

ACCESS TO JUSTICE IN SOUTH AFRICA

by

DAVE HOLNESS

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ACCESS TO JUSTICE IN SOUTH AFRICA

Dave Holness¹

1. GENERAL INFORMATION

South Africa is a unitary state with a representative democracy. This has existed since 1994 which was the advent of the democratic era. Before that date the country was categorised by the racially oppressive system of apartheid whereupon the full vote was given to so-called white citizens only and other races were marginalised in every sphere of society.

In terms of demographics, there are approximately 57 million inhabitants from various ethnic groups, with the significant majority being so-called black African. There are 11 official languages, but English dominates as the language of law, commerce and government. The dominant religion is Christianity.

Some socio-economic information²:

Chart 01. Gross domestic product (GDP) for the last ten years

2010	375.3 Billion US \$
2011	416.9 Billion US \$
2012	396.3 Billion US \$
2013	366.8 Billion US \$
2014	350.9 Billion US \$
2015	317.7 Billion US \$
2016	295.8 Billion US \$
2017	349.4 Billion US \$

Source: World Bank

The gross national income at purchasing power parity per capita GNI (PPP) is 75 575.42. Inequality is extremely high and the poverty line (the percentage of population deemed to be living in poverty) is 55.5%. This high level of inequality and poverty dovetails with high levels of unemployment. All three of these economic scourges have various causes, but the relics of the apartheid system which greatly marginalised the majority of the population is a clear factor in this

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² Source of economic data: <http://hdr.undp.org/en/2018-update/download>

unfortunate status quo.

Life expectancy at birth is 62 years. This can be said to be a reasonably good figure for a developing country and might be explained by a relatively good health care system and at least some form of social assistance being in place.

The expected years of schooling and mean years of schooling is 12 years.

The 2018 human development index is 113 out of 189. This figure likely flows from the inequality, poverty and unemployment faced by large swathes of the population described above. There is in essence an economic paradox. South Africa is one of Africa's economic powerhouses as evidenced by GDP, yet wealth is terribly skewed in favour of a small minority.

2. LEGAL SYSTEM

2.1. TYPE OF LEGAL SYSTEM

South Africa has a 'hybrid' legal system formed by the interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch (and to an extent the Romans), a common law system taken from the British, and a customary law system from indigenous Africans often called African Customary Law. These traditions have had a complex interrelationship, with the English influence most apparent in procedural law and means of adjudication, and the Roman-Dutch influence most evident in its substantive private law. South Africa generally follows English law in both criminal and civil procedure, company law, constitutional law and the law of evidence. Roman-Dutch common law is followed in the South African contract law, law of delict (tort), law of persons, law of things, family law and the like. Customary law is used by adherents of that legal system and operates parallel with the 'western' legal system. Crucially post-apartheid South Africa's highest legal document is its Constitution of the Republic of South Africa, 1996 (hereinafter termed 'the Constitution'). All of the aforementioned aspects of the legal system must be in accordance with the Constitution in order to be valid. The supreme Constitution binds all legislative, executive and judicial organs of State at all levels of government.

2.2. ORGANIZATION OF THE JUSTICE SYSTEM

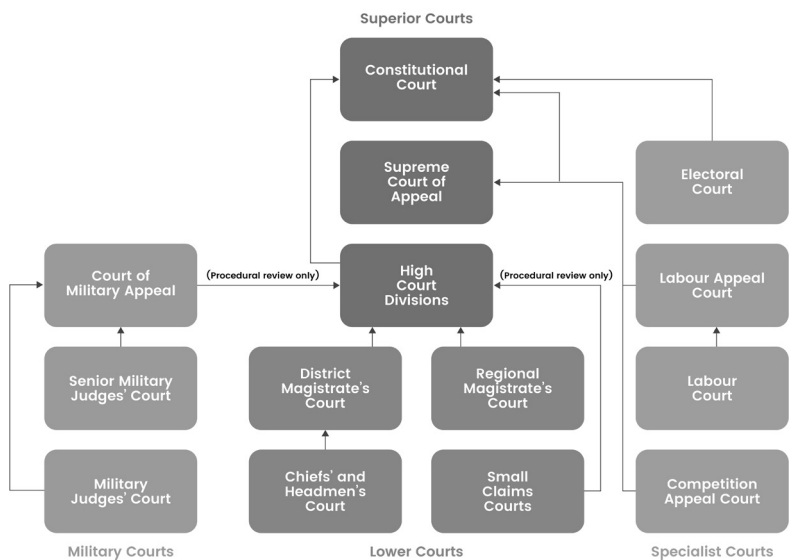
The judicial authority in South Africa is vested in the courts, which are independent and subject only to the Constitution and the

law. No person or organ of state may interfere with the functioning of the courts, and an order or decision of a court binds all organs of State and people to whom it applies.

The Constitution provides for the following courts:

- Constitutional Court
- Supreme Court of Appeal
- High courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from high courts
- Magistrates’ courts
- Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either high courts or magistrates’ courts. Other courts include: income tax courts, the Labour Court and the Labour Appeal Court, the Land Claims Court, the Competition Appeal Court, the Electoral Court, Divorce Courts, Small Claims Courts, Military Courts and Equality Court . An organizational chart indicating the structure and the division of jurisdiction of the country’s justice system follows.

Chart 02. The court hierarchy



2.3. PARALLEL JUSTICE STRUCTURE

South Africa has a parallel justice structure involving courts dealing with customary law. These traditional courts (also sometimes referred to as chiefs' or chiefs' and headmen's courts) still form an important part of the administration of justice in much of rural South Africa. Some critics see them as conservative and unable to deliver justice in the modern social economic and political climate while others see them as prototypes of the kind of dispute resolution mechanisms that are desirable in modern society (because they are more alternative dispute resolution-orientated than our other courts). It has been said that there are several reasons why traditional courts or courts of traditional leaders should be retained in a modern democratic country like South Africa. Firstly, it is argued that customary law, as the law of the majority of African people and the traditional courts that administer justice according to this law, are part of the cultural heritage of African people. This argument has been made particularly by traditional leaders themselves as well as by some academics. Secondly, traditional courts are a useful and desirable mechanism for the speedy resolution of disputes given their nature as an easily accessible, inexpensive (usually free) and simple system of justice. Thirdly, it is argued that although there are shortcomings in the system, they are not beyond repair but may be made to adapt to changing needs and to the requirements of the Bill of Rights in the Constitution³.

2.4. THE STRUCTURE OF THE LEGAL PROFESSION

In terms of the structure of the legal profession, there exist attorneys and advocates (much like solicitors and barristers respectively). But as of November 2018 these 2 branches of the profession are collectively termed 'legal practitioners' governed by one piece of legislation – the Legal Practice Act 28 of 2014 – and one governing body, the Legal Practice Council. South Africa does not allow non-lawyers to become owners of law firms. Multi-disciplinary practices are also not permissible.

2.4.1. *Number of licensed practicing lawyers*

Legal practitioner numbers as at 2015 (the latest readily available) are as follows:

³ See: http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf

- (i) Attorneys 23 712. *There were 15 004 male practicing attorneys as at March 2015, compared to 8 708 female attorneys. The legacy of apartheid is apparent when one notes that of the above figures, white people greatly dominated the number of practicing attorneys at 14 694, with black Africans coming in second at 5 336. As of 1 April 2015, there were 3 060 candidate (meaning trainee) attorneys.*
- (ii) The number of advocates is not currently available from the relevant websites, but is much smaller than the number of attorneys (likely less than 15% thereof). As will become apparent later in this report, the fees charged by practicing lawyers are not at all affordable for the general population.

2.4.2. *Legal representation in Court*

Legal representation by a lawyer is not mandatory in South Africa's justice system. Nonetheless, the country inherited the British adversarial system, which is party-centred: lawyers for both the state and defence in criminal matters and plaintiff and defendant in civil matters play a dominant role in the pursuit of procedural justice. The common law recognises as fundamental the right of the individual to legal advice and legal representation. The Constitutional provisions relating to legal representation are discussed later. In the Small Claims Court for small civil claims (of less than R20000 / +- US\$1380) no lawyers may represent clients⁴.

