

The new look legal aid: Calamity or catalyst?

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Perhaps the only surprise about the announcements on 21 September 1999 by the Legal Aid Board radically slashing legal aid tariffs, virtually abolishing funding for civil litigation and announcing an unequivocal intention to dump private practitioners in favour of public defenders in criminal defences, is that the news elicited any surprise at all. After all, this direction was foreshadowed by the deliberations of the legal aid indaba in January 1998. Announcements by successive Ministers of Justice and by the present Chairman of the Legal Aid Board, Judge Mohamed Navsa, have been unequivocal in preparing the profession for a scaling down of the judicare system and a clear preference,

based on a belief that it will be cheaper, for a nationwide network of justice centres employing lawyers and paralegals.

The principal explanations offered for the radical policy changes are that the board is unable to sustain the provision of assistance to the indigent on the basis of "generous" payments to the profession. The top rate for a day in court on legal aid rates will now be R750,00. No personal injury cases and no claim sounding in money will be funded by the Legal Aid Board, and the profession is expressly told to deal with these matters in terms of the new Contingency Fees Act. There is a parsimonious cap on fees for preparation of R400,00.

It is quite evident that given the financial resources of the fiscus and, in turn, of the Legal Aid Board, virtually all the money available for legal aid will go to giving flesh to the constitutional guarantee of access to counsel in serious criminal matters. There can be little doubt that the Legal Aid Board's choices are prompted by an endeavour to reconcile the fact that we live in a poor country with expensive values.

There are several profound implications for legal practitioners that flow from the

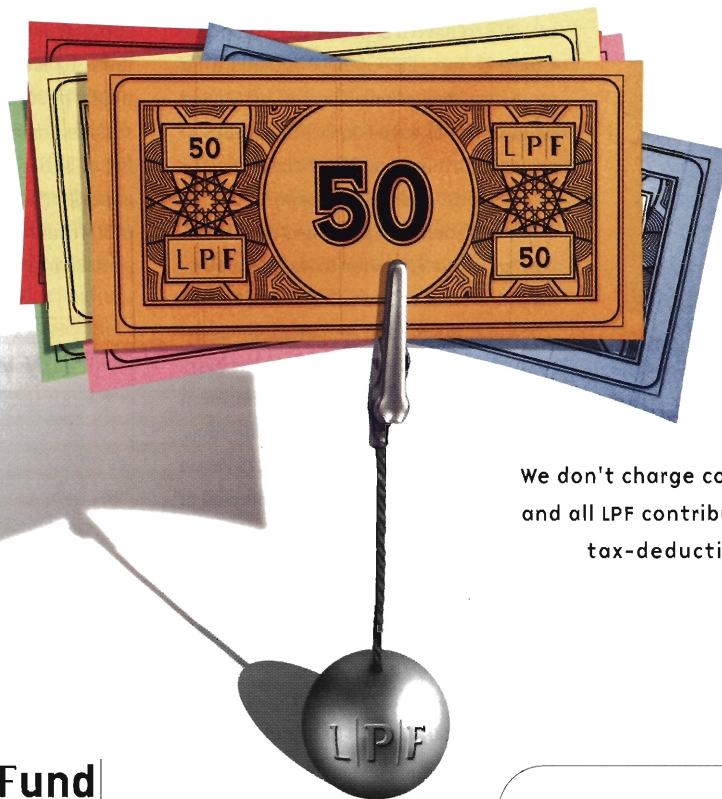
Legal Aid Board's decision.

For some time, publicly funded litigation in criminal defences has been the work upon which new practitioners have relied whilst building up their practices. This clearly will be no more. Paradoxically, the development takes place at the very time when the majority of newcomers into the profession of advocacy are young black graduates who will have to do without this support structure. How it will affect all newcomers' ability to sustain themselves in practice while they develop privately funded work remains to be seen. This is a matter which the Bar will have to monitor carefully and address with sensitivity.

Justice centres

However, it must be borne in mind that the implications of the Legal Aid Board decision are not simply to take away, but also to replace what has been withdrawn with a different system. That different system is a nationwide network of justice centres. If this objective is implemented properly, it will create considerable employment for young law graduates.

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It will be no bad thing for a graduate fresh from university to spend two or three years as a public defender before moving on to chance his luck in private practice at the Bar or as an attorney. Inasmuch as the public interest requires ways and means to be devised to achieve effective skills transfer, the justice centres in this context may well be harnessed to that objective. This will be especially true if Justice Chaskalson's call for the creation of internship for young law graduates finds favour with the authorities. The Bar has in any event embraced that idea with relish because it perceives precisely the opportunity to marry public service with experiential training in the work of the law for young newcomers to the profession. The Minister of Justice in discussion with representatives of the Bar on 28 September 1999 invited the Bar to initiate discussions with him and with the chairman of the Legal Aid Board to expedite the internship idea.


One of the colossal assumptions upon which the Legal Aid Board has built its decision to withdraw public funding for civil litigation is

that the profession has the capacity to embrace the work which is no longer publicly funded by conducting it on contingency. It is seriously doubted whether this assumption is well founded. To systematically embrace a practice built on the back of contingency work is, to say the least, precarious if not imprudent. It seems unlikely, even for attorneys who currently do matters *de facto* on contingency, that there are no limits to the volume of work which they can meaningfully embrace on that footing. As to members of the Bar doing large volumes of work on contingency, the capacity to do so is even more limited. Certainly it is unlikely that young practitioners getting themselves into circulation will be open to defer payment for long periods of time on a hope and prayer that they will succeed in some cases and cross-subsidise their disappointments in others. Contingency work for counsel is something that can only prudently be indulged in on a limited scale.

Opportunities

What seems to be the implication of these considerations is that at least a significant portion of work which used to be publicly funded and which is not suitable to be conducted on a basis of contingency will have no prospect of reaching a court at all. What hope is there then

affording such persons access to justice? The policy decisions of the Legal Aid Board do not even address the question still less proffer any solutions. One possible source of assistance is a resort to private dispute resolution in the form of expedited arbitration and of mediation. This is a field into which the profession, both Bar and attorneys have increasingly ventured in the past decade. The Arbitration Foundation of Southern Africa is now the principal flag-waver of ADR and arbitration in the country. If the time is now ripe for the members of the Bar to acquire skills in arbitration and mediation, one wonders what needs to happen for that to become so. It is in any event high time that the pupil syllabus was overhauled. Given the supposed orientation of pupillage to preparing individuals for practice, the absence of components dealing with Constitutional Court litigation, Labour Court litigation, arbitration procedure and mediation are glaring deficiencies which do not so much beg but indeed shout for attention.

In short, perhaps the prudent practitioner casting his eye on the upheaval in legal aid should refrain from despair and take stock of the opportunities which open as a result thereof and may in the fullness of time fill the void left by the Legal Aid Board. 

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