

FEATURE

Legal Aid Bodies and Access to Justice in South Africa

Sithuthukile Mkhize

Legal aid bodies serve the purpose of making legal services more accessible to poverty-stricken individuals seeking access to justice. In South Africa, those unable to afford the benefit of their own legal representatives constitute, by far, the majority of the population. The day-to-day issues they grapple with include matters related to domestic violence, protection from harassment, spousal and child maintenance, divorce proceedings, and small monetary claims; their needs also extend to criminal matters of various kinds.

Indeed, the list is endless, and the role played by legal aid bodies in assisting less-fortunate individuals is significant – such individuals are entirely reliant on legal aid bodies to fight for their causes. The question, then, is: How is it even possible for legal aid bodies to handle all these cases if they lack the capacity, resources and, sometimes, the competence to do so?

This article reflects on shortcomings in the functioning of the Legal Aid Board in South Africa. It identifies the source of the shortcomings and then provides insight into how they could be overcome in the interests of ensuring proper access to justice for poor litigants.

Background

Legal Aid South Africa ('Legal Aid SA') is an independent statutory body established in terms of the Legal Aid Act 39 of 2014 ('the Act'). Section 34 of the Constitution of South Africa grants everyone the right to access the courts and have any legal dispute resolved in a court of law, while the Act makes it mandatory for Legal Aid to render its services and to do so at state expense.

Moreover, the United Nations Sustainable Development

Goals 2030 (SDGs) – specifically goal 16(3), which envisages peace, justice and strong institutions – provides a further mandate to institutions such as Legal Aid SA to fulfil their role of ensuring the provision of access to justice. SDG 16(3) requires countries to 'have effective, fair and accessible laws and justice systems that ensure security and protection for all people and enable meaningful avenues of redress for criminal and civil wrongdoing'. This entails that institutions such as Legal Aid SA have to ensure that the rule of law is upheld by availing access to justice to qualifying individuals.

The importance of Legal Aid SA's role cannot be stressed enough. In its most recent annual report (2018–2019), it reported that it had handled a total of 416,203 new matters in the year, with similar trends in evidence in preceding years. This highlights not only its significance but the high demand for legal services among indigent persons in South Africa.

However, Legal Aid SA's mandate, as provided for on paper in the Constitution, the enabling Act, and, at an international level, SDG 16(3), is unfortunately not a lived experience on the ground for those who utilise its service. This can be attributed to the various shortcomings that the body faces and which are outlined below.

Shortcomings of Legal Aid South Africa

1. Lack of resources and financial capacity

The first, most obvious, obstacle that hampers Legal Aid SA are its limited resources and financial capacity. One may argue that while this is a common problem among state institutions in South Africa, Legal Aid SA is such an important body that its case ought to be different. It provides the most vulnerable members of society, who are often the most exploited, an opportunity not only to access justice but have their voices heard and ensure that their basic human rights under the Constitution's Bill of Rights are realised.

Statistics in reports show that, at least in the past three financial years, the budget allocated to Legal Aid SA has been wholly insufficient. The budget is regulated by the Public Finance Management Act (PFMA 1999), with Legal Aid SA listed under schedule 3A of this statute. In the 2015–2016 financial year, Legal Aid was allocated approximately R1.7 billion, of which it exhausted 99.1 per cent of it (Legal Aid SA 2015–2016). Similar trends are seen in the preceding



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financial years: the budgetary allocation is largely exhausted but sees very little increase year on year. It is clear from the statistics that the rough average of R1.8 billion allocated each year does not serve Legal Aid South Africa's expenditures to capacity.

According to the Parliamentary Portfolio Committee on Justice and Correctional Services and Legal Aid SA's 2017/2018 annual report, the office received a slightly higher budget that year than in the one before. As a result, it handled a total of approximately 767,656 cases, of which 426,617 were new matters.

Legal Aid SA's budget is not enough to meet the operational capabilities required of it. As at 31 March 2018, its staff complement was at about 2,700 members. Its legal staff, including paralegals, account for 79.3 per cent of the office, with only 64 legal offices across the country. When looking at the number of new matters taken on in the 2017/2018 financial year, nationwide this number is not commensurate with its staff numbers: in other words, there is a vast disproportionality between the work done by the office and its number of employees. Indeed, it would seem that much more could be done with only a slight increase in the staff complement.

The limited staff capacity within the office speaks directly to the insufficient resources and funding allocated to it – a situation which, it seems, will only get worse. The budget in 2018–2019 decreased by 5.5 per cent, with further reductions anticipated in coming years, all of which will undoubtedly aggravate this institution's capacity constraints experienced by legal aid.

This article therefore recommends, in its conclusion, that the government needs to reflect seriously on the current situation, seeing as continuing budgetary reductions will lead inevitably to further denial of access to justice.