2.4.3. *Representation by paralegals*

Representation by paralegals is not permitted in court in South Africa, but as noted below they play a significant role in promoting access to justice. The question can then be asked: what is a paralegal and what do they do? This response will focus on community-based paralegals (CBPs) who work for the indigent as opposed to commercial paralegals who act as legal assistants in commercial law practices.

The (South African) National Paralegal Institute identifies a CBP as a person who is qualified by education, training or work experience to perform legal, social welfare or related work, which requires a basic knowledge of the law. There is, however, no strict or formalised definition of a paralegal in South Africa. A trait shared

⁴ See: https://journals.co.za/content/cilsa/37/2/AJA00104051_100

among paralegals is the quasi-legal, humanist approach to helping a diversity of people with a range of issues from everyday practicalities to more challenging obstacles. Two things a paralegal cannot do is represent clients in court, and they may not give specialised legal advice or practice law in any way that is reserved for qualified lawyers in that jurisdiction.

Dereymaeker recognises the different terms used to describe paralegals in the African context:

“In most African jurisdictions, “paralegals”, also called “community-based paralegals” or “community paralegals”, are usually understood to be individuals who do not have a law degree but have skills and knowledge of the law that allow them to provide some form of legal aid and assistance to those in need, in particular members of a community they are part of or know well, and typically under the supervision of a legal practitioner. A term ‘community based paralegals’ often refers to paralegals who provide a broad-range generalist basic legal aid services to communities with which they are based. There are also specialized paralegals, such as criminal justice or health paralegals working with specialised civil society organizations or relevant government institutions on the matter.”

According to a World Bank Justice and Development Working Paper, CBPs provide a crucial link to justice services and legal redress in South Africa, particularly for the rural poor. Although post-Apartheid constitutional reforms guaranteed a broad range of rights and benefits to all South Africans, including the right to legal assistance, accessing many of these benefits remains a challenge for those who live in remote areas and those who cannot afford legal representation. CBPs fill this gap to an extent by providing dispute resolution and legal support that is both geographically and financially accessible and informed by a deep understanding of the social issues and everyday challenges facing their clients⁵.

Despite the prevalence and importance of CBPs in the South African justice sector, their role remains largely under-formalised and worthy of further study. For example, there is no reliable source indicating the number of CBPs in South Africa⁶.

⁵ See: <http://www.accesstojustice.africa/accesstojustice/what-is-a-paralegal/>

⁶ For an analysis of CBPs in South Africa see Holness D “The need for recognition and

2.5. JUDICIAL CAREERS

South Africa's courts are independent of the other branches of government. The number of judges recruited varies annually - as vacancies arise so they are filled. There are currently 255 judges. Exact statistics as to gender and race representation in the judiciary is not currently available, but there would appear to remain more male than female judges. Judges are appointed to office for an undetermined period/ life (until the retirement age of 70). An exception to this are judges of the Constitution Court which have a 12 year tenure (non-renewable) or until they turn 70. The salaries, allowances and benefits of judges may not be reduced. A judge cannot be transferred to another court without their consent as they are appointed to a particular court. A judge may also not be removed from office unless a particular procedure is followed which can only occur if a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.

Becoming a judge in South Africa is unlike most jobs as one does not study specifically at university to become one, and then apply for the job. Judges preside over criminal, civil and constitutional matters in the High Courts, Supreme Court of Appeal and the Constitutional Court. They are appointed by the State President on the advice of the Judicial Service Commission.

It must be noted that the above relate to judges - those being presiding offices in the superior courts; it does not include magistrates (of which there are a great deal more) who preside of lower, magistrates' courts - albeit such issues as not suffering from an incapacity, gross incompetence or committing gross misconduct do apply to magistrates too.

The South African Constitution states about the Judiciary in section 165⁷:

165. (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other

regulation of paralegals: an analysis of the roles, training, remuneration and impact of community based paralegals in South Africa" (2013) 38(2) Journal of Juridical Science 78-105.

⁷ Available at: <http://www.justice.gov.za/legislation/constitution/chp08.html>

measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

As to appointment of judicial officers, parts of section 174 of the Constitution states⁸:

174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

The Constitutional Court has 11 judges and The Supreme court of Appeal has 24 judges⁹.

2.6. THE CAREER OF PUBLIC PROSECUTORS

South Africa has an independent prosecuting authority but paradoxically prosecutors are civil servants - i.e. state employees. Public prosecutors are recruited via open job adverts to law graduates/legal practitioners. Flowing from this, they are appointed to office for an undetermined period, depending on their employment contract. But the norm is employment as a civil servant until retirement at 65.

There are no figures available from the Department of Justice and Constitutional Development as to how many public prosecutors there are in the country.

Parts of the the South African Constitution to the prosecuting authority are:

“179.(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is

⁸ Available at: <http://www.justice.gov.za/legislation/constitution/chp08.html>

⁹ See: <https://www.concourt.org.za/index.php/judges/current-judges>.

the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

...

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.”

2.7. IS THERE A SHORTAGE OF LEGAL SERVICES?

South Africa has good prosecutorial coverage and wide criminal legal aid defence but very limited civil legal aid.

As to wide criminal defence representation from parastatal, Legal Aid South Africa; but poor civil legal aid coverage¹⁰.

As to the availability of legal representation for more wealthy individuals and corporates, there is little if any available research on this. But it would seem that if one is able to pay for legal services there is plenty of choice as to legal practitioners to engage.

3. PROCESS AND PROCEEDINGS: OVERVIEW

South Africa has adopted an “accusatorial” or “adversarial” system due to the influence of English Law. As a result, presiding officers in criminal and civil cases have a more passive role during the litigation stage. The presiding officer’s decision is based on the information put forward by both parties. This is to ensure that the presiding officer remains neutral and is independent.¹¹

3.1. CRIMINAL PROCEDURE

3.1.1. *Criminal pre-trial steps*

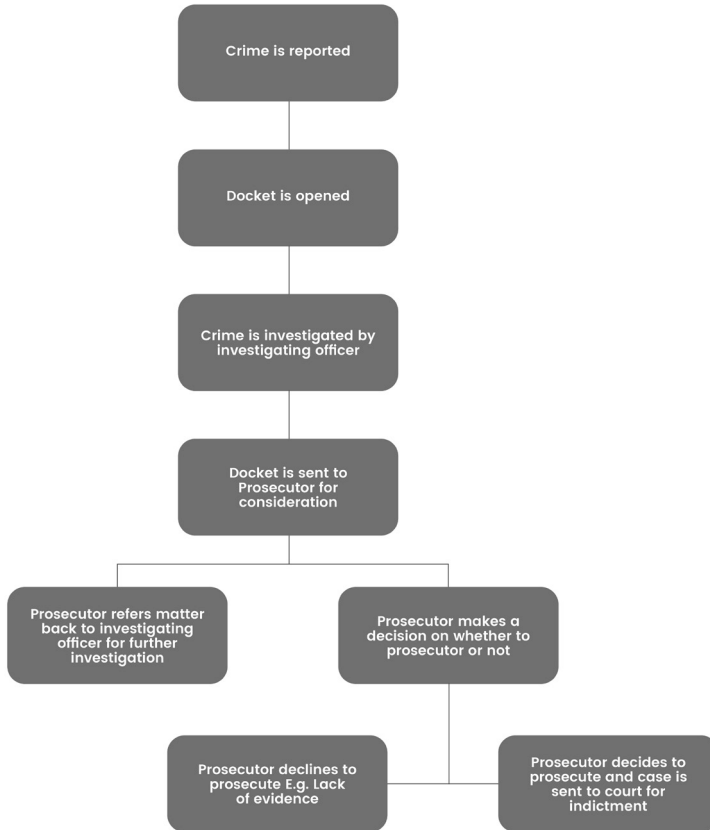
Once a crime is reported to the South African Police Service, a docket is opened, and the crime is thereafter investigated by an investigating officer. The investigating officer will take statements

¹⁰ See: Holness, D “The constitutional justification for free legal services in civil matters in South Africa” [2013] 27(2) *Speculum Juris* 1-21.

¹¹ *Four Wheel Drive CC v Leshni Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018) Paragraph 22-23.

from witnesses and hold an identity parade if necessary. If a firearm was used, the firearm and bullets are sent for a ballistics examination. If there was DNA recovered, the DNA is sent for testing. If there are photos or video footage, the authenticity of this or these is/are tested.

