



**MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA**

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Dear Mr Ximbi

LEGAL AID SOUTH AFRICA ACT, 2014: DRAFT REGULATIONS

Currently the policies and procedures for the provision of legal aid are set out in the Legal Aid Guide that is issued by Legal Aid South Africa, in terms of the (now repealed) Legal Aid Act, 1969 (Act 22 of 1969).

Section 23(1) and (2) of Legal Aid South Africa Act, 2014 (Act No. 39 of 2014) (the Act) provides:

- “(1) The Minister must, after receipt of recommendations of the Board of Directors (the Board), make regulations relating to—
- (a) the types of matters, both civil and criminal, in respect of which Legal Aid South Africa—
 - (i) provides legal aid;
 - (ii) does not provide legal aid; and
 - (iii) provides limited legal aid and the circumstances in which it does



- so;
- (b) the requirements or criteria that an applicant must comply with in order to qualify for legal aid, as well as the terms and conditions on which such legal aid is made available to the applicant;
 - (c) the policy relating to the approval or refusal of legal aid, the termination of legal aid and appeals against such refusal or termination of legal aid; and
 - (d) any matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Act.
- (2) Any regulations made under subsection (1) must, before publication thereof in the *Gazette*, be tabled in Parliament by the Minister for approval.”.

Section 24(1) of the Act provides:

“The Board must compile, amend and approve a Legal Aid Manual and must at least every second year review the Legal Aid Manual relating to—

- (a) the procedures in terms of which applications for legal aid are administered;
- (b) the systems and methods whereby legal aid is delivered;
- (c) the requirements and criteria for the accreditation of private legal practitioners who render legal services to legal aid recipients on the instructions of Legal Aid South Africa and the terms and conditions subject to which such instructions are allocated to accredited legal practitioners, including the fees and disbursements that are payable by Legal Aid South Africa to accredited legal practitioners, taking into consideration the salary scales applicable to the public service; and
- (d) the regulation of any other administrative matter which the Board deems necessary for the effective and efficient functioning of Legal Aid South Africa.”.

The current Legal Aid Guide must therefore in terms of the Act be replaced by Regulations and a Legal Aid Manual.

The Act came into operation with effect from 1 March 2015. Section 26 provides for transitional arrangements and subsection (6)(a) provides that the existing Legal Aid Guide remains in force until it is withdrawn and replaced by regulations and the Legal Aid Manual.



In terms of section 26(6)(b) the first Regulations and Legal Aid Manual had to be published within 24 months after commencement of the Act, in other words before 1 March 2017. However, due to circumstances beyond the Department or my control the Regulations were not finalised before that date. The finalisation of the Regulations is therefore a matter of urgency.

I intend to submit to Parliament the Regulations as required by section 23(2) of the Act soon. However, Parliament may only approve the Regulations but not amend it, which means that if Parliament wishes to amend the Regulations I will have to retract it and resubmit the amended version.

As time is of the essence in this matter it would be appreciated if the Committee could before I formally submit the Regulations to Parliament for approval consider it to avoid a lengthy amendment process.

Your co-operation is appreciated.

With kind regards

A handwritten signature in black ink, appearing to read 'T M Masutha', written over a horizontal line.

T M MASUTHA, MP (Adv)

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Date: 2017.03.09

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**No. R.****2017****LEGAL AID SOUTH AFRICA ACT, 2014 (ACT No. 39 OF 2014): REGULATIONS**

The Minister of Justice and Correctional Services has, under section 23(1) of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), after receipt of recommendations of the Board of Directors, made the regulations in the Schedule.

SCHEDULE**CLASSIFICATION OF REGULATIONS**

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Definitions

1. In these regulations any word or expression to which a meaning has been assigned in the Act has the meaning so assigned to it and, unless the context otherwise indicates—

“assets” includes any—

- (a) movable or immovable property;
- (b) corporeal or intellectual rights to property; and
- (c) item, property or money that a legal aid applicant has received, or will in the future be entitled to receive, from the estate of any deceased person: Provided that this provision will also apply if—
 - (i) no distribution account for the deceased estate has yet been drawn up;
 - (ii) the legal aid applicant or his or her spouse has not yet taken transfer of, or received delivery of, the item, property or money; or
 - (iii) the item, property or money is held in the name of the estate or in the name of a trust as contemplated in regulation 28(3);

“child” means a person under the age of 18 years;

“Children’s Act” means the Children’s Act, 2005 (Act No. 38 of 2005);

General policy

2. (1) Legal Aid South Africa may provide legal aid in a criminal case to any accused person charged before a South African court who qualifies for legal aid in terms of these regulations.

