

- Research Report -

**Justice for Sale: An analysis of how access to justice
remains unattainable for the poor in South Africa**

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Submitted in partial fulfilment of the requirements for the degree

IIE Legum Baccalaureus (LLB)

In the

FACULTY OF LAW

At the

IIE MSA

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Date of submission:

17 November 2022

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Chapter 1

1.1 - Introduction

This study will seek to examine what the concept of “access to justice” is, and an in-depth analysis will be conducted so as to establish how economic status affects the ability to access justice. The right to access to justice is not expressly contained in the Constitution of the Republic of South Africa, 1996, instead it can be said to be an amalgamation of several rights contained in the Constitution, namely sections 9 and 34:

- Section 9 of the Constitution contains the right to equality, with section 9(1) stating that everyone is equal before the law, and has the right to equal benefit and protection of the law.
- Section 34 of the Constitution contains the right to access to courts, and this section states that everyone has the right to have a dispute resolved by application of the law in a fair public hearing before a court, or where applicable, another independent and impartial tribunal.

The above two sections make it clear that every single person in South Africa should enjoy the benefits and protections provided by the law (including the Constitution) equally, which means that every South African should be able to have their disputes resolved by application of the law before a Court or, where appropriate, another tribunal or forum, but realisation of these rights has proven to be difficult to say the least.

1.2 - Background And Significance

This report will attempt to establish how the current configuration of the South African legal system has impacted the ability of the average South African to resolve their disputes by utilising the machineries of the court system. It will specifically examine how the current structure, which has made legal representation almost indispensable, has in effect rendered the right to access to justice a privilege in South Africa.

This privilege is perpetuated in at least two respects, with the first one being that legal representation is prohibitively expensive, and given South Africa’s significant levels of poverty and inequality, this would seem to suggest said legal representation is out of the reach of ordinary citizens. The right to access to justice is further impacted by the fact that the calibre of legal representation available to the poor is generally inferior due to budgetary considerations.

1.3 - Research Objectives

The overarching purpose of this report is to establish how one's economic status affects the ability to effectively utilise the court system to resolve disputes in South Africa. There are also a number of equally important secondary objectives of this study which should grant the reader a thorough understanding of this research topic, they are as follows:

- To establish the extent to which the law affords citizens the right to state-sponsored legal representation;
- To establish the extent to which the right to state-sponsored legal representation operates;
- To examine the alternative ways in which the right to access to justice could be fulfilled.

1.4 - Research Questions

Taking into consideration the research objectives as identified above, there are a number of questions that need to be answered, and for which significant research needs to be conducted, these questions are as follows:

- Are Legal services affordable to the majority of South Africans?
- When, if at all, do the poor and indigent possess the right to free legal representation?
- If so, are there any discrepancies that exist with regards to this right to free legal services?
- Are there any organisations in South Africa who are tasked with providing free legal services to the poor and indigent?
- Are the aforementioned organisations properly funded and able to fulfil their mandate?

1.5 - Problem Statement

The right to access to justice is necessary to promote and protect the rights that are guaranteed to all South African's, but the fact of the matter is that this right remains unfulfilled for the vast majority of South African's. There are a number of potential reasons for this but this study zones in on two, the first reason being that people need adequate legal representation to properly participate in legal proceedings, and the second reason is that the vast levels of wealth inequality in South Africa mean that very few people can afford private legal representation.

In terms of the necessity of legal representation, It has been held that the administration of justice is not impartial, and this is because the majority of legal systems are set up in such a way that makes the use of trained attorneys essential to effectively understand and utilise the courts, which may not be an option for the poorer members of society.¹ This would accordingly

¹ Carlin, J. Howard, J "Legal representation and class justice" 1964 *UCLA Law Review* (12) 381 at https://heinonline.org/HOL/Page?handle=hein.journals/uclalr12&div=34&g_sent=1&casa_token=ojmR4bvLv-

seem to suggest that the machinery of justice, such as the procedures used, make legal representation indispensable when using the court system.²

The quality of legal representation available to the poor has also been a bone of contention, and this is because the larger firms have the necessary funding to attract the most competent and skilled practitioners, which means the smaller firms will generally be left with less talented practitioners.³ It is these smaller firms that almost always serve the poorer members of society, which means that they are further impacted by the lack of adequate legal representation.⁴

Then with regards to the affordability of legal representation, it is well known that South Africa is one of the most unequal societies in the world with about 55.5% of the population living at or below the upper-bound of the poverty line, which was R1268 per month.⁵ A recent survey found that Law firms in South Africa's four most populous provinces, all charge on average over R1000 per hour for legal services,⁶ with these four provinces housing nearly 69% of South Africa's population.⁷

It was also found that between 1988 and 1989 there were approximately 2.25 million criminal matters placed on the court roll, and about 85% of the accused in these matters did not make use of any form of legal representation, and it is doubtful that the situation with regards to civil matters was any better.⁸ Taking into account all of the above information, it is reasonable to assume that most South African's are not able to afford legal representation.

1.6 - Research Methodology

In the past, a study of this nature would have used a legal research method such as the "doctrinal research methodology", however legal researchers have begun infusing legal research techniques with those often used in the faculties of humanity and social sciences.⁹ This has given researchers a broader perspective to the dimensions of law whilst simultaneously relating it closer to society at large, and after all laws regulate society.¹⁰ With this in mind, it can be argued that a study of this nature would in likelihood use a qualitative

MAAAAA:robnuBjuOxLRaYBaprfMR0cM1mcsa_qqsVvXBkm1jrZPoPrKWxWixSPbeYsrCCtNvf7wkCk_yitg [Accessed 15 November 2022].

² Carlin et al "Legal representation and class justice" 381.

³ Carlin et al "Legal representation and class justice" 381.

⁴ Carlin et al "Legal representation and class justice" 381.

⁵ StatsSA "Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015" 2017 website at <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>. [Accessed 15 November 2022].

⁶ Tech4Law "The South African law firms hourly rate survey results" September 2010 website at <https://www.tech4law.co.za/business/efficient-business-process-d50/the-south-african-law-firms-hourly-rate-survey-results/> [Accessed 15 November 2022].

⁷ South African Government "South Africa's provinces" 2020 website at <https://www.gov.za/about-sa/south-africas-provinces> [Accessed 15 November 2022].

⁸ Sarkin, J "Can South Africa afford justice? The need and future of a Public Defender system" 1993 Stellenbosch Law Review" (4) 264-265 at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/stelbl4&id=267&men_tab=srchresults [Accessed 15 November 2022].

⁹ Camilleri-Cassa, F. Aquilla, K "Legal Research Methods" March 2017 website at <https://timesofmalta.com/articles/view/Legal-research-methods.642262> [Accessed 15 November 2022]

¹⁰ Camilleri-Cassa "Legal Research Methods".

data collection method, because the researcher would not need to convert their observations into a numerical form.¹¹

Thus, a combination of the Qualitative content analysis, and Historical research methodologies would likely be used in this study. Qualitative content analysis, or textual analysis would be used because it is extremely effective when examining the narratives found in various texts such as journals, transcripts, and other written documents, and given that the sources of law are largely codified, qualitative content analysis would be appropriate.¹² Then with regards to Historical research, this research method would be used because it involves the examination of historical records, which includes items such as written documents, reports and journals, and given that the law, and the decisions of the courts are largely codified, historical research could prove to very effective.¹³

Chapter 2

This chapter is comprised of the literature review for this topic, this review will accordingly be used to present a number of key concepts as they pertain to the topic at hand, it will also be used to present information necessary to properly introduce this project. This literature review will contain various pieces of information that have been published that find application to the topic, and it will consist of both textbook and various articles.

