THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 363 / 09

LEGAL AID BOARD	Appellant
and	
THE STATE	First Respondent
GARY PATRICK PORRITT	Second Respondent
SUSAN HILARY BENNETT	Third Respondent

Neutral citation: ***Legal Aid Board v The State*** **(363/09) [2010] ZASCA 112 (22 September 2010)**

BENCH: **MPATI P, LEWIS, PONNAN, BOSIELO and TSHIQI JJA**

HEARD: **16 AUGUST 2010**

DELIVERED: **22 SEPTEMBER 2010**

SUMMARY: Section 35(3)(g) of the Constitution - right to legal representation at State expense. Legal Aid Act 22 of 1969 – s 3B – court does not have power to order the Legal Aid Board to provide accused persons with two advocates each in private practice to be remunerated in accordance with the maximum rates permitted by the legal aid tariff.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Borchers J sitting as court of first instance).

1. The appeal succeeds.
2. The order of the court below that the accused are entitled and the Legal Aid Board is obliged to provide them with legal representation at State expense is set aside.

JUDGMENT

PONNAN JA (MPATI P, LEWIS, PONNAN, BOSIELO and TSHIQI JJA concurring):

[1] It is hardly necessary to dwell on the advantages to an accused person of legal representation. They are well documented and recognised. I assume of course that the representation is competent. Trial judges have on occasion had the experience of a litigant in person who seems able to conduct proceedings with skill and sometimes to a successful conclusion. But that is usually the exception. Any litigant in person is generally at a disadvantage more especially one facing a serious criminal charge. The adversarial system that prevails in this country assumes a forensic contest that is more or less evenly matched. The sad reality is that all too frequently it is not. An unrepresented accused is usually disadvantaged, first, by a lack of legal knowledge and skill, and, second, because he or she suffers the disability of not being able to dispassionately assess and present his or her case as well as trained counsel for the State can.

[2] It cannot therefore be doubted that a criminal trial is most fairly conducted when both prosecution and defence are represented by competent counsel. The entitlement of

a person charged to be represented, if necessary, by a legal practitioner at public expense is an important safeguard of fairness in the administration of criminal justice. An entitlement to legal aid is a measure which reduces the possibility of an injustice and enhances the prospects of a fair trial. Our Constitution recognises both the practical and logical nexus between legal representation and a fair trial. Thus section 35(3) of our Constitution guarantees to every accused person his or her right to a fair trial, which includes the right in subsection (*g*) to have a legal practitioner assigned, if substantial injustice would otherwise result.

[3] In *S v Vermaas; S v Du Plessis*[1] Didcott J lamented the fact that insufficient had been done by the State to give meaningful content to the constitutionally entrenched right to legal representation. Whilst accepting that there were multifarious demands on the public purse, he stated that 'the Constitution does not envisage, and it will surely not brook, an undue delay in the fulfilment of any promise made by it about a fundamental right'. Against that backdrop s 3 of the Legal Aid Act[2] came to be amended[3] by the insertion of the following italicised phrase: '[t]he objects of the board shall be to render or make available legal aid to indigent persons *and to provide legal representation at State expense as contemplated in the Constitution* . . .'. The board to which reference is made is the appellant, the Legal Aid Board of South Africa (the LAB), an independent body corporate, established by s 2 of the Act.

[4] The annual parliamentary grant of the LAB for the 2007/8 financial year was in the region of R581m. During that period it employed 2 193 members of staff and finalised approximately 400 000 cases. In essence the LAB uses public funds to provide legal representation to indigent persons on a fairly large scale across the country. Given its fiscal constraints it is obviously unable to provide a full suite of legal aid services to those genuinely in need. It does, on occasion, instruct legal practitioners in private practice to

[1] 1995 (3) SA 292 (CC) para 16.
[2] Act 22 of 1969.
[3] Section 3 was amended by the Legal Aid Amendment Act 20 of 1996, which came into effect on 1 May 2002.

defend accused persons. When it does those practitioners are remunerated in accordance with tariffs prescribed by its Legal Aid Guide.

[5] The second respondent, Gary Patrick Porritt (Porritt) and the third respondent, Susan Hilary Bennett (Bennett) (the respondents) have been indicted together with various companies that they represent on a total of 3 160 fraud charges in the South Gauteng High Court. Both are on bail. Porritt's bail was fixed at R1m, an amount subsequently reduced, on application by him, to R800 000. He states that his bail had been paid by a trust of which he is a beneficiary and that he is currently indebted to it in that sum. Bennett's bail of R100 000 was secured by way of a mortgage bond in favour of the State over a property in Knysna which is registered in the name of a company of which she is the sole director.

[6] Although the respondents 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 representation. Until then, they spent some R23m on various preliminary legal skirmishes. That, according to Porritt, was funded by certain trusts of which, as he puts it, he was 'a discretionary beneficiary'. Those trusts, so he says, have resolved to withdraw their financial support and to distance themselves from the criminal trial.

[7] The respondents thus made application to the LAB for legal representation at State expense. Each was required to complete a standard form briefly setting out their financial position. They declined to do so. Their applications were accordingly refused. Although it initially did so on some other erroneous basis, it is hard to fault the LAB's ultimate conclusion that each had not satisfied it that they were indigent and therefore did indeed qualify for legal representation at State expense.

[8] The respondents, having been advised that they had two rights of internal appeal to higher echelons within the LAB, exercised the first to the Regional Operations

Executive. Unsurprisingly, given their failure to furnish the required information, it failed. Each was nonetheless advised by the Regional Operations Executive of a further right of appeal to the National Office Executive. And informed:

'Should you wish to appeal my decision, please provide the following:

1 A signed means test

2 Details of all your:-

- Assets
- Income
- Liabilities
- Expenditure

3 Your personal circumstances – e.g. where do you reside, what is the value of your right of occupation, who provides for your food, clothing, health etc, needs and at what cost.

