



Republic of South Africa

In the Western Cape High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between:

Case No: A409/2010

Legal Aid South Africa

Appellant

Versus

Gary Walter van der Merwe
Paul Killian
National Director of Public Prosecutions

First Respondent
Second Respondent
Third Respondent

Judgment delivered on: 4 November 2010

LOUW J

[1] The appellant is the Legal Aid Board (LAB), a body corporate established in terms of section 2 of the Legal Aid Act, 22 of 1969 (the Act).

[2] The first and second respondents are businessmen who face multiple charges of fraud in the Western Cape High court. They appeared in person to oppose both the appeal as well as the application by the LAB for condonation

of its late filing of a notice of appeal. I will refer herein to the first respondent as Mr van der Merwe and to the second respondent as Mr Killian and to them together, as the respondents. Mr van der Merwe also applied for the postponement of the hearing of the appeal. I deal later with this application.

[3] The third respondent, the National Director of Public Prosecutions, does not oppose the appeal and abides the decision of the court.

[4] The respondents are both charged on counts 1 to 3 which relate to the allegedly fraudulent sale of shares in two companies namely World On Line Limited, a company registered in Mauritius and Wellness International Network Pty Limited, a company registered in South Africa. It is alleged that investors in the two companies were defrauded of millions of rands.

[5] Mr van der Merwe is charged alone on eight further counts of fraud. Counts 4 and 5 relate to Mr van der Merwe's personal income tax returns for the tax years 2002 and 2003. In respect of the first year it is alleged that he misrepresented his gross income by declaring an amount of R22 000.00 whereas he received more than R2 million as gross income, and for the second year that he declared an amount of R60 000.00 whereas he received in excess of R22 million as gross income. Counts 6 to 11 relate to offences allegedly committed under the Value-Added Tax Act, 61 of 1993.

[6] The respondents applied to the LAB for legal aid to fund their representation at the criminal trial on 21 July 2009 and 4 August 2009,

respectively. The Cape Town Justice Centre, the representative of the LAB in Cape Town, requested the respondents to provide it with information regarding their financial positions so as to enable the LAB to make an informed decision on their applications.

[7] Mr van der Merwe responded on 6 August 2009 in writing to the request for information as follows:

Your request for further information in your letter dated 3/8/09 refers, please note I will answer in order of the requests made.

- I have no fixed income.
- I have no monthly rental nor rental contract.
- I have attached copies of some Judgments and liabilities against me totalling some R80 million, please note these are not exhaustive of the claims against me.
- I have no assets, property, investments, shares or cash.
- I have attached details of liabilities of some R80 million for your records.
- I am not a member of any close corporation, I am a director of several companies all of which are dormant, have no assets and are not in operation any longer with substantial liabilities save for Executive Helicopters LTD (EH), which is a trading entity, EH has no longer any assets but I hope to be able to turn this around in the future, I have no shares in EH.
- I am not a Beneficiary of any trust."

[8] Mr Killian responded in writing on 6 August 2009 and set out a number of his of assets and liabilities as follows:

	ASSETS	LIABILITIES
Costa Atlantica Properties Pty Ltd		
21 Central Drive, Camps Bay		
SHAREHOLDER AND DIRECTOR		R9, 000, 000 BOND
Summer Symphony Pty Ltd		R 800,000 BOND
15 The Fairways, Camps Bay		
SHAREHOLDER AND DIRECTOR		
Pony Ranch Trust	R3, 800,000	R1, 350, 00 BOND
33 Anderson Street		
P/m tenant paying	R 20, 00 BOND REPAYMENT IS R21,	
000		
Joostenbergvlakte		
I am a TRUSTEE my children are beneficiaries		
Paul Killian Family Trust	I am a TRUSTEE my children are	
52 Hely Hutchinson Ave	beneficiaries	
Camps Bay		
8005	R10, 000,000	R 6, 000,000
		Bond is R72, 000 per month
Sang Yong 2004	R 250,000	R 113,000
4 X 4 REXTON		
(divorce settlement belongs to wife SR KILLIAN)		
Surety Ship		
Simply Export CC		R 150,000
CREDIT CARDS		
Amex		R 54,000
VISA		R 44,000
Master card		R 40,000
Virgin card		R 36,000
Standard Master		R 35,000
HP CARS		

Mini Cooper	R120, 000	R 120, 000
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Mini Cooper S	R180, 000	R 180, 000
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CURRENTLY TRYING TO GET A NEW BUSINESS GOING NO INCOME

Skyforce Corporation CC 50% shareholder and member business closed down

[9] The LAB responded to the information provided by the respondents in letters dated 18 August 2009. It is apparent from these letters that the LAB was of the view that, on the basis of information already available to the LAB there were material non-disclosures and inconsistencies in the information provided by the respondents. The LAB informed the respondents that it had decided to refuse legal aid in the interim 'on the basis that you exceed the means test' and invited the respondents to provide further information that may influence the LAB's decision. The respondents were further informed of their right to an internal appeal against the decision to refuse legal aid to them.