2.1 - Textbooks

We will first examine the textbook titled Research matters, and whilst it was not used to expand upon the topic of this study, it still proved invaluable in determining which data collection methods would be most appropriate for a study of this nature. The information used in this regard was taken from chapter 13 (authored by Strydom and Bezuidenhout) and this chapter was used to establish the appropriate data collection methods, which was determined to be a combination of the qualitative content analysis, and historical research methods.

The Beginners Guide for Law Students textbook authored by Kleyn and Viljoen was used to establish the nature, importance, and functions of the various rights as contained in the Constitution of the Republic of South Africa, 1996. In utilising this book it was established that the right contained in section 34 of the Constitution, namely the right to access to courts, was identified as being part of “Civil and Political rights”, otherwise known as first generation, or “blue rights”, and the importance of these rights cannot be understated as they are some of the oldest, and most widely recognised rights in the world.¹⁴ It is also worth noting that whilst no particular generation of rights is regarded as being more important than any other generation, these first generation rights effectively act as a “shield”, aimed at allowing

¹¹ Du Plooy-Cilliers, F. Davis, C. Bezuidenhout, R *Research Matters* 1st ed (2022)174.

¹² Du Plooy-Cilliers *et al Research Matters* 191.

¹³ Du Plooy-Cilliers *et al Research Matters* 192.

¹⁴ Kleyn, D. Viljoen, F *Beginners Guide For Law Students* 4thed (2017) 231.

individuals to protect themselves from unlawful state actions, which is significant given South Africa's history of abuse by the state.¹⁵

The *Criminal Procedure Handbook* also warrants consideration, and it was used primarily to highlight the rights afforded to accused, arrested, or detained individuals, and in particular the right to state sponsored legal representation. The majority of the content was taken from chapter 4 as authored by Kemp, and this chapter emphasised from the outset the importance of the right to state sponsored legal representation, as recognised by the Constitution. Sections 35(2)(c) and 35(3)(g) of the Constitution warrant consideration as they provide that detained persons, sentenced prisoners, and accused persons who cannot afford representation have the right to be assigned legal representation at the expense of the state if injustice would otherwise occur.¹⁶

It was further noted by Kemp that section 73 of the Criminal Procedure Act (CPA) 51 of 1977 further codifies the right to legal assistance of an accused person, with this section providing that an accused that has been arrested is entitled to legal representation at any stage after their arrest.¹⁷ It was also noted that an accused needs to be promptly informed of their right to legal representation after their arrest, as well as at every stage of the investigation process, and during court proceedings, and should a presiding officer fail to inform the accused of said right, it could potentially invalidate the criminal proceedings.¹⁸ Furthermore, section 73(2c) codifies the Constitutional right of an accused, arrested, or detained individual to have a legal representative appointed at the expense of the state, if the accused cannot personally afford representation, and if substantial injustice would otherwise result.¹⁹

Finally, the textbook titled *Fundamental Principles of Civil Procedure* was used to highlight the distinct lack of state sponsored legal representation in civil proceedings. In the aforementioned textbook by the various authors that there is no constitutionally recognised right to legal representation in civil proceedings, unlike in criminal proceedings, but High Court Rule 40, and Magistrates Court Rule 53 do seek to address this.²⁰

High Court Rule (HCR) 40 refers to *in forma pauperis* proceedings, which essentially allow a poor or indigent person bring a suit, and be represented, without being liable for the costs of the suit. In terms of HCR 40(2)(a), for a person to bring or defend proceedings *in forma pauperis* they need to provide an affidavit to the registrar of the High Court which sets out that they do not possess property to the value of R10 000, and will not be able to obtain said sum in a reasonable time.²¹ It must be noted that household possessions, wearing apparel, and tools of trade do not factor into aforementioned amount.²²

¹⁵ Kleyn *et al Beginner Guide For Law Students* 231.

¹⁶ Joubert, J. Basedo, M Geldenhuys, T Karels, M Kemp, G Swanepoel, J Terblanche, S van der Merwe, S *Criminal Procedure Handbook* 12th ed (2017) 93.

¹⁷ Joubert *et al Criminal Procedure Handbook* 107.

¹⁸ Joubert *et al Criminal Procedure Handbook* 98.

¹⁹ Joubert *et al Criminal Procedure Handbook* 104.

²⁰ Theophilopoulos, C. van Heerden, C Boraine, A Rowan, A Broodryk, T Bekker, P Baboolal-Frank, R Dass, D Joubert, Y du Preez, M *Fundamental Principles of Civil Procedure* 4th ed (2020) 37.

²¹ Justic.gov.za "Uniform Rules of Court" June 2009 website at <https://www.justice.gov.za/legislation/rules/UniformRulesCourt%5B26jun2009%5D.pdf> [Accessed 15 November 2022].

²² Justic.gov.za "Uniform Rules of Court".

Magistrates Court rule (MCR) 53 refers to *pro deo* proceedings, also refers to a situation where a poor or indigent party to bring a suit, and be represented, without personally paying the fees, with the obvious distinction being that this occurs in the Magistrates Court. In this instance, the party seeking to make use of *pro deo* council needs to apply to the court to do so, and they need to essentially be able to prove that they do not have the means to pay the costs of the action, court fees, or sheriff's fees associated with the action.²³

It needs to be noted that with both *pro deo* and *in forma pauperis* proceedings, the representation may be "free" as far as the litigant is concerned, but the fees associated with using the attorney or advocate are not borne by the state, they are instead borne personally by the attorney or advocate who is providing the service, and they are usually instructed to do so by the professional body to which they belong.²⁴

2.2 - Articles

If we examine the article by Bekker, the author was at pains to express that, for proceedings to unfold in a fair manner, the parties to those proceedings need to receive adequate legal representation. This much was stated by the author who pointed out that due of the nature of adversarial proceedings, as well as the various mechanisms and procedures that are used in the aforementioned proceedings, legal representation is vital.²⁵ Thus in order for proceedings to unfold in a manner that is considered fair, the parties to the proceedings need to be able to present their cases in a legally competent manner, and doing this requires the use of the specialised services provided legal practitioners.²⁶

The workings of Stewart also warrant consideration as she expressly noted there is no constitutional right to state-sponsored legal representation in civil matters between two adults.²⁷ She did however point out that Constitution does afford children the right to state-sponsored legal representation in civil matters in section 28(1)(h), this is however subject to the *provisio* that the child would suffer substantial injustice if they were not represented.²⁸ This is because the Constitution recognises children as special individuals, who require additional steps to be taken to care for and protect them, however the provision of state-sponsored legal representation, even when children are involved, is dependent on the resources available to the state at a particular point in time.²⁹ This again emphasises the importance of adequate legal representation in court proceedings, but it should be borne in mind that adults can also

²³ Justice.gov.za "Rules regulating the conduct of the proceedings of Magistrates' Courts of South Africa" August 2010 website at https://www.justice.gov.za/legislation/notices/2010/20100823_GG33487_NoticeR740_civil-jurisdiction-rules.pdf [Accessed 15 November 2022].

²⁴ Justic.gov.za "Uniform Rules of Court".

²⁵ Bekker, P "The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa" 2004 CILSA 177 at https://journals.co.za/doi/pdf/10.10520/AJA00104051_100 [Accessed 15 November 2022].

²⁶ Bekker 2004 CILSA 177.

²⁷ Stewart, L "Resource Constraints and a child's right to legal representation in civil matters at state expense in South Africa" International Journal of Children's Rights 19 (2011) 295-296 at <https://web-s-ebSCOhost-com.ezproxy.iielearn.ac.za/ehost/pdfviewer/pdfviewer?vid=4&sid=ccf3f6eb-d529-4746-a3a9-b3777cef7052%40redis> [Accessed 15 November 2022].

