’s income in order to afford a one-hour consultation with an average attorney. For Black households the barrier to access to court is even higher because their earnings are lower than the average. Poverty thus has a negative effect on access to justice for citizens.

The Constitutional Court in *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) highlighted the socio-economic and historical conditions prevailing in South Africa, when they stated the following

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring” (para. [8]).

In South Africa the average monthly household income in 2011 was R 9 962 (Statistics South Africa, 2010/2011), with the average household income of a black family being R 5 803. These statistics are relatively old and the figures may have improved, but the question remains: how do these household incomes compare with

the average cost of legal representation? The majority of South Africans cannot afford legal services, and factors such as race and gender continue to affect access to justice. In the context of this chapter, it is axiomatic that transformation needs to play a role in improving the livelihoods of South Africans who continue to bear the brunt of discrimination two decades after the dawn of democracy (Bester, 2016,n.p).

LASA, which is the organisation under focus in this study, requires that a household income be equal to or less than R 6 000 per month in order to be considered for legal aid. This amount is calculated under the means test mentioned in chapter 3.

Hourly fees for South African Lawyers vary and the table below illustrates the average the fees for legal services (DNA, 2009:21):

Figure 1: Legal fees in South Africa

Legal Practitioner	Candidate pupil	Newly appointed	5 years' experience	10 years' experience	Senior Practitioner
Advocate	n/a	R800 /hr.	R1200 /hr	R2000 /hr.	R35000/R40000 + /day
Attorney (Corporate)	R900 /hr.	R1100 /hr.	R2300 /hr.	R3000 /hr.	R4000 /hr.
Attorney (Solo)	R400 /hr.	R500 /hr.	R600- R900 /hr.	R700-1100 /hr.	R700-1200 /hr.

The above table adapted from a study by Professor Johnathan Klaaren illustrating the cost of justice indicates fee averages highlighting the economic disparities that exists in South Africa and that the cost of Legal representation far exceeds the average household income of South African citizens. Improving Access to legal representation requires that the fee implications of dealing with the legal profession be put under consideration.

The RSA (Republic of South Africa) Department of Justice and Constitutional Development recommend that in order to address the problem, strategies that can be employed include increasing the regulation of fees in order to achieve a reduction in the cost of legal services. This could be achieved by reducing the present maximum tariffs and establishing maximum tariff limits for the delivery of legal services. Practitioners who presently carry high overhead costs would thus be affected. (Republic of South Africa 1998, n.p).

4.2.2 Availability of legal practitioners

The hindrance in accessing legal representation also takes into account the availability of legal practitioners and the question arises whether there are enough practitioners to service the number of people requiring legal assistance. The latest statistics on the legal profession suggest an increase in the number of practicing attorneys. It is still to be seen whether it is indeed enough to facilitate the growing population along with its rising legal issues.

In the last decade the increase has gone from 16 412 in 2005 to 23 712 in 2015. These statistics were released by the Law Society of South Africa's (LSSA's) Legal Education and Development (LEAD) division. As at March 2015 there were 15 004 male practicing attorneys, compared to 8 708 female attorneys. White people dominate the number of practicing attorneys at 14 694, with Africans coming in second at 5 330. (Republic of South Africa 1998, n.p).

...4.2.3 Geographical distribution of legal practitioners

In South Africa, more than the majority of citizens live outside the formal system in that they have to go outside their comfort zones in order to resolve disputes). The reality is that we live in a society where there are great disparities in wealth; livelihoods are different with inadequate social means, high rates of unemployment and lack of access to sufficient service delivery in the public and health sector. It is no wonder that inequalities continue to exist. (Republic of South Africa 1998, n.p).

The majority of lawyers practice in cities and service corporations, most of these corporations charge hefty fees for their services. Attorneys that provide services in the rural areas tend to be white, male and Afrikaans-speaking and provide services to local

businesses and farmers. These practitioners do not appeal to the disadvantaged who reside in rural settlements and townships. (The Department of Justice (RSA 1998, n.p).

A disadvantaged client might be more comfortable if offered the opportunity to receive assistance from an attorney with whom they share a similar culture and language. The Department of Justice (RSA 1998, n.p).

4.2.4 A Representative legal profession

A representative group of practitioners is required in order to ensure a legal profession that represents South Africa's diverse society (RSA 1998, n.p).

Judge Masipa during her address at the Johannesburg Attorneys Association AGM held on 9 September 2015 (Kriel 2015:9) discussed the issue of minimum representation of Black South Africans in the High Court. She went on to state that even though there may be a number of previously disadvantaged individuals entering the legal profession; these figures should be viewed with caution.

Justice Masipa said that transformation and empowerment go together. 'Transformation without empowerment, therefore, is of no value at all. Real transformation must be coupled with a motivation and the willingness to empower,' (Kriel 2015:9).

Deputy Minister of Justice and Constitutional Development, John Jeffrey speaking on transformation, said at the Johannesburg Attorneys Association AGM held on 9 September 2015 (Kriel 2015:9) that:

"While transformation has many meanings, one key element is that we need a legal profession, both attorneys and advocates, which is reflective of the race and gender composition of the country. Do we have this and are we anywhere close? The answer is no. So, I know that for a lot of people raising issues of race make them uncomfortable. They feel let us forget the past, let us move forward, we now have democracy, etcetera. If we do not have an attorneys' profession, an advocates' profession that reflects the gender and race demographics of the country – we are creating problems in the long term. If you look at the Bar, 70% of the Bar is white but whites are only 8,9% of the population; 18% of the Bar is African but Africans make up 79,2% of the population".

He went on say that “Transformation is not just about statistical representivity, it is also about attitudes. And access to justice means access for the public to legal services and our courts, but it also means access to the profession.”

To highlight some of the challenges addressed above, Chief Justice Mogoeng offered suggestions on ways in which the judiciary and the issue of access to justice can be improved for the benefit of all. It was during a transformation session that took place in Mookgopong, Limpopo on the 5th August 2012.

The session addressed issues of case backlogs and the reduction of the numbers of cases along with enhancing stakeholder relations and community outreach programmes and improving overall court performance. The session encouraged senior members of the judiciary to commit to the following:

- The implementation a judicial case management system to curb case backlogs and delays;
- Introduction of additional performance enhancement, monitoring and measures, including additional judicial officers to cope with the increased workload;
- Distribution of mobile courts, and the establishment of more sexual offences and community courts. Traditional courts that comply with the constitution would also be resourced and re-established;
- Addressing the need for additional language practitioners in courts;
- Supplying additional information to the public with valuable information about programmes on offer, afforded by the judiciary, including information about the rights of the public and how best they can access justice for themselves.

4.3 Summary of chapter 4

Access to justice is hindered by numerous factors; there is no quick fix solution to repairing the challenges that exist. It is necessary for government and stakeholders to evaluate the countries current trends within South Africa’s legal system and determine helps and what is a hindrance to the facilitation of access to justice. Changes are required to ensure quality output from the Judiciary and legal profession and this is where good governance is vital.

The Chapter to follow will address access to Justice and the South African Constitution: LASA and the Constitutional Mandate, the chapter will draw together the previous two chapters; namely good governance and LASA illustrating how the South African constitution and good governance play a vital role in the delivery of legal aid and the governing of the organisation LASA.

CHAPTER 5

ACCESS TO JUSTICE AND THE SOUTH AFRICAN CONSTITUTION: LEGAL AID AND THE CONSTITUTIONAL MANDATE

5.1 Introduction

At the 71st annual general meeting of the Johannesburg Attorneys Association (JAA), Dr Mamphela Aletta Ramphela a former apartheid activist addressed the attendees, informing them that on occasion she has had the opportunity to visit campuses and, when at these campuses, Ramphela an academic and business woman would ask the students, how many of them are familiar with our country's Constitution? She stated that she is always shocked to discover that less than 10% of the students know what it entails and understand the Constitution and that this is a discovery that is disheartening; should people continue to not educate themselves about the Constitution then the rule of law is at risk.

One of the principles of the rule of law that encapsulate this study refers to access to justice being provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, ensuring that they adequately allocate resources needed for service implementation and reflect the makeup of the communities they serve (Ramphela,2013, n.p).

The rule of law is the cornerstone of South Africa's Constitution; it is important to ensure that it is not undermined by difficulties in access to justice with well suited representation. It is unfortunate that justice comes late for some people, as in the case of 6 accused men from the Northern Cape a few years ago/ Accused of the rape and murder of a young girl, the accused were later found to not be the perpetrators of the crime, as a result of DNA evidence perpetrators were excluded (Cape Times, 2016:9).

This is just one of the many cases where justice is delayed for the vulnerable, once again highlighting the importance of the indigent being afforded the opportunity to access legal representation of the same caliber as that used by the privileged who make use of private practice attorneys.

The discussion of access to justice and the Constitution is noteworthy because access to justice is as important as any basic human right. This chapter will examine the concept of access to justice in line with the South African Constitution with the focus being on legal aid. The Constitution lays the foundation as to how this Human Right should be addressed within the country. Three dimensions of justice that seek to

achieve fairness within the law and the courts include structural, procedural and normative justice. Participation and accountability forms part of the structural dimension, in this dimension the rights of the minority e.g. women and children are paid particular attention (U.N.D.P,2012:11).

LASA has aligned itself with this dimension in that it recognises the need to address the rights of women and more especially children as all children are granted automatic legal aid (LASA Guide, 2014).Procedural justice comprises of the recommendations for adjudication processes that ensure that parties involved in a dispute are treated equally, ensuring no bias from parties with a vested interest, within LASA should a situation arise where a conflict is observed, in order to ensure fairness and reduce conflict of interest, the other party is represented by a Judicare practitioner.