Chart 03. The (criminal) pre-trial steps



Following the investigation, the docket is sent to the prosecutor who sits at the court with jurisdiction over the matter for consideration. The prosecutor may decide that further investigation is required. Once the investigation is complete, the prosecutor must decide as to whether to prosecute or not. If the prosecutor decides to prosecute, the matter is sent to the Court for indictment, where the accused is formally charged.¹²

¹² Steps of the criminal procedure. *Madehyn Inc.* 16 March 2016. <https://madehyn.co.za/2016/03/16/steps-of-the-criminal-procedure/> (Accessed 2 December 2019).

3.1.2. *Criminal trial*

On the first day of the trial, the charges are formally put to the accused. The accused then pleads guilty or not guilty to the charges.

If the accused pleads guilty, the accused may enter into a Plea and Settlement Agreement in terms of Section 105A of the Criminal Procedure Act 51 of 1977 (the CPA).

Alternatively, the accused may make a Guilty Plea Statement in terms of Section 112 of the CPA. If the Court is of the opinion that the accused has admitted to all the elements of the crime in their Section 112 Statement, the Court will find the accused guilty and the accused is convicted.

If the Court rejects the statement made in terms of Section 112 of the CPA the Court records a plea of not guilty and the prosecutor is directed to proceed with the prosecution. This happens, for example, if there is doubt as to whether the accused is guilty in law of the offence which he or she pleaded guilty to or if all of the elements of the crime were not admitted, or if the accused has a valid defence and so forth.

In terms of Section 109 of the CPA, if the accused elects to remain silent and does not plead, the Court must record a plea of not guilty.

If the accused pleads guilty, he is given the opportunity to make a statement in terms of Section 115 of the CPA indicating the basis of his defence. The accused may choose to remain silent and not make a statement indicating the basis of his defence.

Section 105(1) of the CPA allows the prosecutor to address the court before any evidence is led for the purposes of explaining the charge and to indicate the evidence that will be led to support the charge. The prosecutor examines witnesses for the prosecution and adduces evidence to attempt to prove the accused committed the crime that they have been charged with or that the accused committed an offence of which he can be convicted on such a charge. This is done in terms of Section 150(2)(a) of the CPA. The witnesses for the prosecution may be cross-examined by the accused and then re-examined by the prosecutor (Section 161(1) of the CPA). The Prosecution then closes their case.

Section 174 of the CPA provides that, at the close of the state's case, if the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty. This amounts to an acquittal.

If there is no discharge in terms of Section 174, the accused may choose to lead evidence and may also address the court in terms of

Section 151(1)(a) to indicate the evidence he will be adducing to support his defence. In terms of Section 151(1)(b)(i), if the accused intends giving evidence on behalf of himself, unless good cause is shown, the accused will give evidence first. The accused may then examine other witnesses and adduce evidence to prove his defence. The prosecutor may cross-examine the accused's witnesses and the accused may re-examine their witnesses (Section 161(1) of the CPA). The defence (i.e. the accused or their representative) will then close its case.

Section 175 (1) allows the prosecution and then the defence to address the court once all the evidence is led. The court then makes a judgment on the merits of the matter. If the accused is found not guilty, the accused is acquitted. If the accused is found guilty, the accused is convicted and later sentenced. Appeal against conviction and sentence is possible.

Chart 04. The criminal trial



3.1.3. *Consistency with the Rule of Law*

In South Africa, the doctrine of separation of powers has been adopted. This means that the Executive, Legislature and Judiciary are completely independent of each other and have to perform their duties accordingly.

Presiding officers (judges and magistrates) are required to take an oath or affirmation in which they pledge to uphold the Constitution, which is the supreme law in South Africa, and the human rights contained in it. They further undertake to dispense with legal matters without fear, favour or prejudice, and in a manner that is compliant with the Constitution.¹³

The National Prosecuting Authority (NPA) who are responsible for instituting and conducting criminal proceedings on behalf of the State are also autonomous.

3.2. CIVIL PROCEDURE

3.2.1. *Overview of Civil Procedures*

There are two ways instituting proceedings in a civil court, by way of an *Action* or by way of *Application* procedure. The determining factor when deciding on which manner to proceed is whether a material dispute of fact is foreseen. If a material dispute of fact is foreseen, it is best to proceed by way of an *Action*. If there is no material dispute of fact, you may proceed by way of an *Application*.

In an *Application* proceeding, the matter is usually decided upon on the papers before the court. Parties to these proceedings will depose to affidavits containing their submissions. Usually, oral evidence is not given during *Application* proceedings. If the presiding officer is unable to decide the matters on the papers before them, they may call for oral evidence and/or oral argument. *Application* proceedings are usually quicker than *Action* proceedings.

3.2.2. *Action Proceedings*

In an *Action* proceeding, cross-examination is used to test the evidence. The parties to an action proceeding are a Plaintiff (person

¹³ The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards. *Chief Justice Mogoeng Mogoeng*. 25 July 2013. <https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/> [Accessed 6 December 2019].

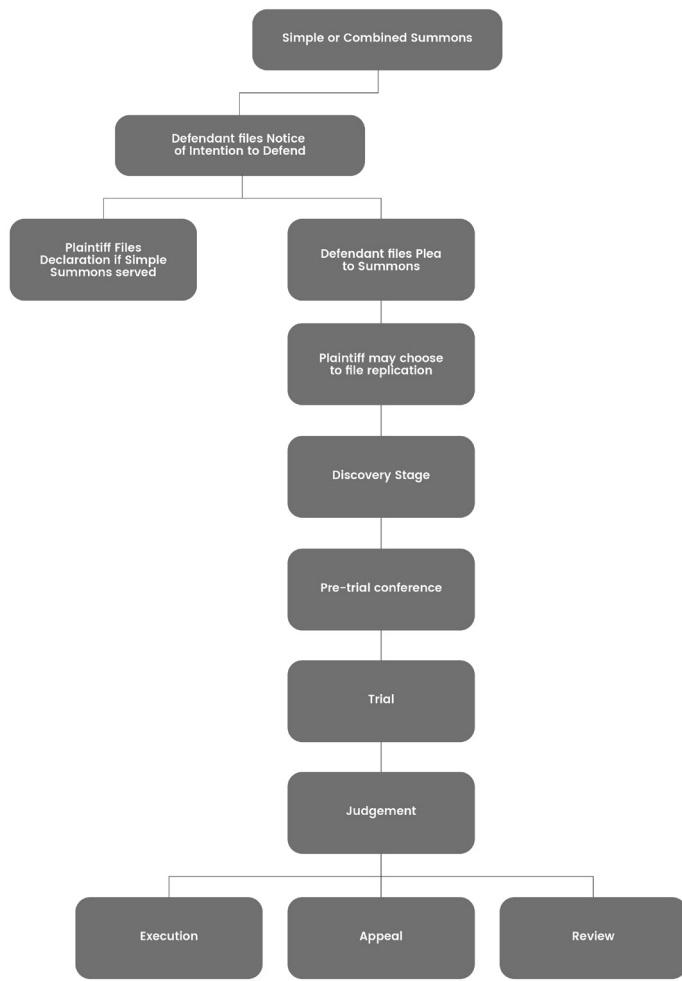
who institutes the action) and a Defendant. To proceed by way of action, a summons needs to be issued by the clerk or registrar of the court and then served by the Sheriff of the Court on the Defendant.

A combined summons will detail the nature of the Plaintiff's claim against the Defendant and the occurrence that gave rise to the claim. Upon receipt of the summons, the Defendant is required to serve a copy of the Notice of Intention to Defend with the Plaintiff and file the original Notice of Intention to Defend at court within ten days if he intends to defend the action.

If a simple summons was issued and served, the Plaintiff will thereafter serve and file a Declaration detailing the nature of the Plaintiff's claim against the defendant and the occurrence that gave rise to the claim. The Defendant must thereafter file his plea, in which he replies to every allegation contained in the Particulars of Claim, paragraph by paragraph. At this stage, the Defendant may raise a Special Plea which will either dispense with the cause of action or postpone its operation. The Defendant may also submit a counterclaim should one exist. Should the Plaintiff decide to file a replication (reply to the Defendant's plea), this needs to be served and file together with the Plaintiff's Plea to the Defendant's Counterclaim.