4 Your background and education.

5 Your ability, if any, to contribute to the costs of your defence.

6 In the light of the statement "I am a beneficiary of certain trusts with substantial assets in SA", details of all trusts of which you, your spouse or your children are beneficiaries, the trust deed and financial statements as well as particulars of the assets of the trust.

7 Details of any property owned by you, your spouse or your children or any trusts of which any of you are beneficiaries and the value of the said property.'

The response of the respondents was to direct a request for information to the LAB ostensibly on the basis that it was required to prosecute their further appeal. When the matter came before Borchers J on 24 October 2007 they were informed by an official of the LAB that they were not precluded, even at that stage, from supplying the information sought and that by doing so the prospects of their appeal succeeding would be enhanced. Once again they declined. Instead, contending that not all of the information sought by them had been supplied by the LAB, they launched an application to compel the LAB to supply the information sought. That application was dismissed by Sapire AJ.

[9] In September 2008, no further progress having been made, Borchers J decided to proceed in terms of s 3B of the Act. Section 3B provides:

'(1) Before a court in criminal proceedings directs that a person be provided with legal representation at State expense the court shall—

(*a*) take into account—

(i) the personal circumstances of the person concerned;

(ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be;

(iii) whether any other legal representation at State expense is available or has been provided; and

(iv) any other factor which in the opinion of the court should be taken into account; and

(*b*) refer the matter for evaluation and report by the board.

(2) (*a*) If a court refers a matter under subsection (1)(*b*), the board shall, subject to the provisions of the Legal Aid Guide, evaluate and report on the matter.

(*b*) The report in question shall be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the court and the person concerned.

(*c*) The report shall include—

(i) a recommendation whether the person concerned qualifies for legal representation;

(ii) particulars relating to the factors referred to in subsection (1)(*a*)(i) and (iii); and

(iii) any other factor which in the opinion of the board should be taken into account.'

[10] The learned judge requested the LAB to furnish her with a report contemplated by s 3B(1)(b). In that report the LAB asserted that accused persons who apply for legal aid are subject to a means test, which is calculated in accordance with a formula prescribed by its Legal Aid Guide. Applying that formula, according to the LAB, an accused person with a calculated income of less than R2 000.00 per month qualified for legal aid. The LAB contended in its report that:

'[Porritt and Bennett] have a right to a further internal appeal against the decision to refuse legal aid. [They] have not yet exercised such right, but if [they] continue to refuse to provide the information and documentation requested by the LAB, the result of any further appeal is likely to be unfavourable to [them].'

And submitted that:

'[I]t is obliged to implement the provisions of the Legal Aid Guide, which is a document approved by Parliament. For the reasons set out above and due to the continued refusal by the accused to provide the information requested, the LAB has no choice but to refuse legal aid'.

'Applicants bear the onus of proving, on a balance of probabilities, that they qualify for legal representation at State expense. To do this, applicants, must be required to provide all necessary information and documentation and answer all relevant questions as to their financial circumstances.'

[11] As Borchers J put it 'the accused raised energetic objections to the court proceeding with the enquiry'. Undaunted, she proceeded. The respondents launched a wide-ranging attack on the LAB's report, submitting in essence that it did not 'constitute a proper report in terms of s 3B of the Act'. They accordingly requested the court to order the LAB to furnish a proper report in compliance with the Act. The learned judge declined to do so. Instead, she directed them to answer a number of questions appertaining to their personal circumstances. That they eventually did.

[12] In her view two issues arose for consideration: first, whether the court should order the LAB to provide the respondents with legal representation at State expense, and if so, second, the scope and extent of such representation.

[13] In answering the first of the two questions in favour of the respondents, Borchers J stated:

'On the first issue, I accordingly find that legal representation in this matter is necessary; further that the accused have shown themselves to be indigent as defined; further, that their children who are beneficiaries of possibly very wealthy trusts cannot be forced to fund their parents' legal representation and, finally, that the Board should be directed to do so.'

On the second issue, the learned judge concluded:

'I order that the Legal Aid board provide two legal practitioners to represent each of the accused in this trial. Such practitioners are to be remunerated at the maximum fee permitted by the Legal Aid Guide.'

On 27 March 2009 Borchers J clarified that all four practitioners to be appointed by the LAB to represent the respondents were to be advocates in private practice and not employees of the LAB.

[14] The recorded transcript of the proceedings during the application for leave to appeal reads:

'COURT: Can I ask this before you go any further, this seems to be your central issue and why you are submitting that your appeal has strength or prospects of success, is there anything further, are you also asking for leave on the grounds that I wrongly found that the accused were indigent and needing of legal aid?

COUNSEL:[4] No M'Lady, the papers as we read them, we would with respect not take issue. There has not been any evidence to suggest otherwise.

COURT: Yes, the accused have made an assertion, and I do not think anything to the contrary was proved.

COUNSEL: No

COURT: Very well.'

[15] Borchers J in her ruling on the application for leave to appeal stated: 'This is the only ground of appeal on which leave is sought. [Counsel] declined to advance the other grounds set out in the notice of appeal, so they fall away.' She then proceeded to grant an order in these terms: 'Leave is granted to the [LAB] to appeal to the Supreme Court of Appeal against the order of … and insofar that it is necessary, against the so-called second order'. That notwithstanding, the LAB in its notice of appeal filed with this Court asserted as its first ground of appeal:

'In the circumstances of the present case, no legal representation ought to have been provided to the second and third respondents at state expense as there was insufficient evidence to demonstrate that they were unable to fund their own representation.'