This mode of representation mentioned in the previous chapter allows for both clients to be represented, ensuring no bias or conflict of interest arises. (LASA Guide, 2014). Finally, normative justice consists of substantive rules that protect the rights of vulnerable groups such as women and children. (U.N.D. P, 2012:11). This chapter will briefly address the dimensions of the South African Constitution and the aims of the Constitution (in respect of access to justice.)

The Constitution of the Republic of South Africa specifies the Constitution as the supreme law of the Republic and its preamble is an expression of the aspirations behind its formulation. Its preamble affirms the following:

“...the Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It reinforces and motivates all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.” (S v Mlungu, 1995:112).

The Constitution was implemented and a Bill of fundamental rights was established, to avoid a repetition of South Africa’s past injustices and to establish a new society based on mutual respect, equality and freedom (Social Security: A Legal Analysis, 2003:52).

South Africa’s high crime rate makes it difficult for civil society to live by the creed that an individual is innocent until they are proven guilty. On many occasions society attempts to take matters into their own hands, but none-the-less even the accused deserve their day in court to plead their case and prove their innocence.

The case of an attorney who travelled in Mpumalanga to represent his client proved to be detrimental to the rule of law and fair trial when he was assaulted by the town residents as they believed the accused to be guilty and disapproved of him having representation. This attack proved to be a gross violation on the rights envisioned in the Constitution of the Republic of South Africa. The assault did not deter the accused's attorney as he was still determined to represent the client (Cape Times. March, 2016:9), as access to justice is deserving of every person as a human right, guilty or innocent.

The concept of access to justice is understood in terms of legal rights, processes and procedure, (Lexis Nexis, 2004: 1). Failing to take into account the impact of the socio-economic conditions (such as poverty, literacy, geographical location etc.) on the ability of claimants to use the adjudication system is a great injustice, as conditions play a vital role for the vulnerable. A broad approach to the concept of access to justice goes beyond access to the institutions that resolve disputes and attend to legal services.

The socio-economic condition of claimants (especially poverty) has an inevitable impact on the ability of the poor and the marginalised to utilise the legal system, therefore, the concept of access to justice is defined in a manner that also considers the number of barriers to the ability to utilise the legal processes to receive a just and fair treatment. Such ability is hampered through various barriers (geographical, time-related, language, cultural, social or legal etc.).

Remarks made by J Didcott in *Mohlomi v Minister of Defence* in 1997 address that in South Africa in particular, the impact of the socio-economic conditions of claimants and other barriers on their ability to utilise the adjudication system must be considered within the concept of access to justice.

Vawda in 2005 addressed the "legal isolation of the poor" emphasizing the relationship between access to justice and other rights in the Constitution (especially socio-economic rights) that require that access to other constitutional rights be inclusive. There can be no access to justice in the face of poverty, unemployment and social inequality (Obiter,2005: 234-247).

5.2 Values and the Constitution

The right of access to justice and to good governance is essential in order to promote the values that inform and strengthen the goals of the Constitution. The impact of

Constitutional values in interpreting the Constitution and understanding its fundamental purpose was highlighted by the Constitutional Court when it stated that:

“The introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted the bill of rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction To treat it with the dispassionate attention one might give a tax law would be to violate its spirit as set out in unmistakably plain language. It would be a repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi constitution in Germany.” (S v Mlungu, 1995 6 SA 867 (CC) par 112).

When constitutional values are interpreted, the rights entrenched in the Constitution must be considered, section 39 of the constitution requests every court, tribunal or forum to encourage the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the rights in the Bill of Rights.

Everyone is equal before the law and has the right to equal protection before the law (Constitution of the Republic of South Africa, Section 9) equality includes the full and equal enjoyment of all the rights and freedoms (Pepuda ACT 4, 2000, n.p).

Section 34 of the Constitution guarantees everyone the right of access to courts. As it has been stated:

“Fundamental to that spirit and tenor was the promise of the equal protection of the laws to all the people of this country and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.”

All persons should have access to effective dispute resolution mechanisms necessary to protect their rights and interests, the adjudication system should be open to everybody, irrespective of their circumstance ignoring economic and social disparities between individuals.

Currie and De Waal in the Bill of Rights Handbook discuss a practical approach to equality required by the Constitution. Section 9(2) states that equality includes the equality of all rights and freedoms. Substantive equality aims to promote the attainment of equality by focusing on outcomes and requiring the law to ensure the equality of the outcome. In the case of legal aid being granted, the economic and social conditions of

individuals or groups of persons are taken into account in determining the attainment of equality. Substantive equality emphasizes that the equality provisions could be used to address historical imbalances that were created by the past and imbalances that continue to affect access to justice, the term 'past' refers to the apartheid era.

Further substantive equality necessitates re-evaluation when pertaining to access to justice, particularly access to courts in order to integrate the promotion of equality and social justice for poor and other vulnerable persons. Implementing such an approach to equality in this respect requires the development of an adjudication system that takes into account social, economic, cultural and other relevant contexts (Vawda, 2005:234-247).

Heywood and Hassim (2008:122) further tackled the issue of redefining equality within the legal system the necessity being because when people are poor, individual incidents of unjust administrative action or unfair denial of access to services e.g. refusal of LASA representation, can lead the poor into greater poverty and widen inequalities in addition the development of pioneering mechanisms to effectively comprehend their right to access to justice.

Influenced by the equality principles in the Constitution, access to justice and equality entails that every complainant should have access to legal assistance provided by the government. However, organizations such as LASA are not obliged to represent an accused person who does not meet the means test requirements (which determines eligibility of applicants); therefore, possibility of having legal representation to increase the chances of a fair trial is therefore dependent on the affordability of justice (Ellmann, 2004:121).

One limitation of LASA is that it provides services mainly in criminal matters. (LASA Guide, 2014) Although the organisation is increasing its assistance in civil cases (where it prioritises matters involving children, women in divorce proceedings, maintenance and domestic violence cases and unlawful evictions), the legal assistance is still largely absorbed by criminal cases. The financial year, 2007/2008 the Legal Aid Board attended to 396,068 matters, ninety percent (90%) were criminal cases with only ten percent (10%) being civil cases. LASA Annual Report 2007/2008, 2. Provides a clear indication that:

“... legal assistance for poor persons is lacking in a variety of civil matters, in administrative forums where their rights are routinely overlooked; in government

bureaucracies which deny them access to social security, and other socio-economic rights (such as in social security administration and delivery institutions and government departments); and in the general context of upholding their dignity, equality and social justice.” (Vawda, 2005: 234-247).

“confining the provision of legal services primarily to criminal matters, and defining access (to justice) so narrowly, has other serious consequences...for example that the focus on criminal defence has implications for gender discrimination. The channeling of limited resources into the provision of representation to accused persons takes away resources from other areas where legal services are required, and as a majority of criminal accused consists of men, women (and other groups) are underserved by the legal aid system. The areas of law affecting women, children, the disabled and the poor – domestic and family issues, access to facilities, jobs, education and social services – are inadequately catered for in the current delivery models.” (Vawda, 2005: 234-247).

Access to legal representation is necessary as it impacts on the founding values of the Constitution. The right of access to justice, like all other socio-economic rights in the Constitution, is closely connected to the founding values of human dignity, equality and freedom. The protection of the right of access to justice also seeks to promote equality, as section 27 entitles everyone to have access to socio-economic rights and to be free from discrimination of any form.

5.3 LASA's Constitutional Mandate

LASA's constitutional mandate relates to criminal trials, appeals, civil childrens matters and civil matters which are derived from four provisions reflected in South Africa's constitution previously mentioned other legislation that impacts on the delivery of services are as per the LASA Guide 2014:

- (i) The Criminal Procedure Act (Sections 309,309B,309C,309D & 316, - Representation in Trials and Appeals)
- (ii) Child Justice Act (Sections 82 (1) & 83 (2) - The representation of Children as no child shall be refused legal aid)
- (iii) Childrens Act 38 of 2005 (Section 55(1))
- (iv) Refugees Act 140 of 1998 (Section 27 (b))
- (v) Labour Relations Act 66 of 1995 (Section 149) (VI)
- (vi) Mental Healthcare Act 17 of 2000 (Section 15)
- (vii) (VII) Restitution of Land Rights Act 22 of 1994 (Section 22)

- (viii) (VIII) Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (Section 4(5))
- (ix) (IX) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Section 10(5)) (X) Protection of Personal Information Act, Act No. 4 of 2013

Apart from the Constitution and the legislation mentioned above the National Legislations which directly impact on the access to justice and the right to legal representation are:

1. The Legal Aid Act

LASA considers the organisations available budget and the resources at their disposal in the fulfillment of legal assistance in these instances. In the event that there is a change in legislation, or recommended amendments to current legislation, in so far as they impact on LASA's mandate and/ or clients' rights, LASA ensures legislation is meticulously monitored and responded to as part of the legal research agenda. In 2013 LASA appealed a ruling by the court that stated that they would have to assist in funding the representation of the Marikana mine incident. The organisation appealed the ruling as it reviewed their budget and if LASA were to fund the Marikana miners then justice would have been denied to many vulnerable citizens. The expense would be too great and the organisation would not be able to sustain itself and, scaling back would be the direct outcome of honoring the court's decision. The CEO of LASA Vidhu Vedalankar stated that R17 million would be needed (Star Newspaper, 2013).