²⁸ Stewart 2011 International Journal of Children's Rights 295-296.

²⁹ Stewart 2011 International Journal of Children's Rights 295-296.

suffer substantial injustice if they are not properly represented and yet but no right to state-sponsored legal representation exists.

The article by Kaersvang also proved quite valuable with its focus being on the creation of Equality Courts in terms of the Promotion and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).³⁰ One of the primary functions of these equality courts is to address some of the barriers that prevent citizens from gaining access to, and navigating the courts effectively.³¹ These barriers are addressed in a variety of ways, for instance these courts are inexpensive to use as there are no fees required to enrol matters before an Equality Court, and no legal representation is required which can lead to significant reduction in costs for those making use of these courts.³² Equality Courts can also be situated in any Magistrates Court, which makes these courts more accessible to the majority of people, and eliminates the travel costs that people from rural areas would incur if a matter needed to be enrolled in a High Court.³³

The writings of Van As then proved invaluable in gaining an understanding as to what exactly is needed to provide funding for the poor and indigent, and the author was of the opinion that the two broad requirements are political will, and funding.³⁴ The author notes that with regards to political will, this refers to the desire or willingness of legislators and those in government to take steps to realise the provision of free legal representation to the poor.³⁵ It was also held that while there is clearly political will to provide free legal representation to the poor in criminal matters, no such will exists with regards to civil proceedings, and this is due to a lack of funding.³⁶ This funding requirement refers to funding to organisations such as Legal Aid South Africa, which are tasked with providing free legal services to the poor citizens of South Africa. Accordingly, with a budgetary allocation of R362 million in 2004, and the present environment of government austerity, not only is this amount likely to be inadequate, but there is not likely to be the political will to increase this funding amount to adequate levels.³⁷

The publication by StatsSA titled "Poverty trends in South Africa" also proved to be of use, and this survey was used to gain an understanding of the levels of poverty that exist in South Africa. In this survey, StatsSA established that by 2017 there were some 30.4 million South African's, or approximately 55.5% of the population, that lived at, or below the upper-bound of the poverty line, which in 2020 was R1268 per person, per month.³⁸ A second StatsSA survey was also made use of, and this survey was used to establish the average household size by ethnic group, as well as the average household size in the difference provinces, and more importantly the average household size nationwide, at 3.3 individuals per household.³⁹ These

³⁰ Kaersvang, D "Equality Courts in South Africa: Legal Access for the Poor" 2008 *The Africa Issue* (15) 4 at <https://quod.lib.umich.edu/j/jii/4750978.0015.203/--equality-courts-in-south-africa-legal-access-for-the-poor?rgn=main;view=fulltext>. [Accessed 15 November 2022]

³¹ Kaersvang 2008 *The Africa Issue* 4.

³² Kaersvang 2008 *The Africa Issue* 499.

³³ Kaersvang 2008 *The Africa Issue* 4.

³⁴ Van As, H "Taking Legal Aid to the people: Unleashing local potential in South Africa" 2005 *Obiter* (26) 188 at <https://journals.co.za/doi/epdf/10.10520/EJC85126> [Accessed 15 November 2022].

³⁵ Van As 2005 *Obiter* 188.

³⁶ Van As 2005 *Obiter* 188.

³⁷ Van As 2005 *Obiter* 188.

³⁸ StatsSA "Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015".

³⁹ StatsSA "Community survey 2016 in brief" 2016 website at <https://www.statssa.gov.za/publications/03-01-06/03-01-062016.pdf> [Accessed 15 November].

two surveys were used in conjunction to gain an understanding of how many people would qualify for assistance from Legal Aid South Africa (Legal Aid SA), which was done to emphasise the pressures that are placed on Legal Aid SA in fulfilling its mandate.

If we then examine the qualification criteria for legal aid from Legal Aid South Africa, a “means test” first needs to be performed to see if a person is eligible for assistance.⁴⁰ This “means test” examines the financial position of the person applying for legal aid, and the basic requirements for legal assistance are as follows:

- If the legal aid is for an individual living alone, they must earn less than R7700.00 per month after tax;⁴¹
- If the legal aid is for an individual who lives in household with other people for 4 or more nights per week, and these people share the household expense, then the total household income must be less than R8400.00 per month after tax;⁴²

If we then cross reference this information with the above StatsSA surveys, it was found that some 30.4 million people live on less than R1268 per month, which would in theory mean they would qualify for assistance.⁴³ Furthermore, with an average national household size of approximately 3.3 people, this will mean that there would be somewhere in the region of 9 million households that could potentially qualify for assistance from legal aid.⁴⁴ It is worth noting that whilst these figures are by no means concrete, it does give some indication of the workload that Legal Aid SA is saddled with, especially considering its limited budget.

Chapter 3

This chapter will seek to examine the various pieces of legislation that are applicable to the topic. It will examine how the preambles of these various pieces of legislation set out the functions of the legislation, and it will scrutinise the various sections within the statutes, and examine how they do, or do not address the issue at hand.

3.1 - Legislation

3.1.1 - Constitution of The Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996, is the supreme source of law in the country, and as such its effects are felt in nearly every aspect of South African society. It regulates and provides guidance on a wide range of matters

⁴⁰ Legal Aid South Africa “How it works” 2022 website at <https://legal-aid.co.za/how-it-works/>. [Accessed 16 November 2022].

⁴¹ Legal Aid South Africa “How it works”.

⁴² Legal Aid South Africa “How it works”.

⁴³ StatsSA “Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015”.

⁴⁴ StatsSA “Community survey 2016 in brief”.

To understand the broad purpose of the Constitution, one need look no further than its preamble, which acknowledges that South Africa comes from a repressive and segregated past. The Constitution also acknowledges those who fought for our democracy whilst also acknowledging that South Africa now belongs to all who live in it. Taking into consideration all of the above, the Constitution was adopted with a number of important goals in mind, these are as follows:

- To heal the divisions that exist as a result of the injustices of the past, but also to attempt to establish a society which is based on democratic values, social justice, and fundamental human rights;
- To provide the foundations upon which a democratic and open society is based, and where the government is empowered by the will of the people, it furthermore provides that every citizen of South Africa is afforded equal protection by the law.

The first section of the Constitution that needs to be examined is section 9, which contains the right to equality, this section provides that everyone in South Africa is equal before the law and has the right to equal benefit and protection of the law. section 34, contains the right to access to courts, and this section provides that every person has the right to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court or another applicable tribunal or forum.

Accordingly, when these two sections are read together, it is clear that every person in South Africa enjoys the benefits and protections afforded to them by the law, the Constitution included. Therefore, every person should have the ability to have any of their disputes adjudicated upon by way of application of the law in a public hearing that is fair and unbiased, and this hearing can take place before a court, or any other applicable tribunal or forum. These two sections are thus an important starting point in understanding the constitutional importance of the right to access to justice, and as discussed prior, justice can only be dispensed properly by utilising the courts. However, the ability to access the courts does not mean that the parties to disputes are on equal footing, and as has been emphasised, until all parties to legal proceedings have equal access to legal advice, access to justice cannot truly be achieved.

The next relevant section of the Constitution to consider is section 28(1)(h) which provides that every child has the right to have a legal representative assigned to them by the state and at the states expense in civil proceedings, provided that substantial injustice would occur in the absence of such representation. The section is relevant because it is the earliest mention in the Constitution of state sponsored legal representation, it is also important because it acknowledges the fact that injustice can, and does occur if parties are not represented adequately. It is however peculiar in that it is the only instance in which the Constitution affords such representation to parties in civil proceedings, but it only applicable in respect of matters concerning children. This is because children are regarded as a vulnerable group due to their age and lack of capacity and they thus require special protections, but it is worth noting that adults can be exposed a wider range of civil suits, and which could potentially carry harsher sanctions.