[10] On 2 November 2009 the criminal trial came before Yekiso J to whom the matter had been allocated for hearing. The respondents were unrepresented and appeared in person. The representative for the state and the respondents addressed the court at some length on the issue of legal aid for the respondents. Mr Cloete of the LAB was present in court and provided information to the court. On 3 November 2009 Yekiso J made an order setting out the procedure to be followed by the respondents in their internal appeals. The order also directed the respondents to disclose certain specified information to the LAB. The criminal trial was postponed to 18 November 2009, pending the outcome of the internal LAB appeals.

[11] The respondents on 11 and 10 November 2009 respectively, provided further information to the LAB.

[12] Mr van der Merwe stated, inter alia, that he had no income over the past six months and longer, that he had resigned the positions previously held by him in all companies he had been a director of, none of which had in any event entitled him to a salary or drawing, that he had no shares in any company and that he was not a beneficiary of any trust. He further stated that he would request the LAB to appoint senior/junior counsel assisted by junior counsel, all of his choice.

[13] In his reply Mr Killian stated that he was a minority shareholder in two companies. Both owned immovable properties in Camps Bay that were bonded and, according to Mr Killian, attempts were being made to sell the properties. No income was derived from these companies and while the one property was being conducted as a guest house, the income was not sufficient to pay any dividends. In addition he disclosed that he was the trustee of two trusts of which his children were the beneficiaries. Both these trusts owned immovable properties which were bonded. The one property was let out but the lessee was not meeting the monthly lease payments and while the other property was being operated as a guest house, the income was not enough to pay the bond instalments. He also disclosed two motor vehicles on hire purchase and his personal liability as a surety in the amount of R100 000.00 for the debts of the Simply Export CC. He further disclosed a

debt of some R200 000.00 outstanding on 5 credit cards. Finally he disclosed that he is a member of a close corporation that owns immovable property in Hout Bay.

[14] On 18 November 2009 the LAB requested further specific information from the respondents.

[15] The particulars requested from Mr van der Merwe are set out as follows:

1. During court proceedings on 10 September 2009 you advised the court that you were employed to recovered helicopters. Please provide us the details of your employer and with a copy of your employment contract.
2. Please advise who is funding the matters below also state who is representing you in these matters and at what stage these matters are. Reference is made to 6 cases in which Mr van der Merwe is involved as a litigant (5 of which are in the High Court).
3. Please provide us with a list of all property owned by the Eagles Trust. Mr van der Merwe is the donor, a trustee, and a beneficiary of this trust.
4. The LAB required proved of resignation as a director of ten named companies set out in the request.
5. Mr van der Merwe was asked to provide information as to income derived from him acting as manager of Zonnekus Mansions Pty Limited.
6. Mr van der Merwe was asked to provide bank statements for the last 3 months.

[16] Mr van der Merwe did not respond at all to this further request for information.

[17] Mr Killian was requested to provide details regarding the property owning companies and trusts disclosed in his previous response. He was also asked to provide the value of certain motor vehicles disclosed by him, a copy of his divorce settlement as well as copies of his latest credit card statements. He was also asked to state how he financed the fees of counsel in an appeal which was heard on 14 November 2009. Mr Killian responded with further information.

[18] When the criminal trial again came before Yekiso, J on 18 November 2009, Mr Esterhuizen, a representative of the LAB, informed the court that the LAB was of the opinion the respondents had not complied with the order made on the 3 November 2009 and that since the LAB required the information stipulated in the order, it could not take an informed decision on legal aid for the respondents. After hearing the parties (the respondents again appeared in person) and the representative of the LAB, the trial was postponed to 2 December 2009 with a direction that the LAB furnish the learned Judge with a report by 30 November 2009 and, in any event, consider the appeal against the refusal of legal aid on the basis of the information the LAB then had before it.