Consistent with that approach, counsel for the LAB submitted in its heads of argument that there were two grounds of appeal. First, that the learned judge should have found that Bennett and Porritt were not entitled to legal representation at State expense. And, second, that the order of the learned judge encroached upon territory reserved for another arm of State and thus offended against the separation of powers doctrine.

[16] Neither Bennett nor Porritt initially participated in the appeal. The first respondent, the State, frustrated at the lack of progress in the trial, did. Its counsel contended that after the abandonment in the court below of the first ground of appeal, this court had no jurisdiction to hear and adjudicate upon it. But as this court has previously held, it will not necessarily consider itself bound by the grounds upon which leave has been granted. If this court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant consideration of it, it will allow such ground to be argued.[5]

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[4] A reference to Mr Budlender's predecessor.

[5] *S v Safatsa & others* 1988 (1) SA 868 (A) at 877A-D; *Douglas v Douglas* [1996] 2 All SA 1 at 8j-9a.

[17] This does not mean that the court will always be free to enlarge the issues whether mero motu or at the request of the parties.[6] The question of prejudice may arise, as indeed it first did in relation to Porritt and Bennett in this case. They had intimated at the outset that they were willing to abide the decision of this court. When they learned that counsel for the LAB was seeking to resuscitate the first ground they communicated their displeasure in a letter addressed to the Registrar of this court. In it, they stated:

'As conveyed in the letter of . . ., we would abide the decision of the Court if the sole issue to be decided was whether the lower court entered the domain of the executive and offended the doctrine of the separation of powers. This was the only issue on which leave to appeal was granted by the lower court. However, in the event that the applicant is permitted to argue for a reversal of the lower court's finding that we were entitled to be provided with legal representation at state expense – which issue was abandoned by the applicant without being argued at the hearing of its application for leave to appeal before the lower court – then we would require to oppose this aspect and we would have to seek counsel to represent us on this issue on a pro bono basis.'

[18] As a consequence when the matter first served before us on 13 May 2010 it had to be postponed at the instance of the LAB. It was thereafter re-enrolled for hearing on 16 August 2010. In the intervening period the LAB launched a formal application on notice to the other parties for condonation and for this court to grant it leave to appeal on wider grounds than those allowed by Borchers J. In an affidavit filed in support of that application, the LAB's then attorney states:

'With respect, it appears that there may have been a misunderstanding, by [Counsel] regarding this point. I had no authority, nor did he have instructions, to abandon the point. I had in fact been specifically instructed by the chief executive officer of the appellant to persist with it. As can be seen above, the point was and remains of great importance to the appellant and it was not an issue which the appellant was prepared to abandon at all'.

[19] In my view, the postponement and subsequent application satisfactorily addresses any prejudice (actual or potential) that the other parties may assert. The question that the LAB now seeks to raise was actually part and parcel of its case before Borchers J and is basic to the adjudication of the appeal. That being so, it appears to me fitting to broaden

[6] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 24C-D.

the scope of the appeal.[7] To do otherwise would be to ignore a fundamental issue that was fully ventilated in the court below. That may well constitute not just a fruitless exercise but also one divorced from reality.

[20] If the contention that the LAB now seeks to revive is good and the other for which leave has already been granted, bad, this Court in refusing to investigate it, would be upholding a wrong order. That, this court should be slow to countenance. Moreover, such an approach may well run counter to s 173 of the Constitution, which provides:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

As it was put by the Constitutional Court in *SABC Ltd v National Director of Public Prosecutions & others*:[8]

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power *must take into account* the interests of justice.'

[21] It is noteworthy that our courts were indeed endowed with such power even in our pre-constitutional era.[9] According to the Constitutional Court:[10]

'The task of an appeal Court in determining its own proceedings is an important one. Its primary constitutional responsibility is to ensure that the proceedings before it are fair and it must give content to that obligation. This obligation has always been part of our law and is now constitutionally enshrined as a fundamental right in s 35(3) of the Constitution. The task of ensuring that the proceedings are fair will often require consideration of a range of principled and practical factors, some of which may pull in different directions.'

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[7] *Van Jaarsveld v Bridges* (344/09) [2010] ZASCA 76 (27 May 2010).
[8] 2007 (1) SA 523 (CC) para 35 and 36.
[9] In *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G, Corbett JA put it thus: 'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice ....'; see also *Manong v Minister of Public Works* 2010 (2) SA 167 (SCA).
[10] *SABC Ltd* para 21.

But it did remind us that 'it is a power which has to be exercised with caution'[11]and sparingly after taking into account the interests of justice in a manner consistent with the Constitution.[12]

[22] In all of the circumstances it seems necessary for a proper adjudication of the matter to allow the LAB to revive its contention based on the first ground. I accordingly turn to that aspect.

[23] Section 3B of the Act must, according to Navsa JA, be seen:

'[A]gainst the [LAB's] objects, as set out in section 3 of the Act, namely, to make available legal aid at State expense to those who qualify for it *and* to ensure that the guarantee of legal representation at State expense, if substantial injustice would otherwise result, as an integral part of the right to fair trial as contemplated in s 35(3)(g) of the Constitution, is met.'[13]

[24] It is so that past practice in this country has forced accused persons on occasion to trial notwithstanding that, by reason of lack of means, they were unable to obtain legal advice or representation. That past practice and the approach to the poor and disadvantaged that it reflects is now considered to be inconsistent with the standards that we as a nation have set for ourselves. Given that history, it may be all too easy for some of us to comprehend the right to legal representation in more absolute terms than that given to us by our Constitution. There are two component parts to that basic right: First, the right to choose counsel and to be represented by that person (s 35(3)(f)); and, second, the right to have a legal representative assigned by the State and at State expense if substantial injustice would otherwise result (s 35 (3)(g)).