The next section to take into consideration is section 35, which refers to the rights of arrested, accused, or detained persons in criminal proceedings, and there are two relevant subsections

that need to be examined in this regard. The first important subsection in this is section 35(2)(c) which provides that everyone who is detained, including sentenced prisoners, has the right to have a legal practitioner assigned to them at the expense of the state if substantial injustice would otherwise occur, and they are also to be promptly informed of this right. Section 35(3)(g) then provides that every accused person has the right to a fair trial, which includes the right to be assigned a legal practitioner at the expense of the state if substantial injustice would otherwise occur, and they too are to be promptly informed of this right.

The above two sections are of importance because it extends the right to state sponsored legal representation to all parties in criminal proceedings, whilst simultaneously emphasising the importance of being informed of this right. These subsections are evidence of the fact that the legislature recognises the importance of adequate legal representation in court proceedings, and this is arguably because the legislature recognised the very real possibility of injustice occurring if a party is not represented properly. Section 35 stands in contrast to section 28 as it does not differentiate between adults and children with regards to the provision of state sponsored legal representation.

3.1.2 - Criminal Procedure Act 51 Of 1977

The criminal procedure act is a fairly comprehensive piece of legislation, and as such it makes provision for, and regulates nearly all matters that are incidental to criminal proceedings.⁴⁵ This particular iteration of the Criminal Procedure Act (CPA), namely the 1977 version, was however not particularly helpful in respect of the topic at hand, as this piece of legislation came into effect in 1977, which was some time before the right to legal representation was extended to criminal proceedings.

The first official acknowledgement of the right to legal representation in criminal proceedings came as a result of the Criminal Procedure Amendment Act 86 of 1996, one of the functions of which was to make provision for an accused to be informed of their right to legal representation.⁴⁶ This was done through the amendment of section 73 of the CPA, which now provides that an accused has the right to not only be informed of their right to legal representation, but also the right to have legal representation appointed at the expense of the state.⁴⁷ The Criminal Procedure Amendment Act 76 of 1997 also amended section 309 of the CPA, which now provides that an accused who appeals a matter must also be informed of their right to legal representation.⁴⁸

Arguably, for purposes of this topic, the most important section of the CPA is section 73(2A) which provides that an accused must, at every stage of criminal proceedings, be informed of their right to be represented by a legal advisor.⁴⁹ This legal advisor can be of their own choosing and at their own expense, or if they cannot afford representation, they are to be informed that they may apply for legal aid and the names of the relevant institutions must be

⁴⁵ Act 51 of 1977.

⁴⁶ Act 86 of 1996.

⁴⁷ Act 86 of 1996.

⁴⁸ Act 76 of 1997.

⁴⁹ S 73 (2A) of Act 51 of 1977.

relayed to them.⁵⁰ This section was inserted into the CPA to give effect to section 35 of the Constitution, and as such it again emphasises the Constitutional importance of adequate legal representation.

Section 73(2C) is also noteworthy because this section provides that if an accused person fails or refuses to obtain legal representation within a reasonable period, the court may make an order that the accused be assigned a legal advisor at the expense.⁵¹ This is of course subject to the Legal Aid South Africa Act, and the court must also be of the opinion that substantial injustice would occur in the absence of legal representation.⁵²

3.1.3 - Legal Aid South Africa Act 39 Of 2014

The Legal Aid South Africa Act, henceforth “the Act”, was promulgated to realise the creation of Legal Aid South Africa (Legal Aid SA), the body tasked with providing free legal assistance to the poor and indigent citizens of South Africa.⁵³ This Act was in essence created to ensure equal access to justice is achieved in South Africa, but furthermore it was created to give effect to the right to legal representation as envisioned in the Constitution. Accordingly, the provision of legal advice and/or legal assistance is a matter of Constitutional importance.⁵⁴

The Act also provides for the appointment of employees and agents of Legal Aid SA, the employees of Legal Aid SA are individuals tasked with assisting it in fulfilling its mandate such as admin staff or in house attorneys, and agents are individuals employed by the Department of Justice to help legal aid applicants complete their applications for legal aid.⁵⁵ The act also lays out the terms, conditions, and scope of the aforementioned individuals’ employment, as well as providing for the protection of client privilege in certain situations.⁵⁶ Importantly, the Act also provides for the establishment of the Board of Directors of Legal Aid SA, and it sets out this boards’ objects, powers, functions, and duties, one of which being the duty to determine in which situations Legal Aid SA should provide free legal services.⁵⁷

The objects Legal Aid South Africa are set out in section 3, which are as follows:⁵⁸

- a) To render or make available legal aid and legal advice;
- b) To provide legal representation to people at the expense of the state; and
- c) To provide education and information to people of their legal rights and obligations, as envisioned in the Constitution.

These three functions or objects thus make it evident that Legal Aid SA was created with the goal of making legal representation available to those who would otherwise be unable to afford it. This again emphasises the importance of adequate legal representation as recognised by the legislature, whilst simultaneously giving effect to various sections contained in the

⁵⁰ S 73 (2A) of Act 51 of 1977.

⁵¹ S 73 (2C) of Act 51 of 1977.

⁵² S 73 (2C) of Act 51 of 1977.

⁵³ Act 39 of 2014.

⁵⁴ Act 39 of 2014.

⁵⁵ Act 39 of 2014.

⁵⁶ Act 39 of 2014.

⁵⁷ Act 39 of 2014.

⁵⁸ S 3 of Act 39 of 2014.

Constitution. Arguably, this piece of legislation is also a tacit acknowledgement by legislators that the vast levels of inequality in South Africa could make it difficult for litigants to be on equal footing during court proceedings

The next section that warrants consideration is section 4, which lays out the powers, functions, and duties of the board of Legal Aid SA. Section 4(e) is important in that it gives the board the power to set out the conditions in which legal representation is afforded to those who lack the means to pay for it personally, these conditions are of course subject to various financial considerations.⁵⁹ Section 4(f) also needs to be borne in mind, as this section states explicitly that the board has a duty ensure that legal representation is afforded to litigants at the expense of the state where substantial injustice would occur in the absence of said representation.⁶⁰ Furthermore, they have a general duty to make legal aid and advice available to litigants who are in need of it.⁶¹

The final section of the act that needs to be examined is section 23, and this section empowers the Minister of Justice and Correctional services (the Minister) to, after receiving recommendations from the board of Legal Aid SA, publish certain regulations.⁶² This includes regulations setting out where Legal Aid SA can provide legal aid, cannot provide legal aid, and can provide limited legal aid.⁶³ This section also empowers the Minister to publish a number of other regulations, such as the criteria that need to be met for a party to qualify for legal aid, and any other regulations needed to ensure the efficient administration of the act.⁶⁴

3.1.4 - Legal Aid South Africa Act, 2014 (Act No. 39 Of 2014): Regulations, No.R. 745,
Government Gazette 41005, 26 July 2017

As mentioned above, the board of directors of Legal Aid South Africa have a duty to determine and make recommendations as to which matters Legal Aid South Africa (Legal Aid SA) should provide free legal services. These recommendations are then relayed to the Minister of Justice and Correctional Services (the Minister) in terms of section 23(1) of the Legal Aid South Africa Act.⁶⁵ The minister will then take these recommendations into consideration and determine which matters are of such significance that they warrant the provision of free legal representation, thereafter his decision will be published in the Government Gazette in the form of these regulations.⁶⁶

Section 3 of these regulations lay out the policy with regards to the provision of legal aid in criminal matters, and in essence it provides that Legal Aid SA must provide legal assistance to any arrested, accused, or detained person.⁶⁷ This is of course subject to the condition that the party in question cannot afford legal representation of their own accord, and that

⁵⁹ S 4 (e) of Act 39 of 2014.