2. Lack of competent staff members

Whilst the quantity of work carried out by Legal Aid SA is important, the quality of its legal services are equally important. The fact that these are offered free of charge

to the poor does not mean they should be of any lesser quality than paid-for services – if they were so, this would be an injustice not only to the poor but to the taxpayers who contribute to government revenue.

It has become evident that Legal Aid SA has rejected numerous applications for legal aid not because the cases lack merit or prospect of success but because, in my view, there is a lack of competent staff members within the office. In my experience of working in public interest law firms (which operate as law clinics), I have seen on numerous occasions people seeking pro bono assistance in legal matters and having Legal Aid SA shut its doors on them for ‘lack of prospect of success’; when I have assessed the same matters that were apparently rejected for lack of merit, this seems not to have been the case. In most instances where we have been unable to take on a matter (for lack of human or resource capacity), we would have had to conduct successful referrals to alternative organisations.

It is important that Legal Aid’s staff are sufficiently and constantly trained so that their skills are upgraded and they are fully equipped to deal with various matters. It would also appear (from my experience) that most of the matters rejected are civil matters. Although Legal Aid has a civil department, it seems that at the moment this unit is especially under-equipped.

The handling of criminal law matters is also questionable. In interviews with a few people who have used Legal Aid SA’s services, they have generally said that the services offered have been unsatisfactory. They have reported that in most occasions Legal Aid has advised people to admit guilt or plead guilty even where there is little or no evidence which proves their guilt. This has often left people with criminal records and unnecessary prison sentences where this could easily have been avoided if quality legal services were provided. In domestic violence matters, Legal Aid clients (especially women) are often advised to settle the matter by negotiating with their abusive partners. Maintenance and divorce matters often follow the same trend.

The more matters are rejected for lack of competence, the greater the miscarriage of justice to the poor. It is commendable that, as a developing country, South Africa is in a position to ensure the provision of free legal services to those who qualify; however, the



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government needs to invest sufficiently in the office to ensure that its services are not only of sufficient quantity but, equally, of sufficient quality. In this way, the government would be able to restore the deteriorating confidence and trust in the Legal Aid office.

3 Delay in case approvals

Legal Aid SA’s case intake requires that applicants follow an application procedure that leads eventually to an approval process by the office. Depending on the nature of the case, on the documents that have to accompany the application, on the steps to be taken in acquiring these documents, and Legal Aid’s own internal processes, this approval process can be lengthy; as a result, it often causes delays in acquiring legal services.

A delay in acquiring legal representation could be so severe in certain instances that one forfeits his or her legal claim due to the time restrictions prescribed by the court rules as well as various pieces of legislation. It is common for a layperson, who lacks an understanding of the law and its processes and who may even be illiterate, to fail to respond to legal papers within the prescribed time limits or to delay seeking legal representation, consequently losing his or her legal claim. Although one may argue that court rules do make provision for an application for condonation (in which the court is asked to excuse a

litigant for failing to abide by prescribed time limits), it is clearly preferable that a person access legal services as soon as reasonably possible and without unnecessary delay.

In view of this, Legal Aid SA's approval process should be more efficient and not require clients to wait at length for their matters to be taken on. It ought to be simple, easy and accessible. It should also recognise that poor litigants, who may be illiterate and hail from remote areas, should not have to endure lengthy application and approval processes to gain access to justice.

Unnecessary delays can, and often do, result in justice's being delayed and eventually denied, as is demonstrated in *Mphukwa v S* (2012). In this criminal case, the magistrate's failure to explain to the accused his right to legal representation – specifically, his right to legal representation at the state's expense – was compounded by other delays caused by the clerk of the same court and resulted in the accused's appeal application being delayed for at least seven years. When it eventually heard his application, the High Court described this as a grave injustice.

A contributing factor was the poor administration of justice on the part of the state. It is therefore safe to conclude that the effects of poor administration of justice by institutions of justice can have dire consequences for litigants, especially indigent, illiterate ones who, as in *Mphukwa*, have little means of affording legal representation and are heavily reliant on bodies such as Legal Aid SA. For Legal Aid SA to be able to render efficient services to the poor, efficient systems need to be in place, along with greater financial resources.

Recommendations

In the light of these shortcomings, the first, most significant recommendation is that the state allocate a larger budget to Legal Aid SA to enable it to strengthen its resources, particularly its human resources. The funds can and should be sourced at



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the national level by the national treasury. There are creative ways of doing so, including by absorbing legal costs in favour of state organs and directing a portion of those funds to Legal Aid SA, as well as by reducing the funding of the judicial commissions of inquiries that have rapidly emerged in recent years. Funding arising as a result of personal costs orders against individuals employed by government should also be (in part) directed to Legal Aid SA's budget in each financial year.