[25] In *Vermaas* Didcott J had occasion to consider s 25(3)(e)[14] of our Interim Constitution, the predecessor to the section here under consideration. He had this to say (para 15):

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[11] *S v Pennington & another* 1997 (4) SA 1076 (CC).
[12] *Parbhoo & others v Getz NO & another* 1997 (4) SA 1095 (CC).
[13] *Legal Aid Board v Pretorius* [2007] 1 All SA 458 (SCA) para 16.
[14] The section reads: 'every accused person shall have the right to a fair trial, which shall include to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise

'the effect of the disjunctive 'or', appearing in the section immediately before the reference to the prospect of 'substantial injustice', is to differentiate clearly between two situations, the first where the accused person makes his or her own arrangements for the representation that must be allowed, the second in which the assistance of the State becomes imperative, and to cater for the personal choice of a lawyer in the first one alone.'

[26] But as Harms JA emphasised in *S v Halgryn*:[15] 'Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations.' Harms JA found support for his view in the Canadian case of *R v Speid.*[16] *Speid* held that the court must 'balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and the basic principles of fundamental fairness'. A view that has since been endorsed by the Constitutional Court in *Fraser v ABSA Bank*[17] in these terms: '. . . the right embodied in s 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation. Financial constraints necessarily play a role and competing needs and demands have to be balanced.'

[27] It bears noting that the Canadian Charter, like our own, does not entrench a general right to counsel at public expense irrespective of the circumstances of the particular case. *R v Rowbotham*[18] pertinently drew the following distinction: 'The right to retain counsel, constitutionally secured by section 10(b) of the Charter, and the right to have counsel provided at the expense of the State are not the same thing.' Our Constitution also makes plain that the right to assigned counsel, unlike the right to chosen counsel, is subject to the important qualifier: 'if substantial injustice would otherwise result'. Whether substantial injustice would otherwise result is a matter pre-eminently for the decision of the judge trying the case, a Judge, according to Didcott J:[19]

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result, to be provided with legal representation at state expense, and to be informed of these rights.'
[15] 2002 (2) SACR 211 (SCA) para 11.
[16] (1983) 7 CRR 39 at 41.
[17] 2007 (3) SA 484 (CC) para 68.
[18] (1988) 41 CCC (3d) 11.
[19] *Vermaas* para15.

'much better placed than we are by and large to appraise, usually in advance, its ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice.'

[28] Canadian cases have generally held that where an accused has been denied legal aid, the trial judge may direct the appointment of counsel if satisfied that the accused is impecunious and that the nature of the case is such that the accused cannot receive a fair trial without representation.[20] The right to counsel is thus inextricably linked to the facts of the case. The position in Australia has been articulated as follows by Mason CJ and McHugh J in *Dietrich v R*:[21]

'Despite the absence in Australia of any formally entrenched declaration of rights similar to the Canadian Charter, the approach of Australian courts resembles the Canadian approach in rejecting the proposition that an indigent accused has an absolute right to the provision of counsel at public expense.'

Later the judgment proceeds:

'It should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is however, inextricably linked to the facts of the case and the background of the accused.'

The approach in those two countries is not dissimilar to our own. That emerges from *Fraser*,[22] where the Constitutional Court held:

'An accused also has the right to have a legal practitioner assigned at the State's expense in terms of s 35(3)(g) where substantial injustice would otherwise result . . . The extent to which this might be appropriate or sufficient in a particular case will depend on all relevant prevailing factors, including the complexity and seriousness of the criminal charges.'

[29] What all of this establishes, in my view, is that a court undertaking the enquiry in question must ask itself two questions: first, would substantial injustice ensue were the

[20] *R v Munroe* 57 CCC (3d) 421; *R v Gauthier* 2004 NLSCTD 137.
[21] 64 A Crim R 176 ; 109 ALR 385.
[22] Para 68.

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?

[30] In this case the first question 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 3000 witnesses are expected to testify. It is anticipated that approximately one million pages of documentary material will have to be read in preparation for trial. All told the trial is expected to last in the region of three years. Against that backdrop it can hardly be in dispute that Bennett and Porritt will require legal representation and that the trial will be rendered unfair were they to appear in person. The second question proved more troublesome. The learned judge, 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 with alacrity. She thus felt compelled to intervene. But as Borchers J herself observed 'neither [respondent] presents the picture of the usual indigent person. They are both well-groomed, use cellphones and have the means to travel by air. [Porritt] wished to travel to the United States in 2007: [Bennett] did in fact travel to the United Kingdom in 2008. Both live in desirable locations. . . .' The learned judge therefore entertained some apprehension as to whether either of the respondents were indeed indigent and thus qualified for legal representation at state expense. As I have already stated she endeavoured to address that by requiring them to answer a range of questions. Whether the responses elicited ought to have done sufficient to quell her apprehension is an aspect to which I now turn.

[31] Each of the respondents was asked to furnish details pertaining to:

(a) Their directorships of and shareholdings in companies and membership interests in closed corporations:

They responded in identical fashion:

'Details of directorships/memberships to be provided by Legal Aid Board' and 'no shares are held in any company which are of any material value'.

(b) Income from any source whatever:

Both answered 'nil'.

