



REPUBLIC OF SOUTH AFRICA

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Legal Aid Board v The State
(363/09) [2010] ZASCA 112 (21 September 2010)

Media Statement

Today the Supreme Court of Appeal (SCA) upheld an appeal by the Legal Aid Board (LAB) against a judgment by Borchers J in the Johannesburg High Court that it provide legal aid to Gary Porritt and Sue Bennett who have been indicted together with various companies that they represent on a total of 3 160 fraud charges. Both Porritt and Bennett are on bail. The former's bail was fixed at one million Rand, an amount subsequently reduced to R800 000. And Bennett's bail was fixed in the amount of R100 000.

Although they first appeared before Borchers J during January 2006, the criminal trial proper is yet to get under way. When they initially appeared in the High Court they were legally represented by counsel and an attorney of their choosing. Since May 2007 they have been without legal representation. Until then, they spent some 23 million Rands on various preliminary legal skirmishes. According to Porritt those legal costs were funded by certain trusts of which, as he puts it, he was a discretionary beneficiary. Since then those trusts, so he says, have resolved to withdraw their financial support and to distance themselves from the criminal trial.

They accordingly made application to the LAB for legal representation at State expense. It was required to complete a standard form briefly setting out their financial position. They declined to do so and their applications were accordingly refused by the LAB.

During September 2008, Borchers J decided to invoke the provisions of section 3(b) of the Legal Aid Act that empowers a court to direct that a person be provided with legal representation at state expense after having taken into account the personal circumstances of the person concerned, the nature and gravity of the charge and any other factor which in the opinion of the court should be taken into account. Borchers J directed the LAB to furnish her with a report contemplated by that section and Porritt and Bennett to answer a number of questions pertaining to their personal circumstances.

On the strength of the information that served before her, Borchers J concluded that Porritt and Bennett had shown themselves to be indigent as defined she accordingly directed the LAB to provide each with two practitioners, who were to be remunerated at the maximum fee permitted by the Legal Aid Guide, to represent them in their criminal trial. Later the Judge clarified that all four practitioners to be appointed by the LAB to represent Porritt and Bennett were to be advocates in private practice and not employees of the LAB.

The SCA held that a court undertaking such an enquiry must ask itself two questions: first, would substantial injustice ensue were the accused to proceed to trial without representation and, if so, second, could the costs of that representation be borne by the accused from his or her own resources? The first in this case proved uncontroversial. The criminal trial, if and when it eventually starts is likely to be a complex one. The indictment runs to over 1 400 pages. In excess of 3 000 witnesses are expected to testify. It is anticipated that approximately 1 million pages of documentary material will have to be read in preparation for trial and that the trial is expected to last in the region of 3 years. Against that backdrop there could hardly be any dispute that Bennett and Porritt will require legal representation and that the trial would be rendered unfair were they to appear in person. For the SCA, the second question proved more troublesome. It accepted that Borchers J, to her credit, was concerned at the delays that had plagued the trial since inception and motivated by a desire that the trial commence and proceed to conclusion as soon as possible. But having analysed their responses to the learned Judge's questions, the SCA concluded that it illustrated a complete lack of candour on the part of both Bennett and Porritt. The SCA accordingly concluded that Borchers J had been wrong in finding that Bennett and Porritt had shown themselves to be indigent as defined.

The SCA proceeded then to consider whether Borchers J had the power to order the LAB to provide each of the respondents with two advocates in private practice to be remunerated in accordance with the maximum rates permitted by the Legal Aid Tariff. The SCA held that in that regard Borchers J had misconceived the nature and scope of her power and it refused to endorse that order.

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