Measures for budget allocation are there to ensure that clients' rights are protected and the mandate of LASA is not extended without associated funding. (LASA Annual Report, 2015/16). The case *Legal Aid Board v The constitutional court* highlighted that legal aid's purpose as being a measure to reduce the possibility of an injustice and enhancing the prospects of a fair trial taking place. In this case the second respondent, Gary Patrick Porritt (Porritt) and the third respondent, Susan Hilary Bennett (Bennett) applied for legal representation with LASA. They had been indicted on charges of fraud in the South Gauteng High Court; the litigants had originally made use of private legal representation, but from 2007 went without representation which lead to their application for legal aid.

At the time of application for legal aid both litigants were requested to provide proof of their financial standing, which is one the requirements as stated in the LASA guide

2014, however the litigants declined to divulge their financial status and their application for legal aid was denied as LASA was of the view that their applicants did not meet the requirements for legal aid representation. The applicants were therefore advised to appeal the refusal for legal aid should they so wish, Annexure L is an example of the form used by applicants who wish to appeal their refusal for legal aid.

Applicants are not without evaluation-refused legal representation: In the case mentioned, clients Porritt and Bennett by refusing to disclose their financial status, caused the outcome of their application to be unfavourable as financial constraints play a role and competing needs and demands have to be determined accordingly.

The court in this matter highlighted the fact that the applicants did not appear to be in need of Government funded representation as they appeared to be well off and not have the look of the usual indigent. Further investigation into their finances and household affairs depicted them as litigants who constructed their affairs in such a way as to conceal their assets.

Sections 10.7.3 of the LASA Guide clearly state reasons to suspect fraud/abuse. In cases such as this one where legal aid applicants may have misled or attempted to mislead the organisation, claiming to be a person of indigence, or an inability to afford legal representation. Applicants then suspected of such misconduct are to be reported to the relevant parties immediately and in writing (LASA Guide, 2014).

In order to remain holistically sustainable the implementation of a strategy was regarded (by LASA) as a planned strategic shift. Over the year spanning 2015-2020, the key focus was on the organisation's core values and the implementation of sustainable goals (LASA Annual Report, 2015-16).

LASA's approach to sustainability is about the sustainable impact of the organization on the economy, society and the environment both in the medium term and the long term, with the aim of improving the maturity level of the organisation to facilitate optimal operation levels in the hopes of providing greater access to justice. The organisation's sustainability strategy has sets out to make the Constitution a living document for the poor and vulnerable, because ultimately access to justice widens the safety net of poor and vulnerable persons (LASA Annual Report, 2015-16).

LASA identified six sustainability focus areas:

- I. Access to justice
- II. The justice System

- III. Good governance
- IV. Maturity levels
- V. Employer of choice
- VI. Carbon footprint

For the purpose of this study, the study will briefly explore access to justice, the justice system and good governance within LASA.

5.4 Access to justice within LASA

A model of 'Practitioner per court' has been implemented, ensuring that all lower courts are covered, thus ensuring that the indigent do not go unrepresented and have equal access to legal assistance .In addition LASA has implemented a 'Remand Detainee' Programme linking to detained persons at correctional centres, which contribute to a reduction in the number of accused that go through the criminal justice system unrepresented, a factor evident in the 13% decrease in the number of automatic reviews in comparison with the previous financial year.

The detainee programme will provide a reduction in correctional centre statistics, the number of accused that fall through the cracks of the justice system unrepresented will decrease. This programme will allow for accused persons to apply for bail should they be represented by LASA; this will ensure that accused clients are not unnecessarily detained pending their trial dates (LASA Annual Report, 2015:72).

In the financial year under review (2014/2015) demand for legal representation in civil matters was and continues to be, high. With limited civil capacity the introduction of a policy provision which gives preference to priority matters and waiting periods has been introduced in order to balance out capacity against demand (LASA Annual Report, 2015-16).

Strengthening links with community advice services has increased accessibility to civil clients particularly in rural areas affording clients the opportunity to access LASA services at their various outreach sites - including civil courts. This thus extends access beyond the organisation's current 64 Justice Centres (JCs) and 64 Satellite Offices (LASA Annual Report, 2015-16).

2015 saw LASA's Newcastle Justice Centre and their Civil clinic at the Potter's House reach out to the community informing the public about civil representation and providing a platform for dialogue with the community, the initiative being in support of

the 16 days of activism against violence against women and children (Newcastle Express, 2015: 6).

The organisation addressed the impact of litigation matters resulting in successful outcomes where the strategic intent of the litigation was achieved. These matters, ensure that the constitutional rights of poor and vulnerable clients are safeguarded. They also ensure that legal precedents are set to enable transformation in our society thereby making human rights and constitutional values a reality (LASA Annual Report, 2015-16).

However, there is a need to improve the organisation's ability to analyse trends relating to client matters, thus ensuring greater reach in matters by addressing certain matters via impact litigation rather than on a case by case basis (LASA Annual Report, 2015-16).

5.5 Justice System

LASA is working in co-operation with stakeholders in the justice cluster to address blockages in the justice system. This includes initiating and implementing various protocols, specifically the Department of Correctional Services/LASA consultation protocol and the protocol for legal aid cases (LASA Annual Report, 2015-16).

This protocol involves Legal Aid Legal staff participating actively in all case flow management committees at a local level enabling LASA's active involvement in identifying factors that result in the access to justice delays and working towards finding solutions. The collaboration has aided in improving the functions within the justice system and increasing its efficiency. This protocol allows for constant communication between the Department of Correctional Services and LASA by ensuring all consultations scheduled to take place by LASA legal staff go through a channel of informing the relevant prison official of LASA's intention to consult with their clients (LASA Annual Report, 2015-16).

LASA links with stakeholders in the justice system to address challenges and monitor the quality of their services. Legal staff frequently undergo training to ensure that clients receive the best possible service (LASA Annual Report, 2015-16). A problem noted by the organisation is that of their limited relief capacity which causes delays in the finalisation of matters. This is due to budget constraints.

5.6 Good Governance Practice and LASA

LASA ensures good governance by fully complying with all legislation and statutory requirements. This includes the submission of statutory compliance and Public Finance Management Act (PFMA) reports.

LASA operates on a policy of: zero tolerance on fraud, corruption and ethical conduct with clients. It is important for such policies to be adhered to as they can impact greatly on the public's perception of the organisation. (LASA Annual Report, 2015:65). An organisation with poor governance cannot function at its optimum. By adhering to good governance; LASA contributes to improved confidence in the organisation to deliver on its mandate and in so doing increases access to justice for clients. Risk management practices influence the amount of negative threats to the performance of the organisation (LASA Annual Report, 2015:65).

Legal Aid's Vereeniging JC is currently on record in a case where the client charged with three counts of murder as a result of the death of his wife and two children who were shot dead as they slept. Legal Aid brought an application for the accused to be released on bail but the application was denied this by the court. The responsibility that the organisation has taken on stems from addressing section 35(2) of the Constitution of the Republic of South Africa which details the rights of arrested, detained and accused persons (Legal Aid Annual Report, 2015:62).

5.7 Legal supporting structures in South Africa

Law clinics were first established at the universities of the Witwatersrand in 1975 and subsequently in the Cape Town, Durban, Pietermaritzburg, Port Elizabeth, Stellenbosch and then, later, at the University of the Western Cape (Ellum, 1975:187). It was only in 1994 that LASA entered into partnership agreements in the hope of addressing the issue of accessing justice. Every year students at these clinics assist a vast number of clients. As with LASA, these clinics are intended to assist the public, acting as public defenders with the aim of reducing the number of unrepresented indigents.

As discussed in chapter 4, geographical location impacts on access to justice since most of these law clinics are situated far from the people who require the service along with the issues of language (discussed in chapter 4) and culture exacerbating the barriers between the assisting students and applicants for Aid.

Certain cases are not handled by the assistants at the various law clinics as they mostly assist with public-interest matters, land rights, housing and labour disputes, administrative abuse and basic human-rights issues. Excluded matters are then referred to the LASA's Board or the Commission for Conciliation. If matters arise that LASA does not attend to, clients are then referred to a relevant institution. The majority of these clinics remain in operation funded by the Fidelity fund, International donors and the private sector (Ngaleka, 1999:8).

The Legal Resource Centre (LRC) as mentioned in the previous chapter was established to assist communities with various human rights issues, legal advice and assistance in the promotion of socio-economic development, using the law as an instrument of justice for the vulnerable and marginalised (Ngaleka, 1999:8).

The LRC also aims to enable vulnerable and marginalised people to assert and develop their rights. It is important for citizens to be aware of their rights and this means to receive aid when they cannot afford to obtain assistance. A lack of information can lead to justice being delayed (Lawyers for Human Rights, n.p)

A litigation matter that the LRC had been involved in since 2004 involved mineworkers who contracted silicosis and tuberculosis at South Africa's gold mines. This matter sought to receive compensation for mine workers for the unsafe conditions they worked in, a matter seeking to gain access to justice for the poor, litigating against a large corporation, in the hopes of providing a service the mineworkers might not have been able to afford or proceed within their own capacity (New Age, May 2016:2).