(c) Funding of normal living expenses:

Porritt asserts that he is dependent on his wife and children for his normal living expenses. He lives in a house owned by his son in Pietermaritzburg for which he pays no rent. He indicated that a cell phone used by him is paid for by the Snowdon Farm Trust to enable him to provide technical advice and assistance to its farming operations. Bennet lives at 31 Cearn Drive, Leisure Isle, Knysna. In October 2004, that property was valued at R5.85m. There were then mortgage bonds to the tune of R4.1m registered over the property. The owner of the property is Moneyline 696 (Pty) Ltd. Bennett is the sole director of Moneyline 696 (Pty) Ltd. The sole shareholder of Moneyline 696 (Pty) Ltd is the Colisseum Trust. Bennett stated that her lodgings are provided by an elder daughter and that her living expenses are 'funded out of payments of R5 000 from time to time by elder daughter's business against a loan of approximately R31 000 made by [her] – which loan is being repaid as and when [her] daughter is able'.

(d) Assets owned by them or in which they have an interest:

Porritt states that he has ‘no assets of any material value’. Whilst Bennett, aside from alluding to the R31 000 loaned to her elder daughter's business, also asserts that she has ‘no other assets of any material value’.

(e) The total amount expended on litigation thus far:

According to Bennett this information was not within her personal knowledge, whilst Porritt states that he 'understands that the total amount expended in relation to the criminal and related matters is in the region of 23 million'.

(g) The names of trusts which met their legal expenses:

Bennett's response is: 'This information is not within [my] personal knowledge as the vast majority of [my] legal expenses have been intertwined with those of [Porritt] and have been met through arrangements facilitated on behalf of [him]'. Whilst Porritt states: 'It is [my] understanding that this was routed ultimately through the Gary Patrick Porritt Children's Trust, although the Boom Street Trust and the Snowdon Farm Trust may have provided some assistance'.

(h) The reason for the trusts paying their legal expenses:

Bennett states that her legal expenses have '[t]o date, been almost invariably the same expenses as those of [Porritt] so there have been no additional expenses paid by the

trusts which were incurred by [me]'. Porritt's response is that he ‘is a discretionary beneficiary of the Gary Patrick Porritt Children's Trust. The Boom Street Trust did not pay any legal expenses but merely stood surety for a limited amount of legal expenses and registered a bond to secure such suretyship’. He adds that it is his ‘understanding that the Snowdon Farm Trust had a loan from the Gary Patrick Porritt's Children's Trust against which certain repayments were made’.

[32] Moreover, the Companies and Intellectual Properties Registration Office (CIPRO) lists 17 companies (one being a public company) of which Porritt is or has been a director and records his status in ten of them as 'active'. CIPRO lists 23 companies of which Bennett is or has been a director. It records her status in 19 of them as 'active'. And then there is a veritable web of trusts: According to Borchers J, Porritt described himself as a ‘beneficiary of a trust with substantial assets’ in an affidavit several years ago. He has subsequently sought to explain that in describing himself thus he meant that ‘he is a "discretionary beneficiary" and the relevant trust in the exercise of its discretion has refused to assist him any further'. The trust to which he alludes is the Gary Patrick Porritt Children's Trust which was founded by his late father 28 years ago for the benefit of his grandchildren born to Porritt'. He goes on to state that although he is not 'a named beneficiary, the trustees may make available such amounts as they at their discretion may deem appropriate for his maintenance or that of his wife or for their reasonable pleasures in life'. The trust according to him originally acquired a number of farming properties with loan finance. He asserts that he is 'not in possession of information regarding the value of the assets of the trust or its income'. Both Bennett and Porritt describe themselves as trustees of the Surrey Farm Trust and the Colisseum Trust. Both of those trusts were established in 1993. The former owns a 34 hectare piece of undeveloped land in Pietermaritzburg, which according to Porritt, 'it leases out for a sum equivalent to its monthly rates'. The trustees are Porritt and his wife. The first named beneficiaries are their children. The trust deed obliged the trustees to acquire four specific farms in the Pietermaritzburg area. The latter, as Porritt puts it, 'owns Moneyline 696 (Pty) Ltd'. The trustees are Bennet and Porritt. In 1993 by resolution of the trustees Bennett’s two daughters were substituted as beneficiaries. In addition Porritt and his wife

are the trustees of the Surrey Development Trust which was established in 1993. The first-named beneficiaries appear to be their children. The trust deed obliged the trustees to acquire four specific farms in the area of Pietermaritzburg, which it lists. The Boom Street trust was established in 1990. The founder was Mr C D Harris (who also founded the Coliseum Trust). The trustees are Mrs Porritt and Mr K H Knight. The beneficiaries are the four children of Mr and Mrs Porritt together with any other persons or trusts appointed or substituted unanimously by the trustees. The trustees are obliged in terms of the trust deed to acquire ownership of a specifically identified property in Pietermaritzburg. The Snowdon Farm Trust was established in 2002. The first trustees were Mrs Porritt and Mr D H Knight. The beneficiaries of the trust are the children of Mr and Mrs Porritt. Together with any other persons or trusts appointed or substituted unanimously by the trustees. This is the trust to which Mr Porritt provides technical advice and assistance and which provides him with a cell phone. The trustees were obliged in terms of the trust deed to acquire the farm Snowdon, in extent 1 283 hectares in KwaZulu Natal. There is also a reference in the record to a further property-owning trust, the Reeboksfontein Trust, of which Porritt's children are the beneficiaries. None of the trust deeds state from whom in each instance the immovable property, the subject of that deed, is to be acquired, on what terms that is to be done and whether it is to be received as a donation or purchased and, if the latter, how the purchase price is to be paid.