(2) Legal aid is only available to natural persons for advice and for legal representation.

(3) Legal Aid South Africa may provide legal aid in a civil matter to—

- (a) a child who is physically resident in the Republic; or
- (b) a person who qualifies for legal aid in terms of these regulations, and who is —
 - (i) physically resident in the Republic; and
 - (ii) a citizen or permanent resident of the Republic.

(4) Legal Aid South Africa may in exceptional circumstances grant legal aid if the issues in a case are justiciable in a court of the Republic, but the legal aid applicant is not physically resident in the Republic.

(5) The requirement that a person must be physically resident in the Republic does not apply to cases pertaining to asylum seekers and the Hague Convention.

- (d) dealing in liquor without a licence;
- (e) drunken driving;
- (f) driving under the influence of alcohol or drugs;
- (g) overloading of a vehicle as provided for by the National Road Traffic Act, 1996 (Act No. 93 of 1996);
- (h) reckless or negligent driving; and
- (i) any attempt to commit any of the offences in this regulation.

(4) A legal aid applicant who is charged in the district magistrate's court for the following common law and statutory offences may be granted legal aid:

- (a) Abduction;
- (b) administering poison or other noxious substances;
- (c) arson;
- (d) assault with intention to cause grievous bodily harm or common assault;
- (e) bigamy;
- (f) bribery;
- (g) compounding;
- (h) culpable homicide;
- (i) defeating or obstructing the ends of justice;
- (j) extortion;
- (k) forgery or uttering;

- (a) criminal defamation;
- (b) public indecency; and
- (c) contempt of court:

Provided that Legal Aid South Africa has a general discretion to grant legal aid in these cases where—

- (i) resources permit; and
- (ii) Legal Aid South Africa is convinced that the accused person will experience substantial injustice if not legally represented.

(6) A legal aid applicant who is charged in the district magistrate's court for any statutory offence relating to the following matters may be granted legal aid:

- (a) Administration of justice;
- (b) animal and nature conservation;
- (c) children;
- (d) corruption;
- (e) counterfeiting currency;
- (f) dealing in unwrought precious metals or uncut gemstones;
- (g) escaping from custody or obstructing the police;
- (h) persons with mental disabilities;
- (i) squatting;
- (j) vehicle theft;
- (k) witchcraft; and

(10) An alleged offender against whom an application in terms of section 31 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), is brought may receive legal aid for legal representation at such hearing.

(11) Where the alleged offender referred to in subregulation (10) is receiving legal aid for the trial, the legal aid instruction includes legal representation at the hearing referred to in subregulation (10).

(12) Where the alleged offender referred to in subregulation (10) has not yet been charged or is not already receiving legal aid for the trial, he or she must apply for legal aid for the appointment of a legal representative to appear on his or her behalf at the hearing of the application referred to in subregulation (10).

(13) A child is entitled to legal representation at a preliminary enquiry contemplated in the Child Justice Act, 2008 (Act No. 75 of 2008).

(14) Legal Aid South Africa may not refuse to grant legal aid to a child who is charged for an offence in a child justice court contemplated in the Child Justice Act, 2008.

Witnesses

- (a) an application for leave to appeal to the trial court that sentenced the convicted person;
- (b) an application for leave to appeal, or a petition for leave to appeal, to a higher court if leave to appeal is refused by the trial court; and
- (c) an appeal, if leave to appeal is granted as contemplated in paragraph (a) or (b), or when the convicted person has an automatic right of appeal.

(3) Legal aid for any other appeal may only be granted if Legal Aid South Africa is of the opinion that there are good prospects of success in further proceeding with an appeal.

(4) If a convicted person applies for legal aid for—

- (a) an application for leave to appeal;
- (b) a petition for leave to appeal; or
- (c) for a condonation application for an appeal that is out of time,

legal aid may be granted for both the application for leave to appeal and the condonation application, or for the appeal itself, subject to the provisions of subregulations (1)(c), (2) and (3).