The Women's Legal Centre addresses constitutional rights, taking to court matters of public interest cases that affect women and their rights. (Women Legal Centre, n.p). Other organisations that assist members of society on their constitutional rights are:

- The Black which is an independent non-governmental organisation;
- The Rural Women's Movement, an independent non-profit organisation based in KwaZulu-Natal emphasizing the liberation of women through education financial freedom (Blacksash, 1997, n.p)
- The small claims courts is another institution gearing for greater access to justice. It has limitations as has any institution. In this case, legal representation is prohibited with the exception of matters involving minors and persons without *locus standi*. (section 7(2) Small Claims Court Act)

The following section will discuss case examples relevant to the study:

1. *Description of a problem*

Nomfundo is a mother of 4 who is living in the Eastern Cape. She lives with her children aged between 7-25. She works as a domestic helper for a white couple in Motherwell, Port Elizabeth. Nomfundo seeks to file a claim for her late ex-husband's property at the magistrate court. The property forms part of the formal legal system in South Africa. This property is the house where she and her children are currently residing. This home is where she has lived for over 30 years; she has never left, even after her divorce. When Nomfundo and her husband divorced they were married in community of property, at the time of divorce her ex-husband then opted to leave Nomfundo in the Marital home and find a place to live.

Nomfundo's ex-husband re-married after their divorce, once again in community of property. At the time of his death Nomfundo's ex-husband had through the years acquired two more properties. The death of her ex-husband has left Nomfundo with a dilemma; she has been contacted by the new wife Sarah who has requested that Nomfundo and her children evacuate the premises immediately.

There is a will stating everything is to be left to Sarah (the new wife). Nomfundo is distraught she calls LASA's toll free advice line (0800 110 110) and explains her situation. She is advised that because her divorce states that she is entitled to 50% at time of dissolution of the marriage. She owns only 50% of the house and the other 50 % goes to Sarah as her ex-husband is now deceased.

Sarah and Nomfundo have a strained relationship as she was the reason behind Nomfundo and her husband divorcing. Nomfundo does not have the money to buy the other half of the house from Sarah, what is she to do? With a monthly salary of R6000 per month according to the means test she does not qualify for legal aid, and it would be at the discretion of the Justice Centre Executive at her nearest Justice Centre to provide oversight into her application.

The above example, though fictional, illustrates a small fraction of the issues experienced by the indigent on a daily basis in South Africa. Typically, the indigent find access to South African legal representation difficult to attain. There are many obstacles, facing poverty being greatest barrier in the case of Nomfundo. These challenges cannot expect equal treatment.

In the case of *Zgili vs McCleod 1904 21 (SC) 150,152*, Lord De Villiers expressed the following:

“It is the primary aim of the courts to protect the rights of individuals which may be infringed and it makes no difference whether the individual occupies a palace or a hut.”

When an indigent person is denied legal representation it perpetuates the circle of poverty and breeds a spirit of inequality. People who are well off and able to afford their own legal representation do not experience the same challenges that a poor person will experience. Here follows example of another descriptive problem:

Two men are from different backgrounds, both in their mid-thirties and both have one child each with an ex-girlfriend. The first father named Njabulo lives in Hilton a suburb within Pietermaritzburg, he is a Business Analyst at a huge consulting firm taking home a net salary of R 75 000 a month, no siblings and only pays for his apartment and car. The second father named Themba lives in Verulam and works as a security guard for a local security company, in and around his area. He takes home a net salary of R8 000, he is currently supporting his sisters, 3 minor children and his unmarried younger sister with his single salary.

Both these men have one child and are in dispute with the mothers over access to their child, the children are both 4 years of age. Thembas' salary does not fall within the required amount to be granted legal aid; he consults with a private attorney to get advice and a quote regarding the dispute.

Themba is advised that to launch an urgent interdict with the High Court for Interim access to his child he will need to put down a deposit of R 20 000, should the matter be opposed by the mother his court fees could escalate up to between R65 000 and R80 000, this is money Themba does not have. He is left with the option to consult with his local family advocate to schedule an appointment for mediation with both the parties, a process that could take months as many make use of the family advocate in matters such as these. Njabulo on the other hand is able to take out the deposit and make use of a private attorney. Socio economic factors a prevalent and determining factor in the receipt of legal services.

5.8 Legal aid in other African countries and South Africa: a comparative analysis.

Introduction

Rooted in International law are various legal schemes all over the world, all with the objective of facilitating greater access to justice for their citizens, the African country briefly under review in this section of the study is Ghana as it has established schemes for legal aid in both civil and criminal cases, as has the scheme in South Africa. This

country has been selected in order to briefly review the similarities between and potential differences between the challenges faced in South Africa and another African country.

5.9 Legal aid schemes in Ghana and South Africa

According to the Draft Strategic Plan (2009-2013:4) The provision of legal aid in Ghana is a facilitator in the journey of fulfilling human rights, provided for under article 294 of the Constitution of Ghana. First established in 1987 by Provisional National Defense Council Law 184 of 1987. The scheme is tasked under the Act 1997 542 to provide legal assistance to the indigent in an effort to create constitutional democracy.

Article 294(1) of the Constitution states that a person is entitled to legal aid in relation to any proceedings relating to the Constitution, this is however achieved with limited funding. Parliamentary power was also given by the Constitution to facilitate the regulatory aid. As it does in South Africa, legal aid consists of access to and representation by a lawyer to a client with the objective being to receive assistance in a matter either criminal or civil for the purpose of fair and just representation.

In Ghana's Constitution sections 2(1) and (3) of Act 542 reiterates article 294(1) and (4) of the Constitution and extends the reach of legal aid to persons who earn the Government minimum wage or less. The aid covers both criminal matters and civil matters if, in the opinion of the board, the person requires legal aid.

Section 310 of the Criminal Procedure Act 2002 states that in criminal matters the accused has the right to legal aid. "Any person accused before any criminal court, other than a primary court, may as of right be defended by an advocate of the high court" Provisions in Criminal Procedure Act 2002 allowed for those who are in need of state funded legal representation to make use, of it should they wish. Citizens are by interpretation of the act encouraged to make use of private attorneys should they have the financial means to do so (Peter,2003:338). Legal aid (Criminal Proceedings) Act Section 3 of 21 provides that;

"where it appears in any proceedings to the certifying authority that it is desirable in the interest of justice that an accused person ought to have legal aid in the conduct and preparation of his defence or appeal as the case may be and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have legal aid and upon such certificate being issued the registrar

shall where it is practicable to do so assign the accused an advocate for the purpose of the preparation and conduct of his defense or appeal as the case may be”.

According to this provision, the grant of legal aid comes about when it appears to the certifying authority that it is desirable in the interest of justice that an accused person should have legal aid to conduct his case on account that he has insufficient means, where upon issuing a certificate an advocate will be assigned. The annual report (2006:12) of Ghana’s legal aid scheme highlights the 10 offices in all regional capitals covered by Ghana legal aid Scheme. (LASA Annual Report, 2006:12). The regions mentioned within the report are however not all actively operational and do not provide clients with aid; this is as a result of many disparities that exist within the country such as poverty (Tindamanyire, 2002:10) in that there are costs and delays in the administration of justice e.g. attorney and court fees, impediments of the law and access to courts. (Cappelletti, 1985:243)

Comparisons

- Legal aid schemes in both countries are in response to the problem of access to justice, which is a worldwide dilemma.
- Both aim at benefiting majority of their citizens who are illiterate, poor and indigent. Ghana and South Africa have established legal aid schemes to improve the realisation of the right of access to justice. There is similarity in the state legal aid schemes operate in criminal matters and also through NGOs.
- Legal aid in South Africa and in Ghana does not benefit the majority of people due to limited financial support and awareness, legal representation is hindered by availability of funds in both countries.
- In Ghana and in South Africa provision of legal aid covers both civil and criminal cases

Differences

- In law and in practice legal aid covers all offences in Ghana while in South Africa the law is not specific and in practice legal aid covers only certain offences already mentioned in chapter 3.
- There are more efforts to improve state provision of legal aid in South Africa than in Ghana, although Ghana is attempting to improve their state provision, and decrease the court delays for refugee claim.

- There is a more elaborate legal aid framework in South Africa than Ghana, this could be attributed to the fact that the schemes were not implemented at the same time in their respective countries.

What can be learnt from the comparison and similarities noted above is that these countries differ in their implementation of their legal aid systems. However, what they seem to both to have implemented is a system to meet the needs that the country was lacking in. Both countries sought to address the issue of legal representation and the right to a fair trial to assist and promote equality for their people.

Neither legal aid scheme has miraculously solved the problems of all the people of Ghana and South Africa, but what they have done is provide assistance for the few in the hopes that in the future a greater number of people can be assisted as and when needed.

5.10 Summary of chapter

The Constitution was created to address past imbalances created by the apartheid era. Now all people are equal before the law, and a break down in the rule of law is break down in the country's founding values and basic human rights. From the analysis of the South African Constitution it is evident that there exists the issue of citizens not appreciating the constitution. The lack of awareness suggests disregard of rights, which could be detrimental to the plight of access to justice and provision of legal aid.

Countries all over the world have their own forms of legal aid and in the case of Ghana there are areas that each can draw from the others experience and practice. Rural areas continue to be the hardest hit with violations relating to basic human rights and access to justice in both countries being addressed in the comparative analysis

The next chapter will summarise what has been discussed in the study, debating interventions that have been put in place for greater access to justice and also suggesting recommendations which could be adopted in South Africa to facilitate the right of access to justice and the provision of legal aid.

CHAPTER SIX:

GENERAL CONCLUSION AND RECOMMENDATIONS:

6.1 Introduction

The dissertation investigates whether the needs of South African citizens have been met with regards to accessing legal representation. A trend in developing countries has been to create their institutions similar to LASA to address their own individual needs, including South Africa. The research confirms that South Africa is in dire need of increased governmental assistance in the quest to provide LASA and legal representation from other agencies for its vulnerable, to remedy the plight of socio economic discrimination and to accommodate persons with limited financial status.