[33] Section 3B makes plain that it is in fact the court's enquiry. It follows that the employment of terminology such as 'burden or onus of proof' is particularly unhelpful and would serve to obfuscate rather than elucidate the enquiry. In those circumstances it would be wholly inappropriate for a court to saddle an accused person with an onus and to decide the matter on the strength of whether or not that has been discharged. That is not to suggest that persons such as the respondents would be free to adopt a supine attitude. On the contrary, particularly where, as here, the information sought is peculiarly within their knowledge, they have as much - if not more - of an obligation as the State to assist the court's enquiry. Failure in those circumstances to assist the court may well be fatal to their quest for legal assistance at State expense. For, if the court is left in the dark

as to one's personal circumstances it can hardly properly undertake the postulated enquiry. Were that to be the case it must perforce decline to issue the directive contemplated by s 3(B)(i). In this case Borchers J observed that 'the court has not the administrative machinery to investigate the correctness of the information supplied'. That may be so. But that ignores the court's power to subpoena witnesses and documents or to place witnesses such as the respondents under oath and if necessary for them to be subjected to cross examination. Those are formidable weapons in the judicial armoury that must, where necessary, be employed by a court to enable it to discharge its constitutional mandate.

[34] I have referred in some detail to the evidential material that served before Borchers J because it illustrates, I believe, a complete lack of candour on the part of both Bennett and Porritt. Counsel for the LAB submitted that the respondents have deliberately structured their affairs in such a way as to facilitate the disposal or concealment of their assets. Whilst there is much to be said for that contention, it is unnecessary for this court to go that far. Both Bennet and Porritt adopted an intractable attitude and for well on one year refused to furnish the LAB with information that was legitimately sought for the purposes of assessing their entitlement to legal aid. They eventually furnished information only after being directed by the court to do so. When they eventually did many of their responses were deliberately evasive and cagey. Each preferred to burden the LAB with the responsibility of ascertaining the extent of their interest in companies and close corporations. Other important disclosures were qualified by the words 'to the best of my recollection' or 'to the extent that I am aware of'. And yet in each instance the information sought was peculiarly within their knowledge. That ought reasonably therefore to have redounded to their discredit.

[35] Given the information supplied by them, one is none the wiser as to why the trusts (or indeed which ones) furnished as much as R23m for various preliminary legal skirmishes. And why they are no longer willing to fund the defence of either in the criminal trial proper. Moreover, one cannot discern on what basis the respondents and in particular Bennet qualified for assistance from those trusts. It is also somewhat rich for

Bennett to say that she qualified for assistance from the trusts because her legal expenses and those of Porritt have invariably been the same and yet in the face of that to assert an entitlement separate from him to representation at State expense. On the LAB's reckoning the criminal trial would cost substantially less than the R23m already spent. A more pragmatic utilisation of the funds at their disposal from the outset would have rendered their application for legal aid unnecessary. But as has been made plain both in this court and the one below they intend to employ every stratagem available to them in order to delay the commencement and thereafter continuation of the trial for as long as they possibly can. Whilst pursuing that as their chosen course may well be their right, it may not be without its consequences. For as the Constitutional Court has endeavoured to stress (*S v Jaipal*[23]):

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

Nothing further need, however, be said about any of that at this stage.

[36] In my view the responses of both Bennett and Porritt fall far short of satisfying one that their personal circumstances are such that they do indeed qualify for legal representation at state expense. I thus am of the view that given the paucity of reliable information the learned trial judge wrongly concluded that Bennett and Porritt 'have shown themselves to be indigent as defined'. It follows therefore that on the first ground the LAB must succeed.

[37] That conclusion ordinarily at any rate ought to have disposed of the appeal. But as Borchers J herself observed in granting leave to appeal to the LAB on the second ground:

'The issue is of great importance to the Legal Aid Board. This is a body charged with the equitable use of the limited public funds made available to it in order to provide legal representation for a very large number of indigent people. My order will annually take away a significant and possibly disproportionate slice from the available funds for several years. More important, perhaps, is the submission made by [Counsel] that I set a precedent which is likely to be followed by other courts. Relatively few orders, if made annually, could

[23] 2005 (4) SA 581 (CC) para 29.

make the Legal Aid Board's financial position unpredictable and possibly untenable. It is therefore crucial for the Legal aid Board that the issue be decided at the highest level by the courts.'

Plainly the ruling of Borchers J on this leg of the enquiry is not purely academic. It does indeed have far reaching ramifications for the LAB. It therefore seems eminently sensible to me that we consider its correctness.

[38] Borchers J was quite correctly concerned with the integrity of the trial. After all she appreciated that the right to receive a fair trial according to law is a fundamental element of our criminal justice system. And that representation by counsel must be considered not on its own but as one relevant element of that broader right. Moreover the learned judge recognised that the constitutional right to counsel must be real and not illusory and that an accused has, in principle, the right to a proper, effective or competent defence.[24] As is evident from the judgment, her approach was cognisant of the fact that the right to chosen or assigned counsel is a right of substance, not form.[25] But as she herself put it the respondents had 'asked for legal representation on a lavish scale – senior and junior counsel and an attorney for each accused'. What she ultimately ordered the LAB to provide was thus much less than that sought. That notwithstanding the question remains whether the right to assigned counsel comprehends a right as generous as that discerned by the learned judge. For, if it did not, then Borchers J lacked the power to order the LAB to provide each of the respondents with two advocates in private practice to be remunerated at the maximum of the legal aid tariff.

[39] Courts now derive their power from the Constitution itself.[26] It follows that courts too must observe the constitutional limits of their authority. In *Doctors for Life International v Speaker of the National Assembly & others*[27] the Constitutional Court stated:

'Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their

[24] *S v Halgryn* 2002 (2) SACR 211 SCA para 14.
[25] *S v Tandwa* 2008 (1) SACR 613 (SCA) para 7.
[26] *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 47.
[27] 2006 (6) SA 416 (CC) para 37.

authority. This means that the Judiciary should not interfere in the other branches of government unless to do so is mandated by the Constitution.'