(5) If a convicted person has received legal aid for the trial he or she does not have to re-apply for legal aid for an appeal, once leave to appeal has been granted.

(2) Legal Aid South Africa may, subject to subregulation (1), provide legal aid for the purpose of compiling a merit report, before any steps are taken, except where steps are necessary to prevent prescription, default judgment or lapsing of the litigants' rights.

(3) A merit report for a civil matter is not required in respect of the following matters:

- (a) Divorces;
- (b) eviction cases, where assistance can be granted to negotiate with the owner of the property concerned to allow the legal aid recipient to stay on the property for a period of time;
- (c) domestic violence matters to protect the best interests of a child;
- (e) the administration of estates; and
- (f) maintenance.

(4) When legal aid has been granted to a person for a case in a court of the Republic and evidence is to be heard on commission outside of the Republic, Legal Aid South Africa may grant legal aid for attendance by one or more legal practitioners if—

- (a) Legal Aid South Africa has sufficient funds available, and
- (b) Legal Aid South Africa is of the opinion that good reasons exist.

(5) Legal Aid South Africa may not provide legal aid for litigation in any foreign court.

court contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), and to impact legal services.

(2) Legal aid may not be granted for the following types of cases:

- (a) A financial enquiry in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);
- (b) an administration order in terms of section 74 of Magistrates' Courts Act, 1944;
- (c) the administration of an estate, subject to the provisions of regulation 23;
- (d) the voluntary surrender or sequestration of an estate;
- (e) the liquidation of a legal person;
- (f) an application for the rehabilitation of an unrehabilitated insolvent;
- (g) debt review; and
- (h) an action claiming damages on the grounds of —
 - (i) defamation;
 - (ii) infringement of dignity, excluding infringement as a result of adultery; and
 - (iii) infringement of privacy:

Provided that legal aid may be granted to defend these kinds of actions.

(3) Subject to the provisions of regulation 23(8), legal aid may not be granted for any action that can brought in a small claims court in terms of the Small Claims Courts Act, 1984 (Act No. 61 of 1984): Provided that Legal Aid South Africa may grant legal aid for a claim that does not exceed the monetary jurisdiction of the small claims court by more than 50 percent.

(9) Legal aid may not be granted for a civil matter where the legal aid applicant is entitled to legal representation at the expense of the state attorney or a government department.

(10) Legal aid may not be granted for the bringing of a claim against the Road Accident Fund, established by the Road Accident Fund Act, 1996 (Act No. 56 of 1996), or any other personal injury claim, subject to the provisions of regulation 23.

(11) Legal Aid may not be granted for a hearing before an administrative tribunal: Provided that legal aid may be granted to review a decision of an administrative tribunal.

(12) A legal aid applicant may only receive legal aid for one civil matter at a time, unless Legal Aid South Africa approves that legal aid may be granted for more than one matter, if it satisfied that—

- (a) there is a good prospect that the cases will succeed; and
- (b) the cost of the cases will be justified by the benefit to the legal aid applicant.

Civil appeals

12. Legal aid may only be granted for a civil appeal if Legal Aid South Africa is satisfied that—

- (a) there is a good prospect that the appeal will succeed; and
- (b) the cost of the appeal will be justified by the benefit obtained to the legal aid applicant.

- (a) legal representation in the Labour and Labour Appeal Courts;
- (b) assistance to farm workers in exercising their rights under the Labour Relations Act, 1995 (Act No. 66 of 1995), as provided for in section 8(3) of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997); and
- (c) assistance to enforce an award by the Commission for Conciliation, Mediation and Arbitration established in terms of the Labour Relations Act, 1995, except where there is no prospect of recovery.

(2) Legal Aid South Africa may not grant legal aid for legal representation at conciliation and arbitration proceedings in the Commission for Conciliation, Mediation and Arbitration or bargaining councils established in terms of the Labour Relations Act, 1995.

Divorce and family law cases

15. (1) If legal aid is granted for the bringing of a divorce action, the action must be instituted in the court for a regional division established in terms of the Magistrates' Courts Act, 1944: Provided that Legal Aid South Africa may grant approval for the institution of the action in another court, after taking the following factors into consideration:

- (a) Cost effectiveness;
- (b) logistical factors, including the legal aid applicant's distance from the court; and
- (c) the interests of the legal aid applicant.