⁶⁰ S 4 (f) of Act 39 of 2014.

⁶¹ S 4 (f) of Act 39 of 2014.

⁶² S 23 of Act 39 of 2014.

⁶³ S 23 of Act 39 of 2014.

⁶⁴ S 23 of Act 39 of 2014.

⁶⁵ Regulations, No.R. 745, Government Gazette 41005.

⁶⁶ Regulations, No.R. 745, Government Gazette 41005.

⁶⁷ Regulations, No.R. 745, Government Gazette 41005.

substantial injustice would occur as a result of the lack of legal representation.⁶⁸ Legal Aid SA can accordingly provide assistance in respect of the following criminal matters:⁶⁹

- Murder;
- Theft;
- Assault;
- Drunken Driving;
- Rape;

Section 9 of these regulations deal with the provision of legal representation to parties in civil proceedings, and these regulations provide that Legal Aid SA may provide to any litigant in a civil matter provided that:⁷⁰

- a) Legal Aid SA is of the opinion that the matters has reasonable prospects for success; or
- b) Legal Aid SA is of the opinion that there is a reasonable prospect of the enforcement of any court order that is granted; or
- c) Legal Aid SA has the necessary financial resources to deal with the matter based on a written merit report, provided that such report exists.

Therefore, the situation with regards to the provision of free legal services in civil matters differs substantially from the provision of said services in criminal matters. The determining factor with regards to the provision of free legal services in civil matters appears to be financial in nature, as such, Legal Aid SA will only commit resources to a civil matter if there are good prospects of success. This indicates that Legal Aid SA does not wish to “waste” money on a matter that will not yield a positive result for the litigant utilising their services, and this is regardless of whether said party will suffer substantial injustice as a result of the lack of legal representation. This accordingly emphasises the discrepancies that exist with regards to the provisions of state sponsored legal representation in civil and criminal matters.

Nonetheless, Legal Aid SA can still provide free legal services to parties in respect of the following civil matters:⁷¹

- Divorce matters;
- Maintenance matters;
- Eviction matters;
- Domestic violence matters;
- Matters concerning the administration of estates.

⁶⁸ Regulations, No.R. 745, Government Gazette 41005.

⁶⁹ Regulations, No.R. 745, Government Gazette 41005.

⁷⁰ Regulations, No.R. 745, Government Gazette 41005

⁷¹ Regulations, No.R. 745, Government Gazette 41005.

3.1.5 - Promotion of Equality And Prevention of Unfair Discrimination Act 4 Of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was created by the legislature so as to give effect to section 9 of the Constitution.⁷² This section refers to the right to equality, and it places a duty on the legislature to create statute aimed achieving the equality as envisioned by the Constitution, as well as legislation aimed at prohibiting and preventing unfair discrimination.⁷³ PEPUDA was also promulgated with the purpose of giving effect to a number of other Constitutional values such human dignity, freedom, and social justice.⁷⁴

The achievement of equality is one of the more important functions of this particular piece of legislation, particularly the achievement of equal access to justice, and in this regard, PEPUDA envisions the creation of Equality Courts.⁷⁵ These courts were created to combat the various barriers preventing ordinary South Africans from utilising the courts effectively.⁷⁶ Section 2(b)(ii) should also be examined as this particular section makes it clear that PEPUDA was created to ensure and promote the right to equality that all citizens inherently possess, as envisioned in the Constitution.⁷⁷

The guiding principles of PEPUDA, as found in section 4, also warrant consideration, particularly with regards to section 4(1)(b). This section states that in any adjudication proceedings that are instituted in terms of PEPUDA, the principle of access to justice must apply to all parties who institute said proceedings.⁷⁸

Furthermore, section 16 of PEPUDA, which provides for the creation of Equality Courts, and in terms of section 16(1)(a), every High Court is by default an Equality Court.⁷⁹ Section 16(1)(c) also empowers the Minister of Justice and Correctional Services (the Minister) to designate one or more Magistrates Courts as an Equality Court. In addition to Equality Courts being more widely available, they also have no associated courts fees, and furthermore, legal representation is not a strict requirement, and thus the parties to proceedings are placed on a more equal footing.⁸⁰

Chapter 4

This chapter will focus on the various instances of case law that are relevant to the topic at hand. In doing so, it will focus on instances where presiding officers have identified and placed emphasis on particular legislative provisions that demonstrate the importance of legal

⁷² Act 4 of 2000.

⁷³ Act 4 of 2000.

⁷⁴ Act 4 of 2000.

⁷⁵ Act 4 of 2000.

⁷⁶ Act 4 of 2000.

⁷⁷ S 2 (b)(ii) of Act 4 of 2000.

⁷⁸ S 4 (1)(b) of Act 4 of 2000.

⁷⁹ S 16 (1)(a) of Act 4 of 2000.

⁸⁰ Department of Justice "Introducing the constitutional right to equality (Section 9 of the Constitution, 1996)" 2022 website at https://www.justice.gov.za/eqcact/eqc_main.html#:~:text=Does%20one%20have%20to%20pay,to%20pay%20any%20court%20fees. [Accessed 15 November 2022].

representation. Thus, it will examine how the interpretations and comments made by the presiding officers emphasise the importance of the issues identified in this research project.

4.1 – Case Law

4.1.1 - *Legal Aid South Africa V Magidiwana and others* 2015 (11) BCLR 1346 (CC)

This case stems from an incident where the police opened fire on a number of striking mineworkers in Marikana, killing 34 and injuring 78 of them.⁸¹ Following this, a commission of inquiry was launched to establish what exactly transpired that day and the days preceding that, a group of these miners managed to secure private funding for legal representation during the initial stages of the inquiry, but this funding ran out fairly quickly.⁸² This group then applied to Legal Aid South Africa (Legal Aid SA) for funding for the remaining duration of proceedings, but this application was refused by Legal Aid SA, with one argument being that budgetary constraints meaning it could not fund the miners who were injured or arrested.⁸³

Nkabinde J made some remarks in her dissenting judgment which warrant consideration, she was at pains to express that the Constitution only expressly provides for state sponsored legal representation in three situations, and these are in section 28(1)(h), 35(2)(c), and 35(3)(g) which have all been covered in some detail above.⁸⁴ Therefore, whilst section 34 of the Constitution could potentially be interpreted in such a way that it guarantees everyone state sponsored legal representation, the reality is that there a vast number indigent and vulnerable in South Africa, and the budget of Legal Aid SA is insufficient to provide for them all.⁸⁵

It is therefore telling that the right to state sponsored legal representation in the above three sections depends on the parties suffering “substantial injustice” as a result of the lack of legal representation.⁸⁶ The fact that the Constitution only guarantees state sponsored legal representation in these limited circumstances implies that we should be reluctant to interpret other rights as guaranteeing the aforementioned representation.⁸⁷ Ultimately this case was used to emphasise the severe budgetary constraints that Legal Aid SA faces, and the impact it has on its ability to fulfil its mandate, as well as the overall impact that funding shortfalls have on the ability of entities such as Legal Aid SA to provide legal services. Furthermore, it also proved useful in highlighting the discrepancies between the provision of state sponsored legal representation in criminal and civil matters.

4.1.2 - *S v Tandwa and others* [2007] SCA 34 (RSA)

⁸¹ 2015 (11) BCLR 1346 (CC) 4.

⁸² 2015 (11) BCLR 1346 (CC) 8.

⁸³ 2015 (11) BCLR 1346 (CC) 7.

⁸⁴ 2015 (11) BCLR 1346 (CC) 109.

⁸⁵ 2015 (11) BCLR 1346 (CC) 110.