Parliament, through the justice portfolio committee, ought to be active in finding ways to ensure that Legal Aid's budget is either constantly increasing or at least consistent (in that it does not depreciate). There are, in addition to what is suggested above, further creative mechanisms for channeling greater funding to Legal Aid SA. These include reviewing the entire Department of Justice budget to reprioritise funds and assign them to institutions where the need is greater; implementing a performance- and demand-based budget within the various agencies in the Department; and minimising the risk of adverse court orders against Legal Aid SA.

The latter would entail investing in the training

and development of practitioners in the office and setting strict criteria for appointing external legal practitioners to ensure that competent and professional practitioners are employed. This would result in a better-performing office, which in turn would be likely to attract more funding. Ensuring diversity in the funding of the office is another way to increase its resource bases. This would entail applying for funding from the private sector to supplement funds from the public sector. Parliament could also engage with Legal Aid SA and other stakeholders, including civil society, in a campaign to increase the allocation of funds to the office.

In this regard, Legal Aid SA's integrated annual report for 2017–2018 reveals that this was the seventeenth consecutive year in which it received an unqualified audit opinion. Such a record of clean audits stands it in good stead for attracting funding as this demonstrates that the money is very unlikely to be mismanaged.

Legal Aid's budget could and should be increased without interfering in the budgets of other institutions in the justice and correctional services portfolio, which may be in equal need of additional funding. The National Prosecuting Authority and Chapter 9 institutions such as the Human Rights Commission and Public Protector face similar budgetary constraints. Their work is also important, so the idea is not to eat into their budgets but to find innovative ways of increasing Legal Aid SA's budget.

Legal Aid SA also requires intensified skills development programmes to improve its performance. These programmes would again require increased budgetary allocations, but there are other, innovative ways too in which skills can be acquired. One obvious suggestion would be an exchange programme among organisations, specifically those practising as law clinics, in which Legal Aid SA employees are placed in law clinics and pro bono organisations that provide legal services to the less fortunate. This would encourage diversity in approach to legal issues, as well as contribute to career growth. Such a programme would be a win-win situation for the organisations involved, and, given the practicality of the skills development involved, is likely to be more beneficial to Legal Aid



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staff than only attending seminars and courses.

The best place to start in implementing the exchange programme would be with short-term employees such as candidate attorneys. This would not only diversify their training regime as aspiring attorneys but be to the benefit of the Legal Aid office, particularly if the same individuals were retained by the office after completing their two-year training stint.

Constant theoretical training is also a component of skills development. Legal aid employees should attend frequent training programmes offered by academic institutions and the Law Society of South Africa. There are also many other skills development programmes, offered pro bono, that would be beneficial to the office.

Internal skills development, too, is very important. This relates to the transfer of skills within the Legal Aid office. If this is already in place, it should be undertaken more frequently and also made available to employees across the board.

Forming critical partnerships between legal aid and other law clinics is another essential component of skills development, over and above the suggested external and internal 'exchange programmes'. Partnerships between organisations could explore various collaborative efforts, such as hosting seminars, having debates on various issues, and setting up information-sharing channels. This is also a tool that would entail less resource-shedding by the office.

Legal Aid SA's current 'impact litigation programme', which allows for the appointment of external attorneys to assist indigent people, is an excellent way to enhance access to justice for indigent persons. The recommendation is that more funds be allocated to this programme. The increase in funding would not only widen its reach to the indigent but enable development of the law, which could indirectly reduce the need for new legal claims, especially by the indigent. The programme is beneficial too in that it increases human capacity within the office.

Legal Aid SA could also invest in improved case-approval systems to address case-approval delays. Improving case-approval systems would require more funding and hence an increased budget, but once again there are creative ways in which the office could improve its systems without having to deplete an already over-stretched budget. For instance, it could collaborate with other state bodies and institute uniform systems for ascertaining people's earning capacities and/or whether or not they qualify for legal aid assistance in terms of the means test.

The office could also trim the red tape on its internal 'signing-off' procedures such that the process does not require too many approval signatures before a case is taken on. In addition, it could conduct more outreach workshops for the indigent to educate them about the importance of acting expeditiously when served with legal documents.

As a further means of improving its human resources capacity, the office should form partnerships with university law clinics in order to use the services of senior law students. The students could be deployed in various ways so as to increase the office's capacity. Although the office would have to provide a minimum of training, this could go a long way in assisting it – nor would it necessarily require any funding from the office to remunerate the students, albeit that in time the programme could be restructured to allow for stipends to be paid to the students.

Conclusion

The Legal Aid office is an extremely important one that has the potential to do much more in fast-tracking access to justice. Engagement with

stakeholders, collaborative efforts, and innovative thinking are necessary both to improve its functioning and, most importantly, increase its revenue. Parliament is urged to initiate discussion with Legal Aid SA and key stakeholders in order to find the urgent solutions that are needed to improve its performance.

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