Having regard to the historical background of the Republic of South Africa's Constitution, the transformation within the legal System, LASA and the other various modes of access to justice available and the concept of human rights, this chapter provides the general conclusion of the study, the emerging recommendations and remarks on the study. The role played by the legal system in the delivery of justice in South Africa is valuable as there are many indigent and vulnerable citizens that require the services of legal representation, yet the issue of limited capacity and resources continues to plague the countries legal system.

6.2 Methodological Approach and Research Questions

Since South Africa has an active legal aid Scheme assisting the indigent it was pertinent to investigate the current trends of the organization and its legal framework. Applying a desktop methodological approach, the researcher investigated which other country has adopted a legal aid scheme in terms of their constitution for similar purposes, i.e. to establish whether the needs of the indigent are being accommodated, as in South Africa's legislation. The study included case studies, opinions of the judiciary and literature on and of attempts to accommodate the needs of those accessing legal representation.

6.3 Research Outcomes

This dissertation addressed the research problems mentioned below

- What are the typical obstacles identified when accessing legal representation in South Africa?
- What are the current industry practices and research advancements intended to resolving these obstacles?
- Are South Africa's' indigent citizens better off than they were during the apartheid system?

An extensive review of the literature showed that many researchers have investigated the matter of access to justice in South Africa with the exception being investigations covering access to legal representation by Government funded institutions. This study specifically considered access to justice issues for the South African poor, highlighting the lack of international and regional research and attention was given to the specific access needs of the poor in South Africa. It has also revealed a hiatus in research conducted nationally with concentrating on justice for the poor.

6.4 Review and discussion

This research sought to investigate the challenges facing indigent and vulnerable citizens accessing justice and obtaining a fair trial in South Africa. It has shown that in the formal justice system, justice is costly; with limited resources; with geographically out of reach practitioners along with cultural and language barriers.

In Chapter One, the study commenced with the problem of access to justice and legal representation in South Africa for the country's indigent citizens, recognizing the link between socio-economic standing and access to justice. The study established the importance of obtaining access to justice for the vulnerable, highlighting the significance of the study and the research problems mentioned above.

In Chapter Two, the study explored the concept of good governance and discussed good governance in relation to human rights in order to highlight good governance being a fundamental human right. The chapter further recognised the influence that good governance plays on alleviating poverty and increasing the quality of service

delivery. The chapter explored the principles of good governance and identified 'public participation' and 'rule of law' to be the two principles vital in the quest for accessing justice. The chapter went on to conclude that for an organization such as LASA to thrive and succeed in its goals and vision, good governance needs to be practiced and

should include the collaboration of the citizens, stakeholders and all the parties involved.

Chapter Three explored the statutory body under focus in this study LASA. Considering the institution's structure and mandate, the study recognised the role the Constitution played in the establishment of LASA whilst also addressing the organisation's qualifying criteria, modes of delivery of its services giving in-depth insight into the workings of South Africa's largest state funded law firm.

Chapter Four examined the problem of accessing the formal justice system, by firstly exploring South Africa's legal sector transformations. The chapter addressed the issues related to accessing legal representation such as the cost of legal services, the availability of practitioners, geographical distribution of practitioners and the issue of a legal profession that is a representative of the country's diversity and culture, highlighting the fact that the failure to provide for a right to good quality legal representation in matters denies many South African litigants equal access. As a result, large numbers of vulnerable litigants cannot access justice. The government's principal remedy for this problem – the provision of legal aid – proving impossible to extend to all litigants. The chapter concluded that the role LASA plays is of importance but limited as only a few of the many deserving cases are and can be attended to.

Chapter Five discussed the Constitution and the role it plays in the fulfillment of access to justice and how LASA plays its part. This chapter examined case studies and interventions, since the coming into force of the new constitution, and the impact on the alignment of access to justice.

The previous sections in this dissertation have analysed the problem of access to justice for vulnerable indigent citizens of South Africa. Based on this analysis, the dissertation argues for the important role played by the Constitution in guaranteeing the right of access to justice. Acknowledging the problem of socio-economic status and access to legal representation in South Africa, it recognises the need for legal institutions, which require the government to strengthen their role in promoting good governance and the rule of law in South Africa.

6.5 Recommendations

The research confirms that there appears not to be legal assistance or any other mode of access to legal representation to meet the demand and population size of the South African poor. Government needs to step in, in order to accommodate persons with no financial means to have access to private practitioners. In addition to government and the facilitation of good governance, government and their respective funded institutions are morally, politically and legally obliged, in terms of the South Africa's Constitution, to provide this right to the South African people.

The researcher therefore makes recommendations which may be helpful to the SA Government, legal institutions and the South African people to ensure that access to justice is prioritised and that it becomes fully accessible to all in the near future.

6.6 Cost of legal services

The cost of legal services is just one of the hindrances affecting the poor (as discussed in chapter 4.) To address this it has been proposed that regulation fees be increased in an attempt to reduce the cost of legal services though the cutting of tariffs and ensuring that there are limits to the tariffs that can/may be charged. At present maximum tariff limits are not in effect (Republic of South Africa 1998, n.p). This of course would result in substantial disapproval from practitioners who carry high overhead costs in delivering their services. (Republic of South Africa 1998, n.p).

Poverty and socio-economic conditions continue to rear their head in the study because they are a significant contributor to the said quality of legal representation, as it doesn't pay to be poor when you need legal representation; an estimation made by an attorney for the Cape Bar stating that on average making use of an Advocate with vast amount of experience can set a person back close to R18 000 a day. This advocate who asked to remain anonymous sighted a lack of cohesion between access to justice and making money, it's the culture of attorneys which varies from those in large organisations with substantial infrastructure and those who are barely making it in the profession in terms of profit (Daily Dispatch 28 July 2014:9).

Another recommendation to curb the cost of legal services is to eliminate all regulation of fees excluding party to party costs (Republic of South Africa 1998, n.p). Allowing attorneys to have control over the fees they charge their clients, would allow for varying

legal costs; an attorney practicing from an office in Sandton Johannesburg, would have higher overhead costs compared to an attorney practicing from a six-corner hut in rural Ixopo, KZN.

6.7 Budget and Resources

The South African Government should prioritise and intervene in the matter of LASA's budget and commit to remedying the current situation as expeditiously as possible. They should review the amount of funds allocated to the institution at the beginning of every financial year to allow for more people to be assisted with legal representation. Input from all stakeholders should be taken into account to facilitate good governance and reach a fair and balanced legislative solution.

Section 36(1) of the Constitution provides for limitations to the extent that they are reasonable and justifiable in an open and democratic society based on human dignity but budget constraints and the lack of resources e.g. legal practitioners should not serve as a justifiable limitation of the right to legal representation for the South African indigent.

LASA could also consider abolishing the use of the Judicare system (discussed in chapter 3) as it has over the years proved to be costly. In doing this LASA could make use of their salaried attorneys, and in doing this building up the experience of their employees and allowing for those new to the field e.g. The organization's Candidate Attorneys (CAs) to gain valuable supervised experience. Making use of salaried attorneys from LASA would allow for better budget management because using the Judicare system budget is impossible to quantify (Republic of South Africa 1998, n.p).

In the case *S v Makwanyane & another (CCT3/94) 1995 ZACC 3:1995*, Justice Ackermann, highlighted governments obligation to protect ordinary citizens as provided for by the Constitution

“Given the clear constitutional provisions and the interpretations emanating from the courts, the state is obliged to ensure that justice is accessible. As mentioned before, budgetary implications arise in the fulfilment of all rights”.

6.8 Alternative approaches to dispute resolution

Government could also make more use of traditional tribunals, local leaders and chiefs in the enforcement of the right of access to justice, ensuring that they are not merely alternative dispute forums but primary courts of justice. This would require as much, if not more, attention by the government than the formal ones. Free from obstacles found in a formal justice system dealing with all types of disputes this alternative to access can make for a different kind of assistance which can in turn address the issue of culture and language barriers in accessing legal representation (Chirayath, Sage & Woolcock, 2005:1).

6.9 Research Studies

Research conducted internationally, regionally and nationally, could serve as a body of evidence to guide government legislators in drafting and implementing effective amendments in the South African constitution pertaining to access to justice. There is a need for legislation to be fine-tuned to address all limitations to access to justice and legal representation affecting the poor, both those that qualify and those that do not qualify for legal aid.

6.10 The role of Universities

Chapter 5 briefly evaluated university law clinics playing a part in the quest for increased access to justice, these clinics are important as they provide another avenue that people may use when they require legal assistance. As previously discussed, they have their limitations which are mainly lack of access to resources and language barriers.

Government should consider ensuring that clinics are run not only by universities but also by small educational institutions. The goal should be more legal aid clinics and educating the public on issues of law to assist in service delivery and increase awareness and help people access justice. Government should also ensure that quality services are being rendered. Legal assistants should undergo regular training sessions to broaden their knowledge and keep them current in regards to with any changes in legislation.

6.11 Pro Bono Services

Chapter 3 of the study briefly reviewed *pro bono* services, the benefits and limitations of enforcing it as a mandatory service, "*Pro bono public*" translates as "for the good of the public" (Strossen, 1993:2122-2149). This being said, forcing practitioners to provide *pro bono* work is not a feasible solution as some would not be rendering a service of their own volition, this might negatively impact on the legal services received by clients.