⁸⁶ 2015 (11) BCLR 1346 (CC) 109.

⁸⁷ 2015 (11) BCLR 1346 (CC) 111.

The case stems from a robbery that occurred in a Standard Bank branch in Mthatha in 1998, during which R9.6 million was stolen.⁸⁸ One of the convicted bank employees alleged that he did not testify as per the advice of his attorney, and therefore claimed that the attorney had acted with incompetence as he had not informed him properly of the adverse consequences of his not testifying.⁸⁹ Ultimately the court found this accused's complaint highly improbable as he was highly educated and had prior experience in testifying, and would thus have insisted on giving effect to a previous testimony, or would otherwise have complained about being unable to testify.⁹⁰

The comments of the court are nevertheless worth examining as they emphasise the importance of competent legal representation, with the court noting that the Constitution guarantees every accused person the right to a fair trial, and competent lawyering is critical to this.⁹¹ This is because incompetent lawyering can have serious consequences on a trial's outcome, which would thus affect an accused's right to a fair trial.⁹² Thus, the right to legal representation as guaranteed by sections 35(3)(f) and 35(3)(g) of the Constitution means the right to have competent legal representation, representation of a sufficient quality and nature to ensure the trial outcome can be considered fair.⁹³

This case proved to be useful because not only did it place an emphasis on the fair trial rights available to accused persons, but it also acknowledges that good, competent legal representation is critical so as to fulfil these fair trial rights. This would seem to imply that the judiciary is acutely aware of the fact that competent legal representation is critical to ensure equal access to justice is achieved.

4.1.3 - *S v Radebe; S Mbonani* 1988 (1) SA 191 (T).

In this case, Goldstone J noted that there are established guidelines in court proceedings that set out the general duty of judicial officers to ensure that unrepresented accused persons have a proper understanding of their rights.⁹⁴ It is important to note that if said accused person does not have a proper understanding of said rights, it is not possible for a fair and just trial to take place.⁹⁵

Accordingly, because judicial officers have a duty to inform accused persons of all of their rights, they will surely have a duty to inform them of their right to legal representation, particularly where the charge faced by the accused is serious in nature which carries a severe sentence.⁹⁶ Therefore an accused who finds themselves facing a serious charge which carries a severe sentence should not only be adequately informed of their right to legal representation

⁸⁸ [2007] SCA 34 (RSA) 1.

⁸⁹ [2007] SCA 34 (RSA) 6.

⁹⁰ [2007] SCA 34 (RSA) 24.

⁹¹ [2007] SCA 34 (RSA) 7.

⁹² [2007] SCA 34 (RSA) 7.

⁹³ [2007] SCA 34 (RSA) 7.

⁹⁴ 1988 (1) SA 191 (T) 194.

⁹⁵ 1988 (1) SA 191 (T) 195.

⁹⁶ 1988 (1) SA 191 (T) 196.

and encouraged to exercise it, they should be afforded a reasonable opportunity exercise the right an obtain legal representation.⁹⁷

This case is important because it emphasized that, depending on the facts and circumstances of a particular, should a judicial officer fail to adequately inform an accused of their rights (including the right to legal representation) and give them a reasonable opportunity to exercise them, it could render the trial unfair and result in a complete failure of justice.⁹⁸ This case is important because it emphasised that even during the pre-constitutional era, the courts were aware of the importance of legal representation, but again this importance was only recognised in respect of criminal proceedings.

4.1.4 - S v Tyebela 1989 (2) SA 22 (A)

Whilst this case stems from an appeal relating to an accused's right to cross-examination and that the fact that these rights need to be explained to said accused, it did place an emphasis on the fair trial rights as envisioned in section 35(3) of the Constitution, with special attention being paid to section 35(3)(g).⁹⁹

These fair trial rights are critical in the context of adversarial proceedings, and Milne JA noted this in this matter, and he further held that it is a fundamental principle of South African law.¹⁰⁰ He further noted that it is a fundamental principle in any civilised society that the/an accused is entitled to a fair trial, and given the constitutional right to have legal representation in criminal matters, it can be argued that legal representation is central to the fulfilment of this right.¹⁰¹ This would accordingly seem to suggest that in order for section 34 of the Constitution to be given effect, legal representation would be necessary to ensure that to ensure that the hearing is in fact fair.

The court also noted that in line with the rules and principles of procedural law, the judicial officer presiding over the matter needs to ensure that they conduct themselves in a fair and unbiased manner, as this could negatively impact the outcome of the trial.¹⁰² This would mean that the presiding officer needs to be certain that an accused understands the various rights afforded to them, including the fact that they have the right to state sponsored legal representation in certain situations.¹⁰³ This case proved to be invaluable in understanding the various rights that accompany the fair trial rights, but the remarks of Milne also emphasise the importance of fair trial rights, and in particular the right to legal representation.

4.1.5 - Zuma v Democratic Alliance and Another 2021 (5) SA 189 (SCA)

⁹⁷ 1988 (1) SA 191 (T) 196.

⁹⁸ 1988 (1) SA 191 (T) 196.

⁹⁹ 1989 (2) SA 22 (A).

¹⁰⁰ 1989 (2) SA 22 (A) 29 G-H.

¹⁰¹ 1989 (2) SA 22 (A) 29 G-H.

¹⁰² 1989 (2) SA 22 (A).

¹⁰³ 1989 (2) SA 22 (A).

This case ultimately stems from a decision to indict Mr Zuma on two counts of corruption, a number of different charges, and In September 2008 the lawyers acting on behalf of Mr Zuma, submitted a request for legal assistance at the expense of the state when acting in matters on behalf of Mr Zuma and this was in terms of section 3(1) of the State Attorney Act 56 of 1957.¹⁰⁴ It was discovered that the State Attorney had, since 2008, wrongfully reimbursed the lawyers acting on behalf of Mr Zuma , which had cost the State Attorney in the region of R25 million.¹⁰⁵

This case was ultimately used to emphasise how protracted, and expensive court proceedings can be, and the reality is that the vast majority of South Africans would not be able to secure funding to for legal representation in matters that are drawn out for years. Furthermore, when one considers the levels on inequality that exist in South Africa and the number of people that could potentially qualify for legal aid, and then compares it to the operating budgets of bodies such as Legal Aid SA, one gets a sense of the pressures that these bodies face in fulfilling their mandates.

Chapter 5

This chapter will focus on the findings of this research project as they relate to the various pieces of legislation, and case law that were found to be applicable. It will in essence lay out the legal position as established by the legislative provisions and cases that were discussed in chapters 3 and 4 above, and this chapter will further give an overview of how they find application to the research topic. In referring to the sources set out above, there are three broad themes that emerge in respect of the topic of this project, these themes will be set out and discussed in more detail below.

5.1.1 - Importance of the right to legal representation

The first theme that emerges from all of the information presented above relates to the importance that is attached to the right to legal representation, and the Constitution is the natural starting point in this regard. Taking into consideration the information contained above, it could be argued that the Constitution expressly recognises the importance of South Africans having the ability to access and utilise the courts to resolve disputes, and this right should in theory operate in a way that it benefits all South Africans, not just a selected few.

It can also be said that the Constitution recognises that in order to effectively utilise the court systems, one needs adequate legal representation, and as such it expressly provides for state-sponsored legal representation in a several situations. This is evident in that the Constitution recognises that the right to legal representation is a critical element of the right to a fair trial, and it thus provides for state-sponsored legal representation for arrested, accused, and detained persons at every stage of their respective proceedings. It is however worth noting that whilst the right to legal representation is quite comprehensive in respect of criminal

¹⁰⁴ 2021 (5) SA 189 (SCA) 1.