(2) Legal Aid South Africa may not grant legal aid for the following matters:

16. Legal Aid South Africa may grant legal aid for the obtaining of a specialist or expert opinion.

Land rights

17. (1) Legal Aid South Africa may grant legal aid for cases under the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) if the Land Claims Commissioner —

- (a) makes funds available to Legal Aid South Africa to fund the matter; or
- (b) is the opposing party to the litigation or possible litigation.

(2) Legal aid may not be granted for the claim lodgement and investigation under the Restitution of Land Rights Act, 1994.

Cases relating to the Land Reform (Labour Tenants) Act, 1996, the Extension of Security of Tenure Act, 1997 and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1988

18. (1) Legal aid may be granted to persons affected by the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997) and the Prevention of Illegal Occupation and Eviction from Land Act, 1998 (Act No. 19 of 1998): Provided that the granting of legal aid in terms of this regulation is subject to the making available of funds by the relevant government department.

(2) Legal aid may be granted to to a defendant or respondent who is an occupier as contemplated in the Acts referred to in subregulation (1), if Legal Aid

Equality court cases

21. Legal aid may be granted for matters governed by the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000).

Civil matters involving children

22. (1) Legal aid may be granted to a child who may suffer substantial injustice in a civil case, after consideration of the following factors:

- (a) The seriousness of the implications for the child of the issue and whether the child's constitutional rights or personal rights are at risk;
- (b) the complexity of the relevant law and procedure;
- (c) the financial situation of the child or the child's parents or guardian; and
- (d) the child's chances of success in the case.

(2) Where a child is the respondent or defendant in a civil matter, the merits of the civil matter are irrelevant and a child may be granted legal aid.

(3) If a child applies for legal aid to bring civil proceedings, Legal Aid South Africa must consider the merits of the case and the child's prospects of success.

(4) The means test is applied when the legal aid applicant is a child, subject to the following provisions:

- (a) If the child is not assisted by his or her parent or guardian, the child's means are taken into account;

(4) Legal aid may be granted to a child to institute a —

- (a) claim against the Road Accident Fund, established by the Road Accident Fund Act, 1996 (Act No. 56 of 1996); and
- (b) to institute a personal injury claim.

(5) Legal aid may be granted to a child in a domestic violence matter where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(6) Legal aid may be granted to an unaccompanied foreign child as contemplated in the Refugees Act, 1998, where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(7) Legal aid may be granted to a child in a matter brought in terms of the Protection from Harassment Act, 2011, where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(8) Legal aid may be granted to a child for a money claim that exceeds the small claims court monetary jurisdiction by more than 50 percent, where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(9) Legal aid may be granted to a child if it is required for the appointment of a curator *ad litem* or a curator *bonis*.

(c) cannot be located; or

(d) is deceased,

as contemplated in section 26 of the Children's Act.

(5) Legal aid may be granted to any person to apply to the High Court, a regional court or a children's court, as the case may be, for an order —

(a) suspending for a period;

(b) terminating;

(c) extending; or

(d) limiting,

any or all of the parental responsibilities and rights which a specific person has in relation to a child, as well as, if appropriate, an application for the assignment of contact and care over that child to the legal aid applicant, as contemplated in sections 23 and 28 of the Children's Act.

(6) Legal aid may be granted to any person to apply to the court for the adoption of a child, as contemplated in the Children's Act.

(7) Legal aid may be granted to any child to obtain a legal representative to represent that child in all applications under the Hague Convention, if the requirements of section 55 of the Children's Act are met.

Matters relating to the Mental Health Care Act, 2002

Qualifying for legal aid and means test

27. (1) In order to qualify for legal aid in either civil or criminal cases, the legal aid applicant's gross monthly income less tax and net assets must fall within the parameters set by the means test contemplated in subregulations (2), (3), (4), (5) and (6) before legal aid may be granted.

(2) An applicant who applies for legal aid for a criminal case and has a net monthly income, after deduction of income tax, of R5 500 a month, or less, may qualify for legal aid in that criminal case irrespective of whether the applicant has a spouse or is a member of a household.

(3) An applicant who applies for legal aid for a civil case and who does not have a spouse or is not a member of a household and has a net monthly income, after deduction of income tax, of R5 500 a month, or less, may qualify for legal aid for that civil matter.