This still does not address the issue of the poor receiving quality legal representation. Initiatives that might promote *pro bono* later on in a practitioner's legal career could be to allow for community engagement and ongoing outreaches where practitioners are able to interact with the demographic of clients they serve on a regular basis to gain an understanding of the impact they play on the profession. It is important for each individual to feel valued their chosen profession. This would promote a better work ethic and might also give legal practitioners an opportunity to expand their fields of knowledge and experience and hone their passion for the legal profession.

6.12 Incorporating African Languages in to the law syllabus

Judge Mlambo delivering a speech on 'The partnership between the Bench and the profession and its influence on access to justice' at the Johannesburg Attorneys Associations (JAA) 71st annual general meeting held on the 9th September 2015 expressed the view that:

“access to justice has featured in many discussions but the stark reality was that achievements in that regard were not enough, in addition the provision of legal services for the poor is one of the greatest challenges to the legal profession across the world, and even more so in Africa and South Africa where there are enormous problems that require a large output of time and resources to ensure access to justice.”

He further expressed that “the judiciary does not exist in a vacuum as it is an institution founded in society and the profession is the pool from which judges are drawn”. In the chapter addressing the transformation of the legal system the issue of culture and language was addressed. Speaking at the same general meeting Dr. Ramphela touched on the rule of law, one of its principles provided in the World Justice Projects, a definition of the rule of law being that:

“Access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.”

Government legislators and educational facilities need to address the issue of language being a barrier in the delivery of access to justice, in order to reflect the makeup of the communities they serve. It could be mandatory for students to learn one African language when pursuing their legal studies. This can be structured in such a way that the language is determined by the institution where the law student is studying. For example if the student is in KZN, the African language would be Zulu, if in the Free State, the student would study Sotho and so on. One cannot assume that on completion the student will remain in the province in which they studied, but to ensure that, should the legal assistant or practitioner find himself or herself assisting a client that is unable to speak English, they are able to attempt to communicate with the client.

The researcher works for one of the Legal Aid's Justice Centres based in KZN, the issue of language is one that she has witnessed first-hand. An African client came in to consult with an attorney. The attorney was Indian and during their consultation the attorney found it difficult to understand the client requested the assistance of one of the centre volunteers to translate.

Barriers as described above result in a delay in justice, and the delay could be extended by the unavailability of a translator at the time of consultation. This needs to be addressed accordingly, taking into consideration language and cultural sensitivity (Republic of South Africa 1998, n.p).

6.13 Increased access to Information about legal services

“When you know better, you do better” A quote by the late poet Maya Angelou who taught this to Oprah Winfrey when she appeared as guest on her show

Increasing awareness concerning legal services creates and promotes empowerment, because when people are aware of where to go (when in need of legal representation or advice) they go there knowing where they can get assistance. The government has proposed the following strategies to address the issue of limited knowledge about legal services in urban and rural areas:

“The provision of information to the public by professional bodies and Legal Aid, increased public media awareness campaign, off street law programmes and incorporating information about legal services in the schools curricula” (Republic of South Africa 1998, n.p).

6.14 Conclusion

Unquestionably access to legal representation is indeed an objective worthy of support, however the question remains as to: the best initiative to provide greater access to justice for the South African poor. No interventions and initiatives are without their challenges but it is important to research in order to be able find the best possible mechanism for service delivery of legal assistance. The South African government should work towards improving access to justice and legal aid taking into consideration avenues other than formal justice to reach the indigent and assisting in funding. To protect the human rights of the South African citizens, legislation needs to be reviewed to ascertain whether or not our government is doing enough for the less fortunate. It could be argued that the country is still at the same level that it was at prior to 1994, when access to legal aid and representation was fundamentally reliant on the common-law right to legal representation. That is where no one was afforded the right to demand legal representation (at least not up until the 1819s). It would seem that, society has changed and the legal system has progressed, but it is not enough. The right to legal aid should be regarded as a necessity rather than a luxury, a necessity that needs to be provided to all those who need it.

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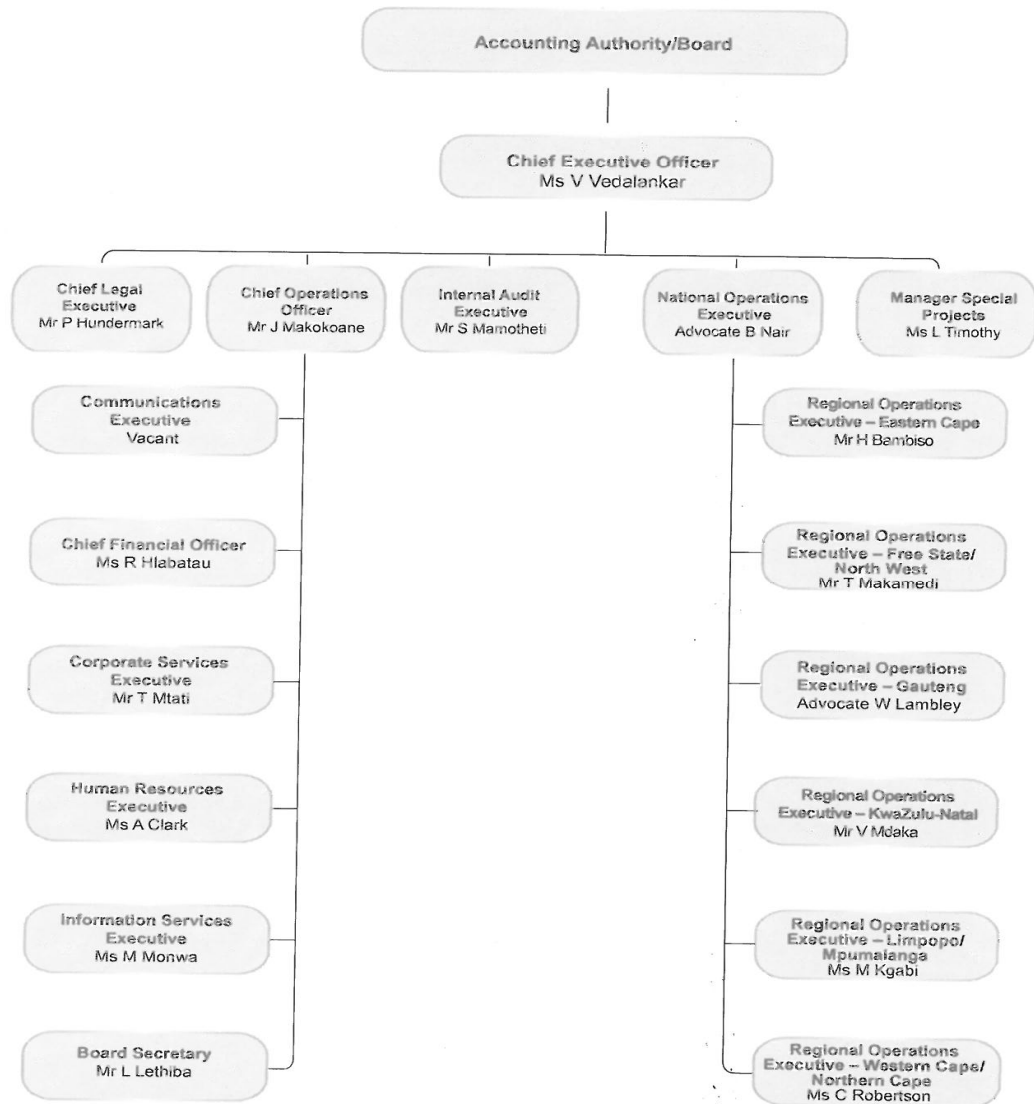
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6.16 APPENDICES

5. Organisational Structure



X REF. NO

CHANGED X REF. NO (when required)

COMPLETED BY (LEGAL AID SA OFFICIAL/ PRACTITIONER NAME)

APPLICATION FOR LEGAL AID

GREY SHADED AREAS ARE MANDATORY FIELDS AND MUST BE COMPLETED

A APPLICANT NAME [Grid]

SURNAME [Grid]

ID NUMBER [Grid] **GENDER** Male Female

NATIONALITY SA Citizen Other Home Address [Text]

BIRTH DATE [D][D]/[M][M]/[C][C][Y][Y] [Text]

APPLICANT IS CHILD / MINOR UP TO 18 YEARS ADULT 18-60 YEARS SENIOR CITIZEN 60+ YEARS Postal Address [Text]

MARITAL STATUS Single Married Widowed Preferred method of written communication: SMS Post Email

Divorced Cell No: [Grid]

RACE African Indian Other Email: [Text]

White Coloured Alternative Contact No: [Grid]

HOME LANGUAGE [Text] Name & Relationship: [Text]

Is the applicant a Minor? YES NO If YES, provide name of parent/guardian [Text]

Is this application on behalf of a Minor? YES NO If YES, provide Minors name. [Text]

B MEANS TEST If the answers to all the questions below is No the applicant is not required to complete the full means test.