The Constitutional Court also reminded us that courts should assiduously refrain from exercising executive or legislative functions under the guise of judicial review (*DPP, Transvaal v Minister of Justice and Constitutional Development & others).*[28] It held (para 183) that judicial review 'permits courts to call upon the executive and legislature to observe the limits of their powers but does not permit courts to exercise those powers themselves'. Courts therefore have a duty to patrol - but not cross – the constitutional borders defined by the Constitution.

[40] If legal representation is indeed an advantage, as it must be to an accused person in practically every case, then it must follow that it would be in the interests of justice that representation be available in practically every case, if necessary at public expense. Moreover, it would be in the interests of justice that such representation be of the highest calibre. But as it was put in *Dietrich v R:* [29]

'If the interests of justice are to be pursued without regard to other considerations, then clearly they require not only a fair trial but the fairest possible trial. But the interests of justice cannot be pursued in isolation. There are competing demands upon the public purse which must be reconciled and the funds available for the provision of legal aid are necessarily limited. The determination of what funds are to be made available is not a function which the courts can or should perform. Nor are the courts equipped to determine how the available funds are to be distributed – for example, whether it is preferable to spread them amongst the largest number of cases possible or to devote them to a smaller number of complex or more costly cases.'

[41] In my view the Canadian jurisprudence is particularly instructive on this aspect of the case. It is clear that the Supreme Court of Canada will not dictate to the provinces and territories how they should deliver legal aid and which delivery models they should establish and implement (*R v Prosper).*[30] As the following dicta from an assortment of Canadian cases illustrate, their courts have manifested a studious disinclination to usurp the power and functions of their legal aid agencies:

'I approach with wariness the prospect of ordering the payment of counsel other than strictly in accordance with the Legal Aid Scheme. The case law is clear: in general, provincial legal aid schemes accord with the

[28] 2009 (2) SACR 130 (CC).
[29] See fn 19.
[30] (1994) 92 CCC (3d) 353.

Charter and fulfil the requirement at common law for the provision of counsel where this is necessary for a fair trial. In addition, the courts should show restraint in ordering the commitment of public funds; ordinarily, that is for those who are elected' (*R v F* (DP)).[31]

'The legal aid system is in place to ensure legal representation for the less privileged in our society. Financial and budgetary constraints dictate that the remuneration paid to lawyers who act for legal aid clients must be carefully controlled and may be less than the amount paid to lawyers for comparable services rendered to clients who are not on legal aid. The fees might not be "reasonable" based on current market rates for lawyers' services. When a lawyer places himself or herself on the Legal Aid Roster and signs a certificate to represent a client he or she knows and accepts the quantum of remuneration to be paid. It would be inequitable if the lawyer could attempt to receive more than the amounts specified in the Legal Aid Rules on the basis that the fees are reasonable, pursuant to a court taxation under Rule 6(1)(iii)' (*P. Barristers and Solicitors v Legal Aid Society (Alberta*)).[32]

'I'm very cognisant of the fact that the Ontario Legal Aid Plan is a programme created and funded by the Province. One of its purposes is to provide for an orderly financially responsible means of funding counsel for those who cannot afford to retain counsel privately. If I were to order that counsel for these accused be paid at hourly rates that are substantially higher than the legal aid rates, then I would be undermining the integrity of the legal aid system in Ontario. There must be a certain consistency in all cases in which funding is provided by the Province for defence counsel' (*R v Magda).*[33]

'Generally, if an accused is offered state-funded and competent counsel within the legal aid scheme, he or she will not be able to seek an order that the Attorney General provide other funded counsel of choice unless the provision of such other counsel is necessary to ensure that the accused can receive a fair trial' *(R v Druken).*[34]

[42] That is not to suggest that a court is powerless in the face of an unreasonably intransigent legal aid board. After all it is the court that is burdened with the constitutional obligation of ensuring that the proceedings are conducted in accordance with notions of fairness and justice.[35] The approach to this conundrum by the Canadian courts, consistent with an appreciation of the limits of its own decision-making powers, is not to

[31] [2000] NJ no. 1110 (NfldTD) para 46.
[32] [1994] AJ no. 1018 (ALTA QB).
[33] [2001] OJ no. 1861 (Ont SCJ) para 56.
[34] (2003) 686 A.R 271 para 29.
[35] *Legal Aid Board v Pretorius* para 36.

issue orders against their legal aid agencies but rather to stay the proceedings where satisfactory arrangements for legal representation cannot be made. In *R v Peterman*[36] the accused was charged with four counts of arson. He was eligible for legal aid and Legal Aid Ontario issued him with a legal aid certificate. The certificate allowed him to select a lawyer of his choice to represent him, provided the lawyer would accept the certificate. The certificate carried with it certain conditions. The lawyer had to bill legal aid at the legal aid tariff and accept certain limitations. The most important of those limitations concerned the payment of fees and expenses of out of town counsel, preparation time and the retention of junior counsel. The accused sought an order for payment at rates in excess of the normal legal aid tariff for counsel and junior counsel. He also sought payment of counsel's reasonable disbursements, payment of counsel for the full amount of preparation time with no maximum limit on the number of hours of preparation and payment for counsel's meals and accommodation. Legal Aid had in place certain policies concerning the use of out of town counsel. The application judge refused to grant most of the relief sought but found 'this is a complicated case, … I am satisfied that no person other than Mr Rock [Counsel selected by the accused] could do a fair representation of the accused at this stage.' She accordingly decided that the denial of travel time, reasonable preparation time and travel expenses was unreasonable and that the request for junior counsel was reasonable. She stated that she had some serious concerns that if counsel's travel expenses and reasonable accommodation and meal expenses were not paid 'the accused would not receive a fair trial'.