¹⁰⁵ 2021 (5) SA 189 (SCA) 29.

proceedings, the Constitution only affords state-sponsored legal representation in civil matters to children.

The Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) is also important in this respect, and it is in effect an extension of right to equality as envisioned by the Constitution. PEPUDA was thus created to give effect to the spirit and objects of the Constitution, with particular attention having been paid to ensuring all individuals enjoy the rights and freedoms contained in the Constitution equally.¹⁰⁶ PEPUDA also places a great deal of emphasis on the right to access to justice, and any proceedings brought in terms of PEPUDA need to give effect to this principle.¹⁰⁷ PEPUDA also led to the creation of the Equality Court, the widely available and low-cost courts which deal with disputes originating from instances of unfair discrimination, hate speech, and harassment.¹⁰⁸ It has been argued that these courts exist to combat the barriers preventing access to justice from being realised.¹⁰⁹

The importance of the right to legal representation has also been emphasised in a number of court cases, such as *S v Tandawa* where the court noted that in order for an accused person to receive a trial that can be regarded as fair, they need to be provided state-sponsored legal representation in the event that they cannot afford said representation personally.¹¹⁰ There was also significant attention paid to the notion of “competent lawyering”, which is the idea that when legal advice or services are provided, they need to be of sound quality and nature.¹¹¹ This is because when a party to proceedings is given poor advice or service from their legal practitioner, it can have significant negative consequences on the outcome of the case.¹¹² Therefore, legal services need to be rendered in a competent manner for the proceedings to be considered fair, and any discussions pertaining to the provision of state-sponsored legal representation, should also focus on the on the provision of quality legal representation.

The case of *S v Tyebela* is also worthy of consideration in respect of the above theme, in this case the court stressed that one of the fundamental principles of modern civilised society is that accused persons are entitled to a fair trial, and these fair trial rights are critical in the context of adversarial proceedings.¹¹³ The Constitution accordingly places a great deal of emphasis on these fair trial rights, and it can be argued that these rights will inevitably include the right legal representation, and this is because of the injustice that can occur if a party is not properly represented. The court was also at pains to state that presiding officers have a duty to conduct themselves in a way that is a fair and unbiased as this will negatively impact the outcome of a trial, and part of this means that the presiding officer needs to make the parties to the proceedings aware of their rights.¹¹⁴

Finally, the case of *S v Radebe* needs to be examined, and this case a great deal of emphasis was placed the duty of the presiding officer to ensure that parties to proceedings are aware of

¹⁰⁶ S 2 (b)(i) of Act 4 of 2000.

¹⁰⁷ S 4 (1)(b) of Act 4 of 2000.

¹⁰⁸ Act 4 of 2000.

¹⁰⁹ Act 4 of 2000.

¹¹⁰ [2007] SCA 34 (RSA) 7.

¹¹¹ [2007] SCA 34 (RSA) 7.

¹¹² [2007] SCA 34 (RSA) 7.

¹¹³ 1989 (2) SA 22 (A).

¹¹⁴ 1989 (2) SA 22 (A).

their rights, particularly unrepresented accused persons.¹¹⁵ This is because if an accused person does not have a proper understanding of their rights, the trial cannot unfold in a manner that can be considered fair, particularly in instances where the accused is faced with a charge of a serious nature.¹¹⁶

In this matter, a great deal of emphasis was placed on the fact that an unrepresented accused needs to be informed of their rights, with arguably the most important right being that they should be informed of their right to state-sponsored legal representation. This is because the average person would likely not be able to navigate the intricacies of the court system without legal assistance, and as a result they could potentially suffer substantial injustice, which emphasises the importance of legal representation. The court also noted that parties should be afforded a reasonable opportunity to exercise their rights, which implies that they should be given a reasonable time to obtain representation, failing which they trial could be rendered unfair.¹¹⁷

5.1.2 – The provision of free legal representation

The second theme that emerges from the information contained above relates to the scenarios in which the law affords people state-sponsored legal representation, and the starting point in this regard is the Criminal Procedure Act (CPA) which exclusively provides for state sponsored legal representation in criminal matters. The CPA provides for state sponsored legal representation if the accused is not be able to personally afford said representation, but said representation is not necessarily “provided” in the true sense of the word, instead the accused is to be advised that they eligible for legal aid, then direct them to a legal aid institution.¹¹⁸ The CPA is also at pains to emphasise that accused person needs to be given a reasonable period of time to acquire legal representation either at personal expense or from a legal aid institution, and if they cannot, then the court has the option to order that the accused by assigned representation at the expense of the state.

The Legal Aid South Africa Act emerges as is the primary piece of legislation which gives effect to the right to access to justice as envisioned in the Constitution, and it is also the primary mechanism through which poor and indigent parties can acquire state-sponsored legal representation in civil matters. This piece of legislation could thus be said to have been enacted to combat the discrepancy between state-sponsored legal representation in criminal and civil matters. The Legal Aid act also directs Legal Aid SA to make legal various legal services and advice available to people at the expense of the state and to educate these people of the legal rights and obligations they possess.¹¹⁹

It is however worth noting that the Legal Aid Act discussed above is effectively a framework act, with the “meat” being located in the regulations published in the Government Gazette by, such as Regulation No.R 745, as published in Government Gazette 41005. These regulations set out where free legal services can be provided in both criminal, and civil matters. In respect

¹¹⁵ 2009 (2) SACR 435 (SCA) 194.

¹¹⁶ 2009 (2) SACR 435 (SCA) 195.

¹¹⁷ 2009 (2) SACR 435 (SCA) 196.

¹¹⁸ S 73 (2A) of Act 51 of 1977

¹¹⁹ S 3 of Act 39 of 2014.

of criminal proceedings, Legal Aid SA can offer assistance in a wide range of criminal matters and does so without much opposition.¹²⁰

Legal Aid SA does also offer assistance in civil proceedings, but not as “freely” as they are in criminal proceedings, and legal aid is only provided in civil proceedings if certain prerequisites are met. Accordingly, Legal Aid SA needs to have the necessary resources to deal with the matter in question, and the matter needs to have good prospects of success and enforcement, and this is arguably the case because Legal Aid SA is concerned about funding constraints, and are aware that they cannot assist all the needy in South Africa.

5.1.3 – Acknowledgement of funding constraints faced by legal aid bodies

The third and final theme that emerges from the information contained in the above chapters relates to the funding constraints faced by the various legal aid bodies in South Africa, and how this negatively impact their ability to fulfil their mandate of providing free legal services. If we examine *Legal Aid South Africa v Magidiwana*, the court emphasised that the Constitution only expressly affords state-sponsored legal representation in three instances.¹²¹ The court also noted that whilst we may be tempted to interpret section 34 of the Constitution in a way that it affords legal representation to everyone in all situations, we should restrain ourselves and accept that the Constitution only affords said representation in these limited circumstances.¹²²

This is in all likelihood because the court is already cognisant of the fact that bodies Legal Aid SA already face severe budgetary constraints, and the court also recognises that there are a vast number of poor and indigent parties who cannot afford legal services.¹²³ Therefore, Legal Aid SA does not have the budget to provide free legal services to the needy South Africans who are eligible for their services, and if we were to extend its mandate to include everyone in South Africa it would stretch their resources to beyond breaking point.

The case of *Zuma v Democratic Alliance* was used to expand upon this further, and much of the case revolved around the extent to which the former president utilised public funds in his numerous, and costly court cases, with litigation expenses running into the millions.¹²⁴ The point of this case was to draw attention to the expensive, and often protracted nature of court proceedings, and this was then examined against the backdrop of poverty and unemployment in South Africa. This case was thus used to emphasise that equal access to justice in South Africa will remain a pipe dream until legal aid bodies receive adequate funding to serve the millions of poor and indigent South Africa, particularly considering the drawn out and costly nature of court proceedings.