The next stage to the action proceedings is the discovery stage. At this stage, parties to the action are required to make a statement under oath setting out any documentary evidence that is or was in their possession and which relates to the matter. This includes any documentary evidence that is adverse to their case. An application for a trial date is made and a pre-trial conference is attended by both parties. At the pre-trial conference the presiding officer notes the points in dispute, may recommend further settlement discussions and if satisfied that the matter cannot be settled, will certify that the matter is ready for trial. At the trial, the parties may address the court on the evidence they will lead. Next each party will lead oral evidence which is tested under cross-examination by the opposing party. Closing arguments are made and thereafter, judgment is pronounced.

Chart 05. Action Proceedings



3.2.3. Application Proceedings

In an Application proceeding, the parties are the Applicant (party instituting the application) and Respondent. A Notice of Motion coupled with a Founding Affidavit is issued by the Clerk or Registrar of the Court and then served by the Sheriff of the Court on the Respondent. The Notice of Motion indicates the relief sought, while the Founding Affidavit provides the basis for the relief sought.

If the Respondent wishes to oppose the Application, they are required to file a Notice of Intention to Oppose and an Answering Af-

fidavit setting out the reasons why they are opposing the Application. Should the Applicant wish to respond to any points raised by the Respondent, the Applicant may file a Replying Affidavit. Any facts pertinent to the matter should be included in the affidavits as usually only oral arguments by the parties' legal representatives are heard in application proceedings. No further evidence is put forward once the affidavits are filed and the matter is set down for hearing. Thereafter, the presiding officer will give a judgment.¹⁴

If a party is dissatisfied with a judgment based on the law, facts of the matter or both, the dissatisfied party may lodge an appeal. The court of appeal will make a decision based on the merits of the matter and may set aside the judgment of the lower court and hand down what is in its opinion the correct judgement.

Chart 06. Application Proceedings



¹⁴ Understanding the Civil Litigation Process in South Africa. *Andre Nortje, Schoemanlaw Inc.* 2016. <https://www.schoemanlaw.co.za/wp-content/uploads/2016/10/Understanding-Civil-Litigation-in-South-Africa.pdf> [Accessed 5 December 2019].

If a party is dissatisfied with the procedure followed by the presiding officer in coming to his decision, the dissatisfied party may take the matter on review. The court of review will only consider the procedure followed and does not consider the merits of the matter.¹⁵

3.2.4. *Procedure for urgent matters*

Rule 6(12) of the Uniform Rules of Court allows for the normal forms and service to be dispensed with if a matter is of an *urgent* nature. The time in which the opposition has to respond may also be shortened. The litigant will have to show damage, prejudice or harm of some sort that requires urgent attention in order to qualify for this departure from the normal rules and procedures. The party pursuing relief on an urgent basis will also have to explain to the court why the same relief could not be obtained were the ordinary course of litigation to be pursued.¹⁶

3.2.5. *Encouraging settlement*

Although not compulsory in all matters, certain areas of law have incorporated alternative dispute resolution mechanisms (ADR is discussed further below). For example, mediation is obligatory within certain aspects of the family law sector. This is made so through the enactment of statutes such as the Mediation in Certain Divorce Matters Act 24 of 1987. The Uniform Rules of Court have been amended to include Rules relating to Case Flow Management. The Judge President of a Division may determine which matters should be subject to case flow management and no trial date can be allocated for these matters until it has been certified ready for trial by the Judge.¹⁷ Prior to trial, in both Application and Action proceedings, a pre-trial conference is held between the parties and the presiding officer. The pre-trial conference does not only assist in limiting the issues in dispute at the trial, but also for the presiding officer to establish whether settlement negotiations have taken place, and if not, to encourage the parties to attempt this prior to the trial date.¹⁸

¹⁵ *Appeal v review: why the debate over rulings?* Sayed Iqbal Mohamed. 7 August 2012. <https://www.iol.co.za/dailynews/consumer/appeal-v-review-why-the-debate-over-rulings-1357493>. [Accessed December 2019].

¹⁶ What is an urgent application? *Matthew Thomson*. 19 July 2019. <https://www.dingley-marshall.co.za/what-is-an-urgent-application/> [Date Accessed 6 December 2019].

¹⁷ Amendment of Uniform Rules of Court with the Insertion of Case Management Rules. *Office of the Chief Justice*. 28 June 2019. https://www.judiciary.org.za/images/news/2019/AMENDMENT_OF_UNIFORM_RULES_OF_COURT_WITH_THE_INSERTION_OF_CASE_MANAGEMENT_RULES.pdf [Date Accessed 7 December 2019].

¹⁸ Shepstone & Wylie Attorneys “Step-by-Step Guide to Commercial Litigation” 2016 (1)

3.3. ALTERNATIVE DISPUTE RESOLUTION

ADR has been incorporated into certain aspects of South African law, key examples set out below.

- (i) The Labour Relations Act 66 of 1995 provides for and more specifically, encourages alternative dispute resolution procedures be used to resolve labour disputes.¹⁹
- (ii) South Africa also has a number of Ombudsmen appointed to assist in resolving matters by providing advice and mediation - (and even sometimes thereafter making a finding) - when a person has a complaint against a company or an organisation. Some of the established Ombudsmen are the Ombudsman for Short-term Insurance, the Ombudsman for Long-term Insurance, the Ombudsman for Banking Services, Credit Ombudsman, Motor Industry Ombudsman of South Africa, Council for Medical Schemes and so on.²⁰ If a party is unhappy with the decision of the ombudsman, the matter may be taken on review.
- (iii) The Pension Funds Act 24 of 1956 makes provision for the formation of the Pension Fund Adjudicator which deals with complaints arising from abuse of power, maladministration, disputes of fact or law, and employer neglect of duty in respect of pension funds. An example would be where an employer does not pay employees' contributions over to the pension fund.²¹ If a party is unhappy with the decision of a Pension Funds Adjudicator, they may take the matter on appeal to the Financial Services Tribunal.²²

¹ Page 5 <https://www.wylie.co.za/wp-content/uploads/SW-Step-by-step-guide-to-commercial-litigation-1.pdf> [Accessed 8 December 2019].

¹⁹ The Cost Of Mediation Vs Litigation. *Brandon Potgieter Incorporated*. 24 July 2018. <https://www.brandpotgieter.com/2018/07/24/the-cost-of-mediation-vs-litigation/> [Date Accessed 7 December 2019].

²⁰ A Basic Guide To Ombudsman Schemes In South Africa. Law For All. <https://www.lawforall.co.za/2019/02/ombudsman-schemes-in-south-africa/> [Accessed 11 December 2019]

²¹ About Us. *Pension Funds Adjudicator*. <https://www.pfa.org.za/AboutUs/Pages/Home.aspx>. [Accessed 10 December 2019].

²² PFA decisions can be taken on appeal to financial services tribunal. *Muvhango Lukhaimane*. [https://www.pfa.org.za/Publications/Latest%20Media%20Releases/PFA%20decisions%20can%20be%20taken%20on%20appeal%20to%20financial%20services%20tribunal%20\(FANEWS%204%20Sept%202018\).pdf](https://www.pfa.org.za/Publications/Latest%20Media%20Releases/PFA%20decisions%20can%20be%20taken%20on%20appeal%20to%20financial%20services%20tribunal%20(FANEWS%204%20Sept%202018).pdf). [Accessed 11 December 2019].

- (iv) The Rental Housing Tribunal was established to resolve matters between landlords and tenants that arise out of unfair practices in this sphere. A decision made by the Rental Housing Tribunal cannot be appealed, however an aggrieved party may take the matter on review to the High Court, where the Court will review the manner in which the proceedings took place.²³
- (v) The National Consumer Tribunal was established by the National Credit Act 34 of 2005 and its purpose is to determine applications brought by consumers, credit providers, credit bureaux, debt counsellors and the National Credit Regulator. Decisions made by the National Consumer Tribunal may be taken on appeal or review to the High Court.²⁴
- (vi) The Road Accident Fund (RAF) provides insurance to all users of South African Roads for bodily injuries sustained or to their dependants in the event of their death. The RAF attempts to settle matters out of court. If a claimant is unhappy with the offer, they may sue the RAF. The RAF's main source of income is the RAF fuel levy which is levied on fuel throughout South Africa.²⁵ The Road Accident Fund will only compensate a person for general damages if serious injuries were sustained. A claimant may appeal to the Road Accident Fund Appeal Tribunal. The decision of the Tribunal may be reviewed and set aside based on the grounds listed in the Promotion of Administrative Justice Act, 3 of 2000.²⁶
- (vii) The Commission for Conciliation, Mediation and Arbitration (CCMA) was established to deal with labour disputes and is entirely funded by the Department of Labour.²⁷ If a

²³ RENTAL WATCH: Rental housing and the law. *Dr. Sayed Iqbal Mahomed*. <https://www.iol.co.za/dailynews/consumer/rental-watch-rental-housing-and-the-law-19823300>. [Accessed 11 December 2019].