On appeal, Rosenberg JA for a three panel Ontario Court of Appeal stated (para 21):

'That the application for setting legal aid rates and policies relating to the retention of out of town counsel and of junior counsel lies with Legal Aid Ontario, not the court. ... A criminal trial court has no jurisdiction to review those policies and having determined that they are unreasonable, impose other arrangements on Legal Aid Ontario. The criminal trial court's jurisdiction rests solely on the obligation to ensure that the accused person receives a fair trial. In some cases, the court would be satisfied if an accused is not represented by counsel, his or her right to a fair trial as guaranteed by ss. 7 & 11(d) of the Canadian Charter of Rights and Freedoms would be infringed, if such an accused lacks the means to employ counsel privately, but has nevertheless been refused legal aid, the court can make an order staying the proceedings until the necessary funding for counsel is provided by the state.'

[36] 2004 119 CRR (2d) 7.

The judgment continued (para 25):

'In considering these issues, the application Judge was, again, not entitled to review the reasonableness of the decisions made by Legal Aid. Her focus had to be on whether the respondent's right to a fair trial was imperilled because of the conditions under which he was being defended. In my view, there was no evidence to support a finding that the respondent's right to a fair trial was at risk.'

[43] Such an approach finds favour in Australia as well. As *Dietrich* put it:

'For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained. While, in some jurisdictions, judges once had the power to direct the appointment of counsel for indigent accused, this power has been largely overtaken by the development of comprehensive legal aid schemes in all states, and, as such, trial judges now cannot be asked to appoint counsel in order that a trial can proceed. However, even in those cases where the accused has been refused legal assistance and has unsuccessfully exercised his or her rights to review of that refusal, it is possible, perhaps probable, that the decision of a Legal Aid Commission would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused.'

[44] Our constitutional model demands no less of our courts. Judicial deference, Schutz JA reminded us, 'does not imply judicial timidity or unwillingness to perform the judicial function',[37] but is an appreciation by the court of the limits of its own decision-making power. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others*[38] O'Regan J explained it in these terms:

'In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference, he cited with approval Professor *Hoexter's* account as follows:

"(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for and the consequence of – judicial intervention. Above

[37] *Minister of Environmental Affairs & Tourism and others v Phambili Fisheries (Pty) Ltd and another; Minister of Environmental Affairs & Tourism and 0thers v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 50.

[38] 2004 (4) SA 490 (CC) para 46.

all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies, not to cross over from review to appeal."'

[45] We need hardly remind ourselves that courts do not control the public purse, nor do they have the power to conscript the legal profession to render services without reward. It is for the other arms of government to ensure that adequate provision is made for legal representation at State expense. Here they have chosen to do so through the LAB. Demands other than legal aid on the public purse may limit the availability of funds. Courts should be slow to attribute superior wisdom to themselves in respect of matters entrusted to other branches of government. As O'Regan J puts it: 'A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts'.[39] The LAB is undoubtedly one such institution. The legislature and executive need to appreciate, however, that if the limitation of available funds for legal representation at State expense is too severe the administration of justice will unquestionably suffer and with it our constitutional order.

[46] Finally, nothing here stated should be construed as being emasculatory of a court's legitimate power of review. It is now well-established that the control of public power through judicial review is a constitutional matter. Courts have a duty to finally determine whether public power has been lawfully exercised and they would be failing in that duty were they to hold that the validity of the exercise of public power is beyond its jurisdiction. The Constitution places significant constraints on the exercise of public power through the Bill of Rights and the founding principle enshrining the rule of law.

[47] As Chaskalson P puts it:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other

[39] *Bato Star* para 48.

functionaries must, at least, comply with this requirement. If is does not, it falls short of the standards demanded by our Constitution for such action.'[40]

[48] Rationality is thus the minimum threshold requirement applicable to the exercise of all public power. Action that fails to pass that threshold is inconsistent with the requirements of our Constitution and therefore unlawful. Thus whilst courts should not substitute their opinions as to what is appropriate for those of the persons in whom the power vests, were a decision to be objectively irrational, a court would have the power to intervene and set it aside.[41]

[49] It follows on the view that I take of the matter that Borchers J misconceived the nature and scope of her power. As she plainly lacked 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, that order cannot be endorsed and it accordingly falls to be set aside.

[50] In the result:

1. The appeal succeeds.
2. The order of the court below that the accused are entitled and the Legal Aid Board is obliged to provide them with legal representation at State expense is set aside.

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V M PONNAN
JUDGE OF APPEAL

[40] *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 para 85.
[41] *Pharmaceutical Manufacturers of South Africa* para 90.

APPEARANCES:

For Appellant:	G M Budlender SC[42] L Crouse Instructed by: Legal Aid Board Braamfontein Bloemfontein Justice Centre Bloemfontein
For 1st Respondent:	E M Coetzee SC J M Ferreira Instructed by: National Director of Public Prosecutions Johannesburg National Director of Public Prosecutions Bloemfontein
For 2nd and 3rd Respondents	 Instructed by Lawley Shein Attorneys Johannesburg Symington & De Kok Bloemfonteint

[42] Mr Budlender and Ms Crouse were only instructed to represent the LAB after the matter was postponed by this court on 13 May 2010. They thereafter filed supplementary Heads of Argument dated 23 July 2010 and argued the appeal on behalf of the LAB on 16 August 2010.