Do you have an income? YES NO Do you have any assets? YES NO Are you employed? YES NO

Do you or any of your family control any company or trust or legal personality? YES NO Name of employer [Text]

Do you or your spouse expect to receive any money or property from a deceased estate and/or are either of you beneficiaries of any trust? YES NO Job Title [Text]

Time in current job [Grid] Years [Grid] Months

C TYPE OF CASE CIVIL CRIMINAL LEAVE TO APPEAL PETITION APPEAL

MAIN CHARGE / MATTER TYPE Most serious charge [Text]

D CASE DETAILS HIGH COURT PRELIMINARY COURT NAME OF DECEASED ESTATE (IF APPLICABLE) [Text]

REGIONAL COURT DISTRICT COURT **CUSTODY STATUS**

SEAT OF COURT [Text] IN CUSTODY - BAIL REFUSED Y/N IN CUSTODY - BAIL FIXED Y/N IN CUSTODY - BAIL NOT APPLIED FOR Y/N

COURT ROOM [Text] ON WARNING Y/N ON BAIL Y/N SENTENCED INMATE Y/N

CASE NO. [Text] BAIL AMOUNT (IF APPLICABLE) R [Text]

SAPS CAS NO. [Text] Name of Prison [Text]

NEXT COURT DATE [D][D]/[M][M]/20[Grid] Prisoner No. [Text]

Date of Arrest [D][D]/[M][M]/20[Grid]

E SPOUSES DETAILS ONLY REQUIRED FOR CIVIL CASES

NAME [Grid]

ID NUMBER / DATE OF BIRTH [Grid]

F DECLARATION I declare that the above mentioned information is true, correct and complete. I understand that a false declaration could lead to the suspension of legal aid, and in appropriate circumstances, to criminal prosecution.

[D][D]/[M][M]/20[Grid] SIGNATURE [Text]

Annexure L



REFUSAL OF LEGAL AID

Your voice. For justice.

A I, (Name)

the undersigned, say that I applied for legal aid under REFERENCE NUMBER

1. I WAS CHARGED with this offence*/ I asked for assistance in this civil case *(delete if not applicable)

2. I WAS ADVISED:

2.1 In criminal cases section 35(3) of the Constitution of the Republic of South Africa of 1996, says that:
“Every accused person has a right to a fair trial which includes the right:
(g) to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(o) of appeal to, or review, by a higher court”

2.2 That a legal aid applicant does not have the right to choose the legal practitioner who will be chosen for him/her in a legal aid case.

2.3 That a legal aid applicant who has ended the mandate of his/her practitioner without good cause does not have a right to the appointment of a second or subsequent legal practitioner on a legal aid basis.

3. I UNDERSTAND THAT I can request reasons for the decision of a Justice Centre Executive requesting these reasons in writing within 90 days of the decision to refuse legal aid being made. A request for reasons must be in writing delivered to the office of the Justice Centre Executive who originally received my application. Legal Aid South Africa will respond to my request within 90 days of receiving it.

4. I HAVE THE RIGHT to appeal to the Regional Operations Executive of Legal Aid South Africa against the decision of the Justice Centre Executive. I can do this by writing to the Regional Operations Executive of Legal Aid South Africa within 90 days of the decision of the Justice Centre Executive and by handing my appeal to the Justice Centre Executive for sending on to the Regional Operations Executive either with or without comment.

5. I HAVE THE FURTHER RIGHT to appeal to the National Operations Executive/CCMC of Legal Aid South Africa against the decision of the Regional Operations Executive. I can do this by writing to the National Operations Executive of Legal Aid South Africa within 90 days of the decision of the Regional Operations Executive and by handing my further appeal to the Regional Operations Executive for sending on to the National Operations Executive/CCMC either with or without comment.

6. I (name) the undersigned now certify that
the Justice Centre Executive of Justice Centre has informed me that:

a. my application for legal aid in a civil / criminal matter has been refused; the reason for the refusal is:

- b. I have the right to appeal to the Regional Operations Executive/CCMC of Legal Aid South Africa against the refusal of legal aid and then a further appeal to the National Operations Executive if my appeal to the Regional Operations Executive is also unsuccessful;
- c. My written letter stating the grounds of my appeal should be handed to the Justice Centre Executive/Regional Operations Executive;
- d. My appeal will be submitted to the ROE/NOE together with the Justice Centre Executive's or Regional Operations Executive comments; and
- e. In a criminal matter I have the right to apply to court before my trial starts for an order that I am provided with legal representation at state expense. Before this order is considered, the court will refer this issue for evaluation and report by Legal Aid South Africa under Section 3B of the Legal Aid Act.

I also say that I understand the contents of this document.

B IF I AM UNABLE TO READ OR WRITE, AN EMPLOYEE OF THE JUSTICE CENTRE WILL ASSIST ME.

Signature of applicant Date / / 20

Signature of JCE Date / / 20



New act for Legal Aid

ANDREW HOWIE
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THE new Legal Aid Act came into effect on 1 March on the Presidency's instruction.

The new legislation will ensure that the public has access to legal representation and that they will be informed of what their rights are.

The act should ensure that all South African citizens can ask for legal advice on any legal matter and know what their options and obligations are.

Legal Aid spokesperson Mpho Phasha said the act made sure that they stayed independent as an organisation.

The act also mandated that attorneys and candidate attorneys be fit and proper individuals in order to serve the public properly.

Phasha added that the introduction of a Legal Aid manual will assist the public in determining what their legal rights were in any situation they might find themselves in. The manual has to be published within two years of the commencement of the act.

Budget cuts 'will hit poor's access to justice'

WYNDHAM HARTLEY
Parliamentary Editor

CAPE TOWN – Access to justice for SA's poor is set to be reduced due to budget cuts ordered for all government departments and state entities in the 2013-14 financial year, Legal Aid SA CEO Vidhu Vedalanekar told Parliament yesterday.

Legal Aid SA, reporting to the justice committee on its performance in 2011-12, noted that more than 680,000 poor people were

assisted with legal aid and legal advice matters in the year under review but budget cuts ordered by the Treasury would reduce the number of people it would be able to help.

Legal Aid SA acts for indigent South Africans who cannot afford legal representation in both criminal and civil matters.

Legal Aid SA is beginning to implement its five-year strategic plan, which marks a long-term growth opportunities "that will allow the organisation to

increase its scope and scale of success". But impending across-the-board budget reductions, to be made in the 2013-14 financial year, could negatively affect the pace of growth. "As it is, current coverage of the courts is not adequate and the budget cuts will exacerbate this with further reductions in coverage," Ms Vedalanekar said.

Budget allocation does not provide coverage for new court and tribunal services, the liberty of legal services and access to justice for the poor.

Legal Aid SA vice-chairman Judge Edwin Moleketi, in a statement urged the legal fraternity to support national efforts to make justice a reality for those who need it the most, by acting on its pledge to strengthen the pro-bono support network.

"Now, more than ever, in the face of the budget reductions, we need the support of private attorneys in extending legal services to the poor," he said.

Legal Aid SA's support to the committee showed that the organ-

isation continues to be the shining light in the criminal justice system, having earned an eleventh straight unqualified audit report and expanding its legal assistance to 680,000 poor South Africans.

Legal Aid SA continues to achieve its targets, and in the 2011-12 financial year, it succeeded in rolling out civil assistance to poor people and succeeded in assisting about 49,000 clients in addition to 12,000 criminal matters where people were assisted.

Ms Vedalanekar said Legal Aid

SA was "also able to expand civil legal aid capacity and establish civil units to improve coverage of civil matters which resulted in a 60% increase in the number of people assisted". Legal Aid SA aided 22,376 children in conflict with the law and 5,584 children in civil legal matters.

Committee members, across all parties, pronounced themselves pleased and impressed with Legal Aid SA's performance in the year under review.

hartley@shiminda



SERVICE: Legal Aid SA CEO Vidhu Vedalanekar says the support of private attorneys are needed now more than ever. Picture: MARTIN RHODES

EVERYONE'S INNOCENT UNTIL PROVEN GUILTY

Beware rule of law breakdown

Patrick Hundermark

SOUTH AFRICA lives by the creed: "Innocent until proven guilty." Yet, for many the idea of justice being extended to all seems unpalatable in the light of our high crime rate – particularly in terms of proving the innocence of those with a high rate of crimes against children.

The recent assault of an advocate, who travelled to rural Mpumalanga to defend the accused in the kidnapping/murder of a 12-year-old girl, is a case in point. The advocate was assaulted by a mob in 'Yonga as they could not understand how he could represent suspected child killers.

The accused have been charged with the murder of a 12-year-old girl last year. The suspect with his life, the advocate thought, he was going to die as the crowd kicked and hit him as they screamed for him to be killed, until police intervened. He was assaulted outside the Iveng Magistrate's Court, the lawyer is determined to proceed, saying that everyone is entitled to legal representation. We can't just abandon them.

The rule of law remains an essential pillar of our democracy. Access to justice by everyone is a fundamental human right. Without it, we cannot have a fair trial. We must ensure that our criminal justice system and further erode respect for the rule of law.

Unfortunately, experience has taught us that not all accused persons are innocent. Some have been charged with the crime for which they have been charged. We have had experiences where the accused – despite their arrest by the police, as well as the communities strongly held views about the guilt of the accused – to be the perpetrators of the crime.

This happened to six accused in the Northern Cape a few years back, who, six months after their arrest for the murder and rape of a 12-year-old girl, were retried and excluded from the retrial. The actual perpetrator was later arrested and convicted as a result of the DNA evidence.

A well-functioning justice system punishes a criminal offender, protects the rights of victims and witnesses in the criminal justice process. Access to representation ensures that



BE FAIR: Democracy is undermined when those who are accused are denied the right to access legal representation because of public opinion, says the writer.

justice can be served. The process of a fair trial is there to protect the innocent, and communities should ask themselves the question: "What if it was my child who was accused, and he would not want him to have a fair trial in which he could prove his/her innocence? Surely they would want that for their own child.