²⁴ National Consumer Tribunal. *Department of Trade and Industry*. <https://www.thedti.gov.za/agencies/nct.jsp> [Accessed 10 December 2019].

²⁵ Fuel Levy. *Road Accident Fund*. <https://www.rafa.co.za/About-Us/Pages/Fuel-Levy.aspx>. [Accessed 10 December 2019].

²⁶ Van der Walt v Road Accident Fund Appeal Tribunal and Others (18332/2018) [2019] ZAGPPHC 231 (6 June 2019). Paragraphs 2-11.

²⁷ CCMA Annual Report 2016/2017. *Commission for Conciliation Mediation and Arbitration*. 2017. <http://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports/token/>

party is unhappy with the CCMA ruling, they will be unable to appeal the decision. Their only alternative is to take the arbitrator's conduct on review if they believe the arbitrator acted unfairly.

- (viii) Alternative Dispute resolution is compulsory in terms of legislation pertaining to certain areas of law such as Mediation in Certain Divorce Matters Act 24 of 1987 and the Labour Relations Act 66 of 1995.

There is also private arbitration of disputes if parties to a dispute agree to this. The parties choose their own arbitrator who makes a binding decision. The parties may also request that organisations such as the Arbitration Foundation of South Africa or Association of Arbitrators appoint a suitably qualified arbitrator. This form of arbitration would be funded by the parties. The arbitrator's decision may be made an order of court.²⁸ Section 33(1) of the Arbitration Act, No 42 of 1965 lists the grounds on which an aggrieved party may make an application to court to set aside an award made by an arbitrator. These grounds are as follows:

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceeding or has exceeded its powers; or
- (c) an award has been improperly obtained.

A form of voluntary diversion in South Africa is taking a claim for R20 000 (about \$1290) or less to the *Small Claims Court*. If the claim is above R20 000, the claimant can choose to abandon the amount causing the claim to exceed R20 000 in order to pursue the claim in the Small Claims Court. The Small Claims Court offers a simpler procedure to that of the ordinary action procedure for claims. Further, the claimant does not require a lawyer to represent them at the small claims court - nor is such representation allowed (in order to 'level the playing fields' between litigants as it were). The Claimant sends a letter of demand to the debtor and if there is no response, the claimant can approach the Small Claims Court with a copy of the letter of

download/ItemId/32 [Accessed 9 December 2019].

²⁸ Arbitration in South Africa. *Arinda Truter*: 5 May 2017. <https://www.polity.org.za/article/arbitration-in-south-africa-2017-05-05>. [Date Accessed 14 December 2019].

demand, proof that the debtor received the letter of demand (such as a registered post receipt), a copy of any contractual agreement or any proof of their claim and the debtor's contact details. The clerk of the court prepares a summons which must be delivered to the debtor by sheriff or by the claimant. The summons will set out a date and time for the debtor to appear in court. Proof that the summons was served on the debtor needs to be submitted on the day of the hearing. The hearing proceedings are simple, and the claimant is asked to tell the Commissioner (who presides over the matter) their version of how the debt arose and may have to answer questions from the commissioner. Judgment is given thereafter.²⁹ The Commissioner's finding may be reviewed but not appealed.

3.4. SIMPLIFICATION OF LAW AND BY-PASSING LEGAL PROCESS

The possibility for urgent civil proceedings has been outlined above. There are some other 'legal simplifications' as it were; two of which are listed below.

- (i) Section 61 of the Consumer Protection Act 68 of 2008 establishes strict liability in the case of producers, importers, distributors or retailers of goods who become automatically liable if unsafe goods are supplied, products fail to work as advertised and defects in any goods, in spite of whose fault it is. This simplifies the legal process for a claimant by reducing an evidentiary burden that would otherwise be upon them.
- (ii) The Compensation for Occupational Injuries and Diseases Act 130 of 1993 allows for no-fault compensation to employees who are injured in accidents which out of and in the course and scope of the employment, or those who develop diseases. Additional compensation may be awarded to employees who are able to prove that the injury or developing of the disease was due to the negligence of their employer. Employers in South Africa are all required to register and contribute towards the Compensation Fund which pays out an employee who becomes temporarily disabled, permanently disabled or to family members of an employee who has died

²⁹ Small Claims Courts. *Department of Justice and Constitutional Development*. <https://www.justice.gov.za/scc/scc.htm>. [Accessed 14 December 2019].

as a result of injuries sustained at work or from the disease contracted.³⁰

4. ACCESS TO JUSTICE, EQUAL ACCESS TO COURT AND FAIR TRIAL

Access to justice, equal access to court and fair trial rights exists in South Africa by virtue of national law. The Constitution contains explicit provisions relating to access to courts, the right to a fair trial and access to Justice in its section 34 and section 35. Section 34 of the Constitution provides for the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Section 35 provides for the rights of the arrested, accused, detained person. Section 35(3) specifically includes the accused's right to a fair trial.

The state funds Legal Aid South Africa (LASA) which provides legal services to indigent people mainly in criminal matters plus in certain categories of civil matters subject to availability of resources. LASA has a mixed delivery system which consists of elements such as primarily a Justice Centre Model and a limited Judicare Model. In line with the Justice Centre Model, LASA employs salaried legal practitioners to assist clients at their Justice Centres and Satellite Offices. Salaried Legal Practitioners are also stationed at a number of District and Regional Magistrates Court to assist in effective legal service delivery. The Judicare Model assists increasing LASA's ability to deliver legal services and by taking on matters, via private lawyers who are engaged to do work in certain circumstances such as where there is a conflict of interest between the client and Legal Aid South Africa, as well as when specialist knowledge not available at the Justice Centre is required and not otherwise available or insufficient in-house capacity exists. LASA also enters into co-operation agreements with other institutions, like certain university law clinics, capable of providing legal services to further increase delivery of legal services- especially in civil matters. LASA also undertakes or funds Impact Litigation Services which will have a noteworthy impact on a group or substantial part of a group. This type of work would be of benefit to a larger group of people rather than just one client.³¹

³⁰ Myburg, P., 2000. Social security aspects of accident compensation: COIDA and RAF as examples'. *Law Democracy and Development*, 5, 45-46.

³¹ Legal Aid South Africa. 2018. Legal Aid Manuel. Available at: <https://legal-aid.co.za/>

Access to justice is a problem for poor people as litigation costs in South Africa are very high in relation to average disposable income. Although there are organisations such as Legal Aid South Africa, ProBono.org and other institutions such as University Law Clinics, these are insufficient to accommodate all citizens who are unable to afford legal services. Many citizens who lack the means to afford a private attorney also may not meet the strict financial means test used by these organisations to determine if their clients are ‘poor enough’ to qualify for free legal services. Many of these organisations may also have specific area focus areas and once they have reached their capacity, are unable to take on more clients with similar issues.³²

Access to Justice has been subject to scholarly³³ and public debate³⁴.

5. LEGAL AID SYSTEM

5.1. HISTORY OF LEGAL AID

The Constitutional right to legal aid has been noted above.

Although founded in 1969, the Legal Aid Board, which is now known as Legal Aid South Africa, began functioning nationally in 1971 under the Apartheid regime. During its inception, the Legal Aid Board provided assistance largely to the minority white population with civil matters by referring their matters to private lawyers (judicare attorneys). As its budget grew progressively, the Legal Aid Board changed its focus from civil matters to criminal matters and

wp-content/uploads/2018/11/Legal-Aid-Manual.pdf. [Accessed 8 January 2020].

³² High litigation costs deprive the poor access to justice. *Kgomotso Ramotsho*. 1 November 2018. <http://www.derebus.org.za/high-litigation-costs-deprive-the-poor-access-to-justice/>. [Accessed 10 January 2020].