(4) An applicant who applies for legal aid for a civil case and who has a spouse or the applicant is a member of a household and whose household has a monthly income, after deduction of income tax, of R6 000 a month or less, may qualify for legal aid for that civil matter.

(5) A legal aid applicant or an applicant who is a member of a household who does not own immovable property and has net movable assets of less than R100 000 in value may qualify for legal aid for a civil or criminal matter.

(6) A legal aid applicant or an applicant who is a member of a household who owns immovable property and has net immovable assets and movable assets in value of up to R500 000, may qualify for legal aid for a civil or criminal matter:

(6) A legal aid applicant must provide proof that he or she is a natural person who is indigent as set out in these regulations.

(7) Legal Aid South Africa may conduct a forensic investigation of the financial circumstances of the applicant or recipient before legal aid is granted or after legal aid has been granted by itself or through a service provider.

No right to choose legal practitioner

29. No legal aid applicant has the right to choose the legal practitioner who will be instructed to represent him or her.

Exceeding the means test and discretion

30. (1) Legal Aid South Africa has the discretion to authorize fully subsidized legal aid for any applicant who exceeds the means test by up to R3 000 a month in respect of gross income for all matters and R100 000 in respect of net assets for all matters.

(2) Legal Aid South Africa may consider the application of any person who does not qualify for legal aid in terms of the means test under regulation 27(1) and (2), but who subjectively judged, is indigent and deserves sympathetic consideration on the grounds of exceptional or other circumstances: Provided such application otherwise qualifies for legal aid in terms of regulations 3(1) and 10(1).

Partially subsidized legal aid

31. (1) If a legal aid applicant does not qualify for legal aid in terms of the means test for a criminal matter, Legal Aid South Africa may provide partial legal aid and require from the legal aid applicant to contribute to the cost of the legal aid.

parameters of the means test, that court order must provide for a contribution in accordance with this regulation.

Termination of legal aid

33. (1) Legal Aid South Africa may terminate a legal aid recipient's legal aid on account of the conduct of the legal aid recipient, which may include that the legal aid recipient —

- (a) ceases to qualify under the means test;
- (b) fails to appear in court timeously on the appointed day without giving a good reason for not appearing and a warrant for arrest has been issued;
- (c) unreasonably refuses to accept a settlement;
- (d) does not timeously comply with a contribution order as contemplated in regulation 32;
- (e) terminates the mandate of the instructed legal practitioner unreasonably and without good reason; or
- (f) makes it impossible for the instructed legal practitioner to carry out his or her mandate.

(2) If legal aid is terminated Legal Aid South Africa may instruct a further legal practitioner after consideration of the facts of the case.

(3) Legal aid may be terminated where the instructed legal practitioner withdraws or has his or her mandate terminated by Legal Aid South Africa for reasons that may include the following:

- (a) Ethical reasons;
- (b) the legal practitioner ceases to practise;
- (c) the legal practitioner ceases to be a Legal Aid South Africa accredited legal aid practitioner;

- (c) the legal costs involved would be out of proportion to the relief that the legal aid applicant wishes to get; or
- (d) considering all the circumstances of the case, legal aid should not have been granted for financial or other reasons.

Refusal of legal aid

34. (1) When an application for legal aid has been refused the legal aid applicant has the right of appeal according to processes as determined in the Manual.

(2) Legal Aid South Africa must inform the legal aid applicant in a criminal matter of his or her right to apply to the court for an order that he or she must be provided with legal representation at State expense and that, before that order is considered, the court will refer the issue for evaluation and report by Legal Aid South Africa under section 22 of the Act.

Impact legal services

35. (1) Legal Aid South Africa may undertake or fund litigation or other legal work which has the potential to positively affect the lives of a larger number of indigent persons other than the person or persons to whom legal services are rendered directly, which matter—

- (a) may establish a legal precedent, jurisprudence or clarify aspects of the law that will be followed in dealing with indigent persons in similar matters;
- (b) may have the potential of resolving a large number of disputes or potential disputes, and obtain wider collective objectives; or
- (c) may improve the lives of a group of persons or a sizeable portion of a group.

39. Any legal aid instruction that was issued before the coming into operation of these regulations must be dealt with in terms of these regulations.