When this includes access to representation, it would be preferable for lawyers to feel taking on certain cases might endanger them and their families for simply doing their jobs. We must ensure that we separate our enthusiasm for the crime from the right to a fair trial. Surely we want the actual perpetrator to be held to account for their deeds, and not an innocent

person who is incorrectly accused of committing the crime. We can acknowledge the frustration that members of the community might have in accessing justice for victims. It is true that access to justice is a basic human right, but we have come a long way from the days when South Africans were refused access to justice during apartheid.

We must ensure that the rights of all are protected, and that the convicted and suspected without the benefit of competent legal representation merely because they are poor. Our constitution is a step towards a more equitable society, but we must ensure that the rights of all are protected, and that the convicted and suspected without the benefit of competent legal representation merely because they are poor. Our constitution is a step towards a more equitable society, but we must ensure that the rights of all are protected, and that the convicted and suspected without the benefit of competent legal representation merely because they are poor.

formed society, where everyone's fundamental human dignity is respected and protected.

We know that if we are to deal with South Africa's structural inequalities, justice must be extended to all. Access to justice unlocks all other rights in the constitution.

When people are not able to access their rights, this could lead to a breakdown in the rule of law, which is the cornerstone of our democracy. We must ensure that the convicted and suspected without the benefit of competent legal representation merely because they are poor. Our constitution is a step towards a more equitable society, but we must ensure that the rights of all are protected, and that the convicted and suspected without the benefit of competent legal representation merely because they are poor.

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PHOTO: GUY LAWRENCE/GETTY IMAGES

NEW AGE, THE
22 Jul 2013, p.4

Close call for Legal Aid

High court order for state to fund miners would have crippled body financially

SIYABONGA MKHWANAZI

LEGAL Aid South Africa says the North Gauteng High Court's decision to deny injured and arrested miners state funding in the Marikana Commission of Inquiry saved it a lot of money.

The body said on Friday that had the court granted the application for the funding of the miners, this would have crippled it financially.

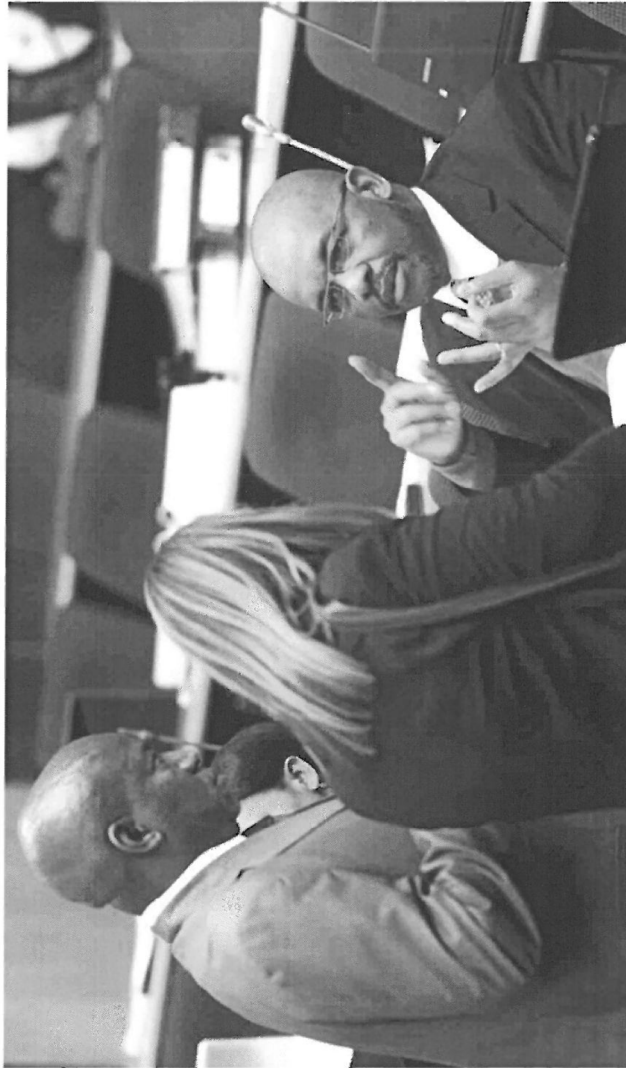
CEO for Legal Aid South Africa Vidhu Vedalankar said they opposed the application, brought by Dali Mpofu, because their mandate was to help the poor and vulnerable in criminal and civil cases.

The scope for Legal Aid South Africa did not cover commissions of inquiry, she said.

The North Gauteng High Court turned down Mpofu's application for the funding of legal representation of the injured and arrested mine workers.

"This clarifies the organisation's mandate in as far as commissions are concerned; that we are not funded to provide legal aid in commissions of inquiry," Vedalankar said.

"Furthermore, if the court had ruled that we should provide legal aid in this instance, this would have affected the sus-



CLOSE CALL: Had the application by advocate Dali Mpofu, right, to have Legal Aid SA fund miners at the Marikana Commission of Inquiry been approved, it would have crippled the agency, Legal Aid SA says. PHOTO: ISHMANHATIE

tainability of the organisation in

providing access to justice in criminal and civil aid matters for the poor and vulnerable," she said.

Legal Aid South Africa has a budget of R1.36bn and handles about 500 000 cases a year with 89% of the matters related

to criminal cases.

Vedalankar said their mandate did not allow them to help the injured and arrested miners.

"Due to funding constraints, some limitations are placed on the granting of the much-needed legal aid for the indigent

in criminal and civil matters," Vedalankar said.

"Most of our budget is consumed by the criminal legal aid; we have a lot more to do on civil aid."

If the body pumped money into commissions of inquiry, it would have resulted in less

money being allocated to civil matters.

It would not have been possible for Legal Aid South Africa to go beyond its legislated mandate by providing support to miners in the Marikana commission of inquiry, Vedalankar said.

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How much does a lawyer cost?

Tips to check if you are being over-charged

A READER has queried legal tariffs after he ended up paying far more than he expected: "Where can I find out if lawyers charge the correct amount for interest and costs? I got in trouble with a credit card and will end up paying back almost double the original amount."

However, the answer to the question "how much does a lawyer cost?" can range between zero and millions of rands, with one straight answer almost impossible as it depends on so many factors.

Dr Henry Lerm of Legal Aid South Africa replied to this specific query, suggesting the reader approach the attorney concerned.

"My advice to him is to insist on an account where they break down all the fees and expenses charged in collecting the debt," Lerm said.

You are entitled to ask for:

- An itemised account setting out each and every item charged for, including consultation fees, telephone calls, collection commission charged, interests rates charged, letters written, court appearances made (if any); and

- An outlay of future charges, including collection commission and interests still to be charged.

Lerm also outlined the difference in tariff structure between litigious and non-litigious cases.

He said non-litigious fees, where an attorney acts only for you in, for example, drawing up a will or putting together a lease would be "much higher" than where an attorney acts for you in a dispute against another person or business and collects, for example, outstanding debts on a client's behalf.

"But in both instances there are set charges or tariffs that apply to different work done," Lerm said. "Tariffs or fees are charged on an hourly basis or 'part thereof' where, for example, an attorney appears in court or consults."

Bear in mind that it is customary for attorneys to require a deposit before they perform any legal services, but you may ask your attorney only to provide necessary services.

Clients may ask for an agreement, setting out fees before their attorney starts to work. "The client should insist on a copy being given to them for record purposes," Lerm said.

The Cape Law Society has

issued general guidelines to court tariffs, which you can download from its website.

Under the documents tab, this site gives a four-page breakdown of legal fees per quarter hour for consultations, appearances, conferences and inspections in the high court.

Whether or not this reader is charged the correct fees, Lerm warned against ignoring debt.

"It is important to educate the consumer because debt is like a cancer – the sooner you seek advice and help, the better.

"Many people receive a summons and they think it will go away if they ignore it.

"They should rather go and see the lawyer who sent it and make arrangements to pay that amount – it will never go away. The charges just mount up, mount up, mount up."

If you are not satisfied with the account, said Lerm, you can ask for the account to be "taxed", or checked either before a taxing master (official employed by the Justice Department) or the Law Society.

"It is very clear to the Law Society if the attorney has charged too much," he said.

● Further information from www.capelawsoc.law.za

Mogoeng gets courts moving

IT IS essential that we commend the significant effort towards making justice more accessible to and effective for the people of South Africa. The backlog in our courts has existed for quite some time now.

Speaking during the launch of the National Enhancement Committee in Pretoria, chief justice Mogoeng Mogoeng said faith must be restored in the justice system, which includes resolving cases in reasonable time.

He was recently quoted as saying “members of the profession (judiciary) have to lead the charge on the transformation of the judiciary”.

He said that court modernisation and automation, specifically electronic filing and record keeping, are key to help facilitate the efficient management of cases as well as speedy finalisation. Under Mogoeng the previously hypothetical responsibilities of the Constitutional Court have become a practical reality, especially as regards monitoring of courts’ performances.

The Constitutional Court under his leadership initiated the National and Provincial Efficiency Enhancement committees, to address the backlog of cases on the roll.

Judicial and criminal law experts often point to poor evidence collection from the investigation team of the South African Police Service as a reason for courts failing to complete cases on time.

These committees will close the evidence collection gap. This is because they comprise the National Prosecuting Authority, the Department of Correctional Services, Justice, Social Development, police, Legal Aid South Africa and the advocates and attorneys profession.

These teams will complement each other and can identify if a judicial officer is not doing what s/he is paid to do. I welcome Mogoeng’s initiative and expect real judicial transformation, not only structurally, but also in terms of service provision.

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