³³ For scholarly examples, see the following: (1) McQuoid-Mason, David, Access to Justice in South Africa: Are There Enough Lawyers? (May 31, 2013). Oñati Socio-Legal Series, Vol. 3, No. 3, 2013. Available at SSRN: <https://ssrn.com/abstract=2272640> (2) Holness, D., 2013. Recent developments in the provision of pro bono legal services by attorneys in south africa. *Potchefstroom Electronic Law Journal*, [Online]. 16/1, 129-164. Available at: <https://www.ajol.info/index.php/pelj/article/viewFile/88747/78335> [Accessed 10 January 2020]. (3) Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: ‘Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice.’

³⁴ For public debate examples, see the following: (1) Prince Charles. Access to Justice is not only about Access to Courts, it is about Access to Rights. 23 October 2019. Available at: <https://www.activateleadership.co.za/uncategorised/access-to-justice-is-not-only-about-access-to-courts-it-is-about-access-to-rights/>. [Accessed on 10 January 2020] (2) The Citizen. 2019. Social injustice a great threat to democracy – Thuli Madonsela. [ONLINE] Available at: <https://citizen.co.za/news/south-africa/society/2203049/social-injustice-a-great-threat-to-democracy-thuli-madonsela/>. [Accessed 10 January 2020].

continued to provide assistance by referring matters to *judicare* attorneys. When South Africa became a democracy and the right to legal aid was entrenched in the Constitution, this led to an increased demand for legal aid as black South Africans could now benefit from this right without discrimination. The legal aid system of the time could not keep up with this new demand and began to break down forcing a turn towards a more effective model. As noted further above, the new model provides for justice centres with salaried legal practitioners and candidate legal practitioners. There are also cooperation agreements with public interest law firms and university law clinics to assist with the delivery of free legal services. Where justice centres are unable to assist clients, these clients are referred to *judicare* attorneys.³⁵

Legal Aid in South Africa is extremely important in delivering access to justice, equal access to courts and fair trial rights and goals when it comes to indigent persons. The lay person does not always know or understand the law and may agree to plea deals that are unfair, allow their rights to be violated if they are not aware of them and may not know how to adequately defend themselves. In South Africa, where illiteracy is not uncommon, arrested, detained and accused person can benefit greatly from someone who can adequately explain their rights and the law to them. Although the Department of Justice has claimed to have attempted to make certain court processes easier, such as domestic violence matters and introducing ‘do-it-yourself’ divorces, unless these matters are straightforward, the average person will not know how to go about the process. For example, a contested divorce where one of the spouses has a pension fund and there are minor children involved.

5.2. LEGISLATIVE FRAMEWORK FOR LEGAL AID

The right to Legal Aid is specified in the Constitution.

Section 35(2)(c) thereof provides for every detained person, including sentenced prisoner has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

Section 35(3)(g) thereof provides that every accused person has the right to a fair trial which includes the right to have a legal

³⁵ Some Reflections on the Impact of the Constitution on Legal Aid In South Africa 1994-2014. *David McQuoid-Mason*. <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/McQuoid.pdf>. [Accessed 14 December 2019].

practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.³⁶

Section 22 of the Legal Aid Act 39 of 2014 provides that:

A court in criminal proceedings may only direct that a person be provided with legal representation at state expense, if the court has—
 “(1)(a) taken 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
 ...”

5.3. INSTITUTIONAL FRAMEWORK FOR LEGAL AID

Legal Aid South Africa (LASA) is the national legal aid system that is funded by the national government with offices in each province and satellite offices in more remote areas. LASA is the main institution responsible for providing legal aid services to those who are unable to afford private attorneys.

There is no obvious evidence of the client community participating in governance of or setting priorities for legal aid, nor is there available information or statistical data evaluating the public’s perception of the legal aid institution. Clearly having client input on both of these aspects would be advantageous to the legal aid on offer.

Apart from LASA, there are far smaller non-governmental ‘legal aid clinics’ of various types and sizes (generally quite small operations) which provide free legal services primarily in civil matters. Examples of these are:

- (i) The Legal Resources Centre – This organisation is an independent non-profit organisation which provides legal services to poor, homeless and landless individuals and communities.
- (ii) University Law Clinics – Almost all universities with law

³⁶ Brickhill, J., 2018. The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana. *Constitution Court Review*, [Online]. 8/1, 256-281. Available at: <http://www.saflii.org/za/journals/CCR/2018/22.pdf> [Accessed 12 January 2020].

faculties/schools have active Law Clinics.

- (iii) ProBono.Org – This is an NGO which makes use of private legal practitioners to assist poor people with their legal matters via a ‘clearing house system’.

5.4. LEGAL AID BUDGET

The sources of legal aid funding for LASA is the government. Independent legal NGOs seek their own donor funding. The legal aid budget to LASA is a separate component of the annual justice system budget allocated to the Department of Justice and Constitutional Development (DOJ). This is a decision made by the executive which has the power to allocate resources as it sees fit to the DOJ; the latter then decides on LASA’s allocation.

The level of the national budget for legal aid is not clear in so far as the amounts for legal aid are conflated with overall justice spending. The South African government’s genuine commitment to (or at the very least prioritisation of) legal aid-related access to justice could be questioned in terms of a major cut having been made to LASA’s budget flowing from a decrease in the Department of Justice and Constitutional Development’s allocation from the national fiscus. LASA already had its funding from government reduced by 5% in the 2018-19 financial year alone with a further huge budget cut of 503 million Rand over the next three years having been announced.³⁷ Such drastic funding cuts for legal aid spending makes service provision by them all the more challenging. A call for greater state allocation of funds towards legal aid from government, especially for LASA, does not form a focal area of this paper. However, it is normatively argued that state funding for legal aid, particularly civil legal aid, needs to instead be increased, not reduced, if access to justice is really something to which everyone in South Africa will have reasonable access to.³⁸ An increase in state funding of legal aid generally and particularly civil legal aid will ensure greater sustainability of legal aid programmes. It will suffice to state that a prominent role by LASA in legal aid provision is only possible if sufficient resources are allocated to its work. LASA remains an obvious focal point for a

³⁷ Mabuza E (2018) “Legal Aid SA budget cuts bad news for poor and vulnerable seeking justice”. *Times Live* available at <https://www.timeslive.co.za/news/south-africa/2018-10-17-legal-aid-sa-budget-cuts-bad-news-for-poor-and-vulnerable-seeking-justice/17> October 2018 *Times Live* (accessed 1 May 2019).

³⁸ LASA does provide a quite broad criminal legal aid net - as the statistics in section 5.7.3 below attest to.

more harmonised approach to legal aid if for no other reasons than its massive scale of operations³⁹ in comparison with other South African legal aid service providers.

5.5. LEGAL AID PROVIDERS

Quite a lot has been stated above about the parastatal legal aid service provider, Legal Aid South Africa. What must be stressed is that a very significant proportion of its budget, personnel and case output (approximately 87% in each instance) is focused on criminal as opposed to civil legal aid⁴⁰.

The normal requirements for admission as a legal practitioner apply to state funded legal aid providers. For example, after completion of a minimum four year law degree at university (the LLB), they must then perform a period of one to two years of vocational training which includes passing admission examinations. The procedure to become a staff member of a legal aid institution is by a normal job application. Anecdotaly, due to the scarcity of vocational training opportunities in the legal field and even good positions for admitted legal practitioners, there is a high level of interest among lawyers to become State funded legal aid provided. Legal aid providers are paid for their services via salaries when employees of LASA or legal NGOs and the relatively small proportion of work done by private lawyers in terms of *judicare* are paid as consultants on a case-by-case hours worked basis.

There is no empirical evidence available to evaluate the remuneration offered to legal aid providers, but it is evident that LASA salaries are better than those in the legal aid NGO sector and the former as opposed to the latter have employment benefits attached thereto.

It is not easy to evaluate the level of independence/autonomy of legal aid providers. On the basis of the maxim “he who pays the piper calls the tune” it is logical to conclude that legal NGOs have a good degree of autonomy. As for LASA, its autonomy is guaranteed by statute. Nonetheless, as LASA is state owned/funded there may be a perception that this is not the case even if there is no basis to back this up. Overall it would be concluded that legal aid provision in South Africa is independent of undue pressure from government arms.

