

# 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

20 August 2007

## **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 Supreme Court of Appeal, 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. 1 OF 2007**

### **AMENDMENT OF LEGAL AID BOARD POLICY ON CRIMINAL APPEALS**

1. Be pleased to take notice that paragraph 1.2 of Chapter 3 of the 2002 Legal Aid Guide (as amended by Circular 2 of 2004) was amended by Circular 2 of 2006.
2. Take notice further that Circular 2 of 2006 remains in effect for prospective appellants who were sentenced on or before 31 May 2007.



3. The revised "Policy relating to Criminal Appeals" is attached hereto marked Annexure "X" and this document comes into effect from 1 June 2007 for prospective appellants who are sentenced on or after 1 June 2007.
4. The limitations contained in paragraph 1.4 of the Policy relating to Criminal Appeals need to be clarified with the courts and it is suspended from implementation until the Constitutional validity of this provision has been tested. A further circular will be issued relating to the implementation of these provisions once the necessary clarity has been obtained.

Yours faithfully



V N VEDALANKAR  
CHIEF EXECUTIVE OFFICER

## **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. It being noted that this right has to be exercised in accordance with spelt out procedures that are practical and in keeping with the overall intent of the Constitution. In a recent judgment the Constitutional Court has stated that "This Court has never held that a leave-to-appeal procedure is inevitably in breach of the requirements of the Constitution. There are practical reasons why a leave-to-appeal procedure is desirable."<sup>1</sup>.

### **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.

---

<sup>1</sup> Clause 51 Shinga v The State & Another CCT 56/06

- 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.
- 1.2.7 The Constitutional Court in the matter of M K Shinga v The State (CCT506/06) declared that various provisions of Section 309 and 309C were unconstitutional. The effect of this finding does not affect the requirement for accused convicted and sentenced in the Magistrates Courts to obtain leave to appeal from the trial court or the Judge President of the High Court where the trial court refused leave to appeal. This judgment however now requires 2 judges to consider a Petition for leave to appeal as well as for the full record of the proceedings to be submitted with the Petition. An appeal may also not be heard in chambers. An appeal must be heard in open court.

### **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 application/petition for leave to appeal and/or 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 An application/petition for leave to appeal has not been requested timeously and a period of less than one year has expired since the date of imposition of sentence; and
- 1.3.4 The accused has not been afforded the right to an appeal or review by a higher court as contemplated by the Constitution<sup>2</sup>.

### **1.4 Limitation of Right to Legal Aid**

It is necessary to limit the right to legal aid in appeals due to limited resources available to the Legal Aid Board. The right to Legal Aid in an appeal will extend to assistance with the following:

- 1.4.1 An application for leave to appeal to the trial court that sentenced the client.

---

<sup>2</sup> Clause 52 Shinga v The State & Another CCT 56/06

1.4.2 An application for leave to appeal to a Higher Court if leave to appeal is refused by the trial court.

1.4.3 An Appeal, if leave to appeal is granted in terms of 1.4.1 or 1.4.2 above.

Any further assistance with an appeal beyond what is stipulated above shall only be granted if there are chances of success with proceeding further with the appeal.

## **1.5 Timeous Prosecution of Applications for Leave to Appeal and Appeals**

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

1.5.1 Obtain the client's instruction on whether he/she wishes to appeal against his/her conviction and sentence, if the client is sentenced to a sentence as stipulated in paragraph 1.3.2 above. Clients should be actively encouraged to elect to apply for leave to appeal at this early stage.

1.5.2 Obtain the clients confirmation in writing on whether he/she chooses to appeal or not. In these circumstances Annexure "A" hereto must be completed and submitted to the relevant Justice Centre within 7 days of the date of signature thereof.

1.5.3 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.

1.5.4 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.

1.5.5 Advise the Justice Centre Executive of the outcome of the application for leave to appeal together with rendering any final outcome report and account.

1.5.6 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.

The legal aid mandate of a practitioner is not discharged until such legal practitioner has attended to all of the above aspects on the instructions of the accused. The Board will accordingly not consider any account for payment until:

- (a) The Board receives the clients instructions as per Annexure A referred to in paragraph 1.5.2 above indicating that he/she elects not to appeal; or
- (b) The application for leave to appeal is granted by the trial court; or
- (c) Where the trial court refused leave to appeal, the application/Petition for leave to appeal to the relevant court is served and filed.

## 1.6 **Out of Time Application for Leave to Appeal or Appeal**

If an accused person wants legal aid for an application/petition for leave to appeal or an appeal that is out of time, legal aid should be granted for both the condonation application as well as the application for leave to appeal

or the appeal itself, subject to the limitations as stipulated in paragraph 1.3.3 and 1.4 above.

### **1.7 Legal aid instruction on appeal**

It is not necessary for an accused that was on legal aid for the trial to reapply for legal aid for an appeal, once leave to appeal has been granted.

If an accused has been granted leave to appeal, the JCE will liaise with the High Court Unit Manager at the court where the appeal is to be heard, to instruct a legal practitioner practicing at that court to prosecute and argue the appeal.

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

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

### **1.9 Means Test Procedure**

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

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

#### **1.10.1 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.

### **1.10.2 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.

### **1.10.3 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.

#### **1.10.4 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.

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

The procedures applicable to appeals 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 1.6 above.

### **3. COMMENCEMENT**

The above amendments shall come into operation with effect from 1 June 2007 for prospective appellants who were sentenced on or after 1 June 2007.

Circular 2 of 2006 remains of full force and effect for prospective appellants who were sentenced on or before 31 May 2007 and who were not previously refused legal aid as stipulated in paragraph 4 below.

### **5. APPLICATIONS FOR LEGAL AID FINALISED IN TERMS OF PREVIOUS POLICIES**

All decisions regarding applications for legal aid for applications/petitions for leave to appeal and appeals dealt with in accordance with the policies applicable at the time of the decision remain of full force and effect and are not affected by the implementation of this policy for accused sentenced after 1 June 2007

# LEGAL AID BOARD



Annexure A

## ELECTION RELATING TO APPEALS

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

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

Magistrate/Judge:..... Date of Sentence:.....

Sentence:.....

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

Legal Representative:.....

I .....(name)

- Hereby elect not to apply /petition for leave to appeal against my conviction and sentence. I realize that if I change my mind that I need to file an application / petition for leave to appeal within 14 days of my sentence/21 days of the date of refusal of leave to appeal and need to apply for Legal Aid within 1 year of being sentenced failing which I will not qualify for legal aid(\*)
- Hereby elect to apply / petition for leave to appeal against my (\*)
  - Conviction Only (†)
  - Sentence Only (†)
  - 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/Thumbprint) .....(Signature)  
Client Legal Representative

.....(Date)

- If the clients elects to appeal/petition the practitioner shall:
- ✓ Obtain a completed and signed power of attorney from the client;
  - ✓ bring an application /petition for leave to appeal orally immediately after the passing of sentence or order and hand up the power of attorney or file and application/petition for leave to appeal and the power of attorney within the prescribed period;
  - ✓ Attend to the application /petition for leave to appeal;
  - ✓ Send/Hand a copy of this form (completed and signed) to the relevant Justice Centre within 7 days of signature thereof
- If the client elects not to appeal/petition
- ✓ 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

(\*) Delete if not applicable and initial  
(†) Tick the relevant box