

# LEGAL AID BOARD

Legal Aid House  
29 De Beer Street  
Braamfontein  
Johannesburg 2017 South Africa  
e-mail: info@legal-aid.co.za



Private Bag x76  
Braamfontein 2017  
Tel: (011) 877 2000  
Fax: (011) 877 2222  
www.legal-aid.co.za

1 April 2006

## **FOR ACTION**

Regional Operations Executives, Justice Centre Executives, High Court Unit Managers, other Legal Aid Board Staff, Legal Practitioners and agent Legal Aid Officers at Magistrates' Courts.

## **FOR INFORMATION**

The Chief Justice, The President of the Constitutional Court, Judges President, The National Director of Public Prosecutions, Registrars and Bars of the Cape of Good Hope Provincial Division, Eastern Cape Division, South Eastern Cape Local Division, Northern Cape Division, Free State Provincial Division, Kwa-Zulu Natal Provincial Division, Durban and Coast Local Division, Transvaal Provincial Division, Witwatersrand Local Division, North West Division, Ciskei Division, Transkei Division and Venda Division, General Council of the Bar of South Africa, the Law Society of South Africa, the Law Societies of the Cape of Good Hope, Kwa-Zulu Natal, Free State and Northern Provinces, National Association of Democratic Lawyers, Black Lawyers' Association, Association of Independent Advocates of South Africa, The National Forum of Advocates of South Africa, The Magistrates' Commission, National Prosecuting Authority, Department of Justice, the Editor of De Rebus and the Editor of Advocate.

Dear Sir/ Madam,

## **CIRCULAR NO. 2 OF 2006**

**Amendment of paragraph 1.2 of Chapter 3: 2002 Legal Aid Guide (As Amended by Circular 2 of 2004).**

Be pleased to take notice that paragraph 1.2 of chapter 3 of 2002 Legal Aid Guide (as amended by circular 2 of 2004) is hereby amended by the substitution thereof for the following:



## **1. POLICY RELATING TO CRIMINAL APPEALS**

### **1.1 Criminal Appeals under section 35(3) of the Constitution.**

Section 35 (3) of the Constitution says:

"Every accused person shall have the right to a fair trial, which shall include the right –

.... (o) of appeal to, or review by a higher court"

The right to an appeal is an integral part of the right to a fair trial. When substantial injustice would otherwise result, the accused is entitled to legal representation at state expense to appeal. However, this does not mean that every accused who is convicted has a right to legal aid for an appeal.

### **1.2. Appeals to the High Court or the Supreme Court of Appeal**

The Criminal Procedure Amendment Act 42 of 2003 has these effects:

1.2.1 Accused persons convicted and sentenced by a magistrate on or after 1 January 2004 need to get leave to appeal before an appeal can be proceeded with.

1.2.2 Children under 14 sentenced to imprisonment (not wholly suspended) and unrepresented children under 16 sentenced to imprisonment (not wholly suspended) do not need to get leave to appeal against the judgment or sentence by a magistrate as they still retain an automatic right of appeal.

1.2.3 Accused persons convicted and sentenced before the High Court need to get leave to appeal before an appeal can be proceeded with.

1.2.4 Accused persons who wish to appeal to the Supreme Court of Appeal against dismissal of an appeal to the High Court need to get leave to appeal before an appeal can be proceeded with.

1.2.5 Section 7 of the Criminal Procedure Amendment Act does not apply to appeals pending before the High Court or Supreme Court of Appeal on

1 January 2004.

- 1.2.6 Accused persons convicted and sentenced by a magistrate before 1 January 2004, but who have not appealed before 1 January 2004, will have to apply for leave to appeal under Section 7 of the Criminal Procedure Amendment Act.

### **1.3 Substantial Injustice in Criminal Matters.**

There will be 'Substantial Injustice' in an intended criminal appeal if legal representation is not made available to the accused at state expense in a case where:

- 1.3.1 The accused is unable to afford the costs of his/her own legal representation for the appeal; and
- 1.3.2 The accused has been sentenced to imprisonment with an unsuspended portion of more than 3 months, and if given the option of a fine, the fine is unpaid 2 weeks after the date of sentence; and
- 1.3.3 Where leave to appeal has not been requested timeously and there is a reasonable chance that condonation for the late filing will be granted taking into consideration the reason for the delay in applying for leave to appeal and the chances of success on appeal; and
- 1.3.4 The accused has not exhausted all legal remedies relating to the appeal.

### **1.4 Means Test Procedure**

The means test set out in Circular 5 of 2004 shall continue to be applicable.

### **1.5 Appeals against Refusal of Legal Aid.**

#### **1.5.1 Appeal to ROE**

An applicant has the right of appeal to the ROE against the refusal of a JCE to grant legal aid.

The JCE shall inform the applicant of this right with brief reasons for refusing legal aid in writing and, if requested within 3 months of being informed of the right, the JCE shall furnish detailed reasons for the refusal of the legal aid.

The grounds of appeal must be submitted to the JCE in writing. The JCE must forward these to the ROE together with the application documents and his/her comments.

### **1.5.2 Appeal to NOE**

An applicant has the right of appeal to the NOE against the refusal, on appeal, of a ROE to grant legal aid.