³⁹ See section 5.7.3 below.

⁴⁰ See: Holness D “Improving Access to Justice through Law Graduate Post-Study Community Service in South Africa” PER / PELJ 2020(23) - DOI <http://dx.doi.org/10.17159/1727-3781/2020/v23i0a5968>

5.6. QUALITY ASSURANCE

This is evidently a very poor aspect of South Africa's legal aid functioning - one requiring much work. Focus has been placed on quantitative output of legal aid over checks on the quality thereof⁴¹.

Linked with a lack of legal aid quality assurance is there being no requirement on legal aid providers to engage in continuing education and/or skills training. There is no administrative remedy available if a person receives legal aid services, but the legal aid provider is unprepared or unqualified or if the services are otherwise of poor quality. Seemingly the only route available for such a client would be to lay a complaint against the lawyer with the Legal Practice Council or in litigious matter to appeal if it were to be shown that the legal aid representation grossly denied a client's rights to a fair trial. The chance of the latter occurring is very small.

There is a formal accreditation scheme in place for legal aid providers via recognition by the Legal Practice Council. But this is simply based on the legal aid providing showing that it serves the poor sans charging a fee and similar such requirements; i.e. it is not dependent on showing quantitative output of work or the quality of assistance provided.

5.7. CRIMINAL LEGAL AID

5.7.1. *Scope of criminal legal aid*

The report above has discussed the scope of criminal legal aid via section 35 of the Constitution and the wide criminal legal aid net provided by the state-owned Legal Aid South Africa.

5.7.2. *Eligibility criteria for criminal legal aid*

The relevant constitutional provision setting out eligibility criteria constitutionally has been cited above in section 35 of the Constitution⁴².

In terms of the financial eligibility criteria for criminal legal aid is the same as for civil legal aid. The LASA threshold (followed by a number of legal NGOs) is R7400 (+- \$510 p.m.) for individuals and

⁴¹ In this regard see Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: 'Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice.'

⁴² For a further discussion on this constitutional right and a submission as to a more indirect right to civil legal aid in South Africa in certain matters see: Holness, D "The constitutional

R8000 (+- \$551 p.m.) for couples and in almost all cases the recipient of criminal legal aid services does not contribute to the cost of providing those services.

5.7.3. *Process for obtaining criminal legal aid*

This is a purely administrative process involving completion of a requisite form followed by a follow-up interview; these being done to ensure qualification for assistance.

Although the law is silent on this, on the basis of the constitutional right to a fair trial including legal representation *de facto* the case will be (and very typically is) postponed until a legal aid lawyer is available and present.

If legal aid is denied, there is a possibility of ‘appealing’ the decision by LASA in terms of its own internal rules for appealing such a decision; for example a committee convenes to decide in this regard.

The mechanism for assigning legal aid providers is in the hands of LASA and not the accused. Also someone may instead choose to represent themselves.

The total number of criminal cases filed in court where State funded legal aid was provided in 2017/2018 was 371 202.

5.8. CIVIL LEGAL AID

5.8.1. *Scope of civil legal aid*

The indirect right to civil legal aid in certain matters has been described above in relation to section 34 of the Constitution⁴³.

Only certain services are included as part of civil legal aid in South Africa. The ‘right to civil legal aid’ is specified in LASA rules but only in so far as its limited ambit of civil legal aid service. LASA has its own rules as to the limited parameter of civil legal aid matters accepted. E.g. a claim sounding in money for something like an assault is a category of case for which legal aid is provided, but there are other categories (like defamation) not provided for. There are also some anomalies like the rule that LASA represents non-residents in refugee status tribunals (i.e. whether they should be classed as refugees), but does not represent such non-residents in other forms

justification for free legal services in civil matters in South Africa” [2013] 27(2) *Speculum Juris* 1-21.

⁴³ For an analysis thereof see again: Holness, D “The constitutional justification for free legal services in civil matters in South Africa” [2013] 27(2) *Speculum Juris* 1-21.

of civil legal aid. The limitation on the ambit of civil legal aid matters relates to the limited funding available for such work.

Civil legal aid covers legal advice. There has been recognition that the provision of basic legal advice or information, even where no formal legal representation is necessary. This last point is made through recognising that no legal right can be realised unless the right-holder is aware of it and knows how to exercise it. A fairly recent initiative was introduced by LASA in this regard to provide an exclusively advice service. That initiative is a telephonic legal advice line facility, including a “Please call me” free sms/text service for call-backs so as not to limit the service to those who are able to afford the call. In 2016/2017 alone, LASA’s Annual Report reflected 41 777 items of advice or legal information were given via their telephonic legal advice line.⁴⁴ Almost all of this advice was given for civil as opposed to criminal matters. However, LASA does take on a number of litigious civil matters before courts and tribunals, as do other legal NGOs/Law Clinics.

There is a broad range such as land disputes, evictions and family law (such as divorces)⁴⁵.

5.8.2. Eligibility criteria for civil legal aid

This has largely been discussed above. For example, the types of civil matters that LASA takes on. The financial means test is exactly the same as that mentioned in the criminal legal aid section of this report. LASA also only takes on civil legal aid matters which it views as having relatively good prospects of success.

LASA stresses the need to assist vulnerable groups: women, children and people with disabilities. Despite this espoused focus, the financial means test for such applicants remains the same. Also strategic litigation (e.g. to help many vulnerable people) is undertaken periodically by LASA.

The recipient of civil legal aid services does not normally have to contribute to the cost of those services - i.e. if they qualify for the service financially. But those who only miss qualifying financially may be required to pay a portion of the legal costs incurred, often once litigation is concluded.

⁴⁴ LASA 2017 http://www.legal-aid.co.za/wp-content/uploads/2017/09/ANR-Legal-AidSA_2017.pdf.

⁴⁵ See LASA’s latest Annual Report available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Legal_Aid_Annual_Report_20172018.pdf

5.8.3. *Process for obtaining civil legal aid*

This is the same as for criminal legal aid as set out above.

As to the total number of applications and mandates accepted by LASA, these are available on the LASA website at <https://legal-aid.co.za/>. For example in 2017/2018 there were 55 415 new civil matters opened (versus 371 202 criminal files).

5.9. HOLISTIC LEGAL SERVICES

There is very little information available concerning holistic legal services; quite likely because South Africa's legal aid network (e.g. between LASA and other legal aid providers) is not well aligned - these may be said to operate in 'silos'. This is also alluded to in the concluding comments to this report⁴⁶.

5.10. LEGAL AID BEFORE REGIONAL HUMAN RIGHTS MECHANISMS

This is not commented on as LASA is not operating in this sphere and there is extremely minimal involvement in such work by legal NGOs in the country.

5.11. ALTERNATIVE SOURCES OF LEGAL ASSISTANCE

- (a) Legal NGOs have been mentioned above, as have community-based paralegals⁴⁷.
- (b) Another source of assistance is private lawyers acting *pro bono* - something which is theoretically possible but has been said to have yielded little or at least limited assistance in practice⁴⁸.
- (c) Assistance by law students acting *pro bono*, especially in university law clinics⁴⁹. In some university's law schools such

⁴⁶ For a discussion in this regard see Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: 'Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice.'.

⁴⁷ CBPs see Holness D "The need for recognition and regulation of paralegals: an analysis of the roles, training, remuneration and impact of community based paralegals in South Africa" (2013) 38(2) *Journal of Juridical Science* 78-105.

⁴⁸ In this regard see Holness, D. 2013. Recent developments in the provision of pro bono legal services by attorneys in south africa. Potchefstroom Electronic Law Journal, [Online]. 16/1, 129-164. Available at: <https://www.ajol.info/index.php/pelj/article/viewFile/88747/78335> [Accessed 10 January 2020]

⁴⁹ See Holness "Improving Access to Justice Through Compulsory Student Work at

work is compulsory and others not.

6. COSTS OF RESOLVING DISPUTES WITHIN THE FORMAL JUDICIAL MACHINERY

6.1. OVERVIEW OF JUDICIAL COSTS FOR LITIGANTS

The Deputy Minister of the Department of Justice and Constitutional Development noted that South Africa's legal fees were "astronomically high" compared with those of other parts of the world (this is in relation to spending-power of the population).⁵⁰ There is therefore a need for greater free legal services (broadly defined) for those in dire need of such assistance. Such high legal costs relate chiefly to the costs of engaging a lawyer. Litigants may have a disbursement cost like service of legal process by the sheriff but are otherwise not required to pay a court fee to start a proceeding at a court.