¹²⁰ Regulations, No.R. 745, Government Gazette 41005.

¹²¹ 2015 (11) BCLR 1346 (CC) 109.

¹²² 2015 (11) BCLR 1346 (CC) 111.

¹²³ 2015 (11) BCLR 1346 (CC) 110.

¹²⁴ 2021 (5) SA 189 (SCA).

Chapter 6

This chapter will focus on rounding up this research project, and it will attempt to examine whether or not the information provided is sufficient to answer the questions central to understanding this research project.

Conclusions

Taking into consideration the high levels of unemployment and inequality that exist in South Africa, and contrasting them against the seemingly high cost of legal services would seem to suggest that legal representation is simply not affordable to the majority of South Africans. Therefore, the Constitution has three sections which expressly provide parties to court proceedings legal representation at the expense of the state, namely section 28(1)(h), 35(2)(c), and 35(3)(g) in order to combat this .

There are however some discrepancies between these two rights to state sponsored legal representation, in that any accused, arrested or detained person in a criminal matter are entitled to legal representation at the expense of the state. However, the constitution only guarantees legal representation to civil matters to children, and this only because of their age and status. Nevertheless, it is a curious position adopted by the drafters of the Constitution, as adults can be subjected to a wider range of matters due to their majority status, and they could therefore suffer greater injustice as a result of not being properly represented.

There are a number of organisations that exist in South Africa tasked with providing free legal assistance to the poor and indigent persons of South Africa. One such organisation is Legal Aid SA, which was created to give effect to the right to access to justice as envisioned by the Constitution, and it is tasked with providing legal representation to the poor so as to ensure that they can properly navigate the court system. Legal Aid SA accordingly offers significant assistance in respect of criminal matters, but they only offer assistance in civil matters if the case has a reasonable prospect of success, and if funding allows the matter to be taken on.

Finally, it would appear that bodies like Legal Aid SA are not adequately funded, with the courts having pointed out on a number of occasions that Legal Aid SA simply does not have the funding to service the needs of all poor South Africans. The courts have also noted that it is simply not feasible to extend the mandate of organisations like Legal Aid SA to cover every single needy South African, because they simply do not have the funds to do so, and it would likely stretch these organisations to breaking point. [9945 words]

Bibliography

- Constitution of the Republic of South Africa, 1996

Legislation

- Criminal Procedure Act 51 of 1977
- Legal Aid South Africa Act 39 of 2014
- Legal aid South Africa Act, 2014 (ACT No. 39 OF 2014): Regulations, No.R. 745 Government Gazette 41005, 26 July 2017
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Case law

- *Legal Aid South Africa v Magidiwana and Others* 2015 (11) BCLR 1346 (CC)
- *S v Radebe; S Mbonani* 1988 (1) SA 191 (T).
- *S v Tandwa & Others* [2007] SCA 34 (RSA)
- *S v Tyebela* 1989 (2) SA 22 (A)
- *Zuma v Democratic Alliance and Another* 2021 (5) SA 189 (SCA)

Books

- Du Plooy-Cilliers, F., Davis, C. and Bezuidenhout, R., 2022. Research matters. 1st ed. Cape Town: Juta & Company Ltd.
- Joubert, J., Basedo, M., Geldenhuys, T., Karels, M., Kemp, G., Swanepoel, J., Terblanche, S. and Van der Merwe, S., 2017. Criminal procedure handbook. 12th ed. Cape Town: Juta and Company (Pty) Ltd.
- Kleyn, D. and Viljoen, F., 2017. *Beginner's guide for law students*. 4th ed. Cape Town: Juta & Company Ltd.
- Theophilopoulos, C., Van Heerden, C., Boraine, A. and Rowan, A., 2020. *Fundamental principles of civil procedure*. 4th ed. Cape Town: LexisNexis (Pty) Ltd.

Journal Articles

- Bekker, P "The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa" 2004 CILSA 177 at https://journals.co.za/doi/pdf/10.10520/AJA00104051_100 [Accessed 15 November 2022]

- Carlin, J, Howard, J “Legal Representation and Class Justice” 1965 *UCLA Law Review* 12 at: https://heinonline.org/HOL/Page?handle=hein.journals/uclalr12&div=34&q_sent=1&asa_token=ojmR4bvLv-MAAAAA:robnuBjuOxLRaYBaprfMR0cM1mcsa_ggsVvXBkm1jrZPoPrKWxWixSPbeYsrCCtNvf7wkCkyitg&collection=journals [Accessed November 2022].
- Kaersvang, D “Equality Courts in South Africa: Legal Access for the Poor” 2008 *The Africa Issue* (15) 4 at <https://quod.lib.umich.edu/j/jii/4750978.0015.203/--equality-courts-in-south-africa-legal-access-for-the-poor?rqn=main;view=fulltext>. [Accessed 15 November 2022]
- Sarkin, J “Can South Africa afford justice? The need and future of a Public Defender system” 1993 *Stellenbosch Law Review* (4) 264-265 at https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/stelblr4&id=267&men_tab=srchresults [Accessed 29 July 2022]
- StatsSA “Community survey 2016 in brief” 2016 website at <https://www.statssa.gov.za/publications/03-01-06/03-01-062016.pdf> [Accessed 15 November 2022]
- StatsSA “Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015” 2017 website at <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>. [Accessed 15 November 2022]
- Stewart, L “Resource Constraints and a child’s right to legal representation in civil matters at state expense in South Africa” *International Journal of Children’s Rights* 19 (2011) 295-296 at <https://web-s-ebSCOhost-com.ezproxy.iielearn.ac.za/ehost/pdfviewer/pdfviewer?vid=4&sid=ccf3f6eb-d529-4746-a3a9-b3777cef7052%40redis> [Accessed at 15 November 2022]
- Van As, H “H “Taking Legal Aid to the people: Unleashing local potential in South Africa” 2005 *Obiter* (26) 188 at <https://journals.co.za/doi/epdf/10.10520/EJC85126> [Accessed 15 November 2022]

Internet Resources

- Camilleri-Cassa, F. Aquilla, K 2017 “*Legal Research Methods*” website at <https://timesofmalta.com/articles/view/Legal-research-methods.642262> [Accessed 15 November]
- Department of Justice “Introducing the constitutional right to equality (Section 9 of the Constitution, 1996)” 2022 website at https://www.justice.gov.za/eqcact/eqc_main.html#:~:text=Does%20one%20have%20to%20pay,to%20pay%20any%20court%20fees. [Accessed 15 November 2022].

- Justic.gov.za. 2009 “Uniform Rules of Court” website at <https://www.justice.gov.za/legislation/rules/UniformRulesCourt%5B26jun2009%5D.pdf> [Accessed 15 November 2022]
- Justice.gov.za. 2010 “Rules regulating the conduct of the proceedings of Magistrates’ Courts of South Africa” website at https://www.justice.gov.za/legislation/notices/2010/20100823_GG33487_NoticeR740_civil-jurisdiction-rules.pdf [Accessed 15 November 2022].
- Justice.gov.za. 2020. “*South Africa’s provinces*” *South African Government*. website at: <https://www.gov.za/about-sa/south-africas-provinces> [Accessed 15 November 2022].
- Legal Aid South Africa “How it works” 2022 website at <https://legal-aid.co.za/how-it-works/>. [Accessed 15 November 2022]
- Tech4Law.co.za. 2010. “*The South African Law Firms Hourly Rate Survey Results*” - Tech4Law. website at: <https://www.tech4law.co.za/business/efficient-business-process-d50/the-south-african-law-firms-hourly-rate-survey-results/> [Accessed 15 November 2022].