The ROE shall inform the applicant of this right with brief reasons for refusing the appeal in writing and, if requested within 3 months of being informed of the right, the ROE shall furnish detailed reasons for the refusal of legal aid.

The grounds of appeal must be submitted to the ROE in writing. The ROE must forward these to the NOE together with the application documents and his/her comments.

### **1.5.3 Limitation of Appeals against Refusal of Legal Aid**

If the NOE also refuses legal aid, the legal aid applicant's internal *remedies* are exhausted. There are no further internal appeals beyond the NOE.

A dissatisfied legal aid applicant may:

- Apply for judicial relief.

### **1.5.4 NOE's Reasons**

The NOE will give brief written reasons for the decision on appeal to the applicant or his/her legal representative and if requested within 3 months after the decision was communicated to the legal aid applicant or his/her legal representative, the NOE shall furnish detailed reasons for the refusal of legal aid.

## **1.6 Timeous Prosecution of Appeals**

It is the responsibility of a legal practitioner instructed on a legal aid basis to conduct a criminal trial to:

1.6.1 Obtain the client's instruction on whether he/she wished to appeal against sentence and conviction, if the client is sentenced to more than 3 months imprisonment.

1.6.2 Obtain confirmation in writing from the client if he/she chooses not to

appeal. The confirmation must set out the time limits for appeals so that the accused is aware of this. In such circumstances Annexure 'A' hereto must be completed.

- 1.6.3 Apply for leave to appeal from the trial court, preferably in writing, immediately after sentence and within the time limits, once instructed to appeal by the client.
- 1.6.4 Forward the notice of appeal and/or Rule 49(1) Notice and power of attorney timeously, if leave to appeal is granted, to the Justice Centre from which the original instruction emanated.
- 1.6.5 Serve and file the petition for leave to appeal, or application for leave to appeal to the superior court, and the power of attorney, if leave to appeal is refused by the trial court.
- 1.6.6 Advise the Justice Centre Executive of that outcome of the application for leave to appeal together with rendering any final outcome and report.

The legal aid mandate of a practitioner is not discharged until such legal practitioner has attended to the above aspects on the instructions of the accused. The Board will not consider any account for payment until the above aspects have been attended too or the Board receives the clients instructions as per Annexure A in referred to in paragraph 1.6.2 above.

## **1.7 Legal Aid instruction on Appeal**

It is not necessary for an accused who was on legal aid for the trial to re-apply for legal aid for an appeal.

If the accused has timeously applied for leave to appeal, the JCE will liaise with the High Court Unit Manager at the superior court where the appeal is to be heard, to issue an instruction to a legal practitioner practicing at that court.

## **1.8 Accused not Previously on Legal Aid**

Where legal aid is needed for an appeal where the accused was not on legal aid during the trial, the accused will have to apply for legal aid.

## **1.9 Out of Time Appeals.**

If an accused person wants legal aid for an application for leave to appeal that is out of time, the JCE or HCUM must consider the prospects of success on a balance of probabilities in preparing any necessary condonation application.

If the accused was advised of the relevant time limits in Annexure A hereto, legal aid will only be granted in exceptional cases where the JCE or HCUM is satisfied that there are good reasons for the delay.

## **2. PROCEDURE RELATING TO APPEALS IN CRIMINAL MATTERS**

The procedures applicable to appeal in criminal matters as per Circular 2 of 2004 shall continue to apply mutatis mutandis in effecting the policy on appeals set out above save for the amendment stipulated in paragraph 1.7 above.

## **3. COMMENCEMENT**

The above amendments shall come into operation with effect from 1 April 2006.

Yours faithfully



**V N VEDALANKAR**  
**CHIEF EXECUTIVE OFFICER**

# LEGAL AID BOARD



Annexure A

## APPEALS FROM LOWER COURTS

State v..... Age of Accused:.....

Case no:..... Court:..... District/Region:.....

Magistrate:..... Date of Sentence:.....

Sentence:.....

Legal Aid Reference no:..... Justice Centre:.....

Legal Representative:.....

I.....(name)

- hereby elect not to appeal against my conviction and sentence. I realise that if I change my mind that I need to file an application for leave to appeal at the clerk of the court within 14 days of my sentence and need to apply for Legal Aid in the appeal as soon as possible
- Hereby elect to apply for leave to appeal against my
  - Conviction
  - Sentence
  - Conviction and sentence

And wish to apply for Legal Aid in the appeal. I realize that my conviction on the present crime could be replaced by a more serious conviction on appeal and that my sentence could be increased on appeal.

.....(Signature)  
Client

.....(Signature)  
Legal Representative

If the clients elects to appeal the practitioner shall:

- ✓ Obtain a completed and signed power of attorney from the client;
- ✓ bring an application for leave to appeal orally immediately after the passing of sentence or order and hand up the power of attorney or file and application for leave to appeal and the power of attorney within the prescribed 14 day period;
- ✓ Attend to the application for leave to appeal;

If the client elects not to appeal

- ✓ Send/Hand a copy of this form (completed and signed) to the relevant Justice Centre
- ✓ File this form completed and signed in your office file and close the file