6.2. EXEMPTION FROM JUDICIAL COSTS

Unless legal aid represented, there will always be legal costs to the legal provider applicable. A concern is that some *disbursement costs* - e.g. service of court processes by the sheriff of the court - especially for legal aid by NPOs outside LASA - may be payable by legal aid recipients which may in itself make access to legal services prohibitive.

Another huge factor is the *risk of an adverse costs order* for any recipient of legal aid. In other words, even if a litigant gets free legal services, on losing a civil matter in court (i.e. not applicable to criminal cases), they are very likely to be liable to pay the other litigants costs. This therefore makes litigation in South Africa an inherently risky affair even for recipients of civil legal aid, making access to justice potentially less attainable as litigants may not be willing to risk the little they have in the event of an adverse court finding.

6.3. MECHANISMS TO REDUCE COSTS BY VARIATIONS TO COURTS AND PROCEDURES

Alternative dispute measures which reduce costs and forums like the Small Claims Court (where lawyers have no right of appearance) are discussed elsewhere in this report.

University Law Clinics" [2013] 16(4) *Potchefstroom Electronic Law Journal* 328-349.

⁵⁰ Manyathi-Jele N "The Legal Practice Bill and Community Service" 2013 *De Rebus* 10.

7. THE PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS

The LASA strategic litigation division has been mentioned above. Most collective rights/ strategic litigation is done by specialised legal NPOs. Examples are:

- (i) The Legal Resources Centre (which was party to the abolishment of the death penalty, for example);
- (ii) Lawyers for Human Rights (which has done much such work for refugees and asylum seekers);
- (iii) Section 27 which deals with health rights; and
- (iv) The Treatment Action Campaign which successfully challenged the government's erstwhile unconstitutional unequal provision of anti-retrovirals for HIV-positive pregnant mothers⁵¹.

The Constitution's broad *locus standi* (legal standing to bring matters) relating to constitutional rights in section 38 encourages litigation of group claims.

8. PROFESSIONAL LEGAL ETHICS

South Africa has reasonably effective self-regulation by the legal profession of lawyers'/legal professionals' ethical conduct - largely through the legal profession itself and not externally. Legal ethical requirements are stated as key elements of the role of the lawyers' oversight body, the Legal Practice Council. But the number of reports of lawyers actually having been sanctioned for unacceptable ethical behaviour is perhaps lower than could have been anticipated. Some Law Schools have a dedicated ethics course in the LLB degree (the Bachelor of Laws which is the minimum degree requirement for entry into the legal profession). However, most would in any event cover certain aspects (like the need for lawyer-client confidentiality) in a course linked with its university aid/law clinic or another professional training module.

Professional ethics is examined in one of the admission exams for both attorneys and advocates. An oath of allegiance is taken to the court and country - which encompasses ethical behaviour - upon

⁵¹ See: Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: 'Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice.'

admission to the legal profession in court.

There are promising regulatory initiatives (if introduced) towards promoting greater access to justice (via free legal services for those in need thereof) in S.29 of the Legal Practice Act relating to Post-study Community Service⁵² and *pro bono* work by admitted lawyers⁵³.

9. TECHNOLOGICAL INNOVATION AND ACCESS TO JUSTICE

Technological innovation in access to justice is not as wide as it could be and thus is not commented upon. There has been some civil procedure development in terms of our courts having allowed service of court processes via Facebook. Such innovations are likely to make access to justice more attainable - e.g. by reducing disbursement costs.

10. UNMET LEGAL NEEDS

This has received quite extensive attention earlier in this report relating to the need for a broader civil legal aid ‘net’ in terms of the type of cases undertaken and geographical reach of those services, the latter especially to rural and so-called township areas where black South Africans continue to typically be socio-economically disadvantaged even 25 years after democracy - with very high unemployment, extreme poverty and gross inequality rife.

There has unfortunately been no countrywide needs assessment study in recent years (if at all), looking at the distribution of justiciable problems and how the public responds to them.⁵⁴ Clearly this is needed.

11. PUBLIC LEGAL EDUCATION

This is provided mainly by university law clinics (but with a very limited geographical footprint), community-based paralegals

⁵² Holness D “Improving Access to Justice through Law Graduate Post-Study Community Service in South Africa” PER / PELJ 2020(23).

⁵³ Holness, D., 2013. Recent developments in the provision of pro bono legal services by attorneys in South Africa. Potchefstroom Electronic Law Journal, [Online]. 16/1, 129-164. Available at: <https://www.ajol.info/index.php/pelj/article/viewFile/88747/78335> [Accessed 10 January 2020].

⁵⁴ Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: ‘Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice.’

and Non-profit organisation, Street Law. Street Law trainers are attorneys, advocates or academics and law students under their supervision. Street Law South Africa provides, *inter alia* training aimed at enhancing the capacity of the police, health care workers, lawyers, prosecutors, candidate attorneys, paralegals, voluntary legal advisors, rural participants and educators with the aim of assisting communities in accessing their legal and human rights. Street Law also focuses on creating a culture of legal and human rights awareness among the youth, providing lessons to over 300 schools on democracy, human rights and legal education, reaching over 30 000 learners annually. The programme tackles current issues facing the youth, such as HIV/AIDS and discrimination, racism, crime and violence, xenophobia and crimes against women and children. It makes learners aware of their rights and legal remedies to protect their and others' rights⁵⁵.

There is no legal education included in the school education curriculum.

12. GLOBAL EFFORTS ON ACCESS TO JUSTICE

On a collective scale this can be said to be poor, albeit involvement in certain organisations like the Global Alliance for Justice Education and the Commonwealth Legal Association by certain individuals like renowned academic and human rights activist, Prof. David McQuoid-Mason.

13. CONCLUSIONS

There is a definite need to move from excellent criminal legal aid coverage to improved civil legal aid coverage too.

Holness's research in this area concludes thus:

“This research has repeatedly acknowledged the challenges of providing a comprehensive and good quality civil legal aid ... with limited funds available to do this. It is worth reiterating the calls made ... for government (mainly through LASA) to increase its budgetary allocation for civil legal aid. But the provision of legal aid facing challenges of limited funding is a widespread phenomenon. Barendrecht and van den Biggelaar have written that many countries struggle to maintain an affordable and sustainable legal aid system. But these

⁵⁵ Street Law South Africa “About us” (undated), available at: <http://www.streetlaw.org.za/index.php/about-us/about-us> (accessed 2013-05-26).

authors show how the adaptation in the Netherlands of an “interactive consultation process” between legal aid suppliers and users was able to develop proposals for successfully increasing access to justice whilst limiting the costs of providing the services.⁵⁶ It is therefore argued that existing funding limitations should not be seen as an insurmountable obstacle to widening the scope of civil legal aid provided ... and improving its quality through a coordinated and well planned approach. Continued efforts should be made to increase funding for civil legal aid... . At the same time careful planning is called for, particularly at the level of the proposed civil legal aid association ... , on how most effectively to utilise what monies are available.

Bhabha calls for the need to institutionalise access to justice.⁵⁷ This report proposes just such a goal in mind It ... stresses that to increase access to justice, a full legal needs analysis will have to be undertaken. The extent to which those needs are being met and by whom (must) been documented. (This report proposes a) model aim for a wider and better coordinated civil legal aid system of improved quality This model, if implemented, should institutionalise access to justice in civil matters (particularly) ... through providing for a civil legal aid scheme that works optimally and covers the key civil legal aid needs through a multi-faceted yet coordinated approach.”⁵⁸

⁵⁶ Barendrecht and van den Biggelaar [http://216.92.68.58/conf_2009/papers/Sustainable%20Legal%20Aid%20and%20Access%20to%20Justice-%20A%20Supply%20Chain%20Approach%20\(MB\).pdf](http://216.92.68.58/conf_2009/papers/Sustainable%20Legal%20Aid%20and%20Access%20to%20Justice-%20A%20Supply%20Chain%20Approach%20(MB).pdf).

⁵⁷ Bhabha 2007-2008 *Queen's Law Journal* 139.

⁵⁸ Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: ‘Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice.’ 301.