[19] The matter came before Yekiso, J on 2 December 2009. By this time, the report the LAB had drawn up pursuant to the direction made by the court

in terms of section 3B (1) (b), together with the annexures to the report, had been placed before the learned Judge. It was recorded that the respondents' internal appeals against the refusal of legal aid had been unsuccessful. Yekiso J then made the following order, which order is the subject of this appeal, in terms of section 3B of the Act:

1. It is hereby recorded that both the accused appeal against the refusal by the Legal Aid South Africa, to grant them legal aid assistance has been **UNSUCCESSFUL**.
2. It is further recorded that the matter involving the charges prepared against both the accused is complex and that it would be desirable if each of the accused were to be represented by counsel who is knowledgeable and has experience in matters pertaining or relating to complex commercial crimes.
3. Arising from what has been stated in paragraph 2 of this order, substantial injustice would thus result if the matter were allowed to proceed to trial without each one of the accused being afforded legal representation.
4. In view of what is stated in paragraph 3 of this order, and despite the refusal by Legal Aid South Africa to grant both the accused legal assistance, and despite an unsuccessful appeal against such refusal to grant legal aid by each one of the accused, Legal Aid South Africa is directed to grant both the accused legal aid assistance, by appointing counsel of its choice in respect of each accused person provided counsel so appointed, in respect of each of the accused person shall as far as is reasonable possibly and consistent with principal of equality of arms, be of the same level of seniority to the most senior of the legal representatives of representing the State.

5. Appointment of counsel as contemplated in paragraph 4 of this order, shall –
 - (a) Be made no later than the expiry of five court days of the handing down of this order.
 - (b) Within seven court days of the handing down of this order, such counsel shall be furnished with a copy of the indictment including copies of all the relevant evidential material as would facilitate proper trial preparation.
6. To the extent that the accused are alleged to be possessed of assets, in the instance of accused number one, in excess of R120 million and in the case of accused number two, in excess of R40 million. If it is proved that the accused are possessed of such assets in the context of ownership, then in that event, Legal Aid South Africa shall be at liberty to proceed against each one of the accused for recovery of whatever amount Legal Aid South Africa shall have dispersed on behalf of each accused.
7. The matter is postponed until Monday the 1st February, 2010 for trial.

[20] The LAB applied for leave to appeal against the order of 2 December 2009. When the criminal trial resumed on 1 February 2010, the matter was postponed to 16 February 2010 for purposes of hearing the application for leave to appeal.

[21] On 16 February 2010, after hearing argument on the application for leave to appeal, Yekiso J refused leave to appeal. The criminal trial was then postponed to 25 March 2010 and on that date the trial was further postponed

to 21 April 2010 pending the outcome of a petition for leave to appeal which the LAB had in the interim filed with the Supreme Court of Appeal. On 21 April 2010 the matter was further postponed to 8 June 2010, pending the outcome of the LAB's petition for leave to appeal to the SCA.

[22] On 6 May 2010, the SCA granted the LAB leave to appeal to the full bench of this court against the order made by Yekiso J on 2 December 2010.

[23] Section 3B (1) and (2) of the Act is the source of the power of a court in criminal proceedings to make the order that legal aid be afforded to an accused person. It provides as follows:

3B Direction for legal aid by court in criminal matters

- (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.

[24] When the court a quo made its decision and granted the order of 2 December 2009, the learned Judge had the report prepared by the LAB in terms of section 3B (1)(b), before him. The report is dated 30 November 2009 and records the LAB's conclusion that on the information at its disposal, Mr van der Merwe had a nett asset value of R120 million while Mr Killian has a nett value of R14, 711 million and, that the respondents' appeal against the refusal of legal aid had been refused. The report made the following recommendation to the court.

Based on the information provided to Legal Aid South Africa by the applicants, it is recommended that legal aid should not be granted to the applicants herein as they are *neither indigent nor unable to afford the costs of their own legal representation*. (my emphasis)

[25] The court a quo did not provide separate reasons for making the order in terms of section 3B. Paragraph 2 of the order, however, records that the matter is complex, and that it would be desirable if each of the accused were to be represented by counsel who is knowledgeable and who is experienced in matters pertaining or relating to complex commercial crimes and, in paragraph 3 of the order it is stated that:

arising from what has been stated in paragraph (2) of this order, substantial injustice would result if the matter were allowed to proceed to trial without each of the accused being afforded legal representation.

[26] As was pointed out by Mr Budlender during argument, paragraphs 2 and 3 of the order explain why the respondents require legal representation. This is common cause and it is not disputed that as a result of the nature and gravity of the charges which they face and the anticipated complexity of the trial, the respondents do require legal representation at the trial. Paragraphs 2 and 3 of the order do, however, not explain why such legal representation should be provided at the expense of the State and why substantial injustice would result if legal representation were not provided at the expense of the State.

[27] In giving reasons for refusing to grant the LAB leave to appeal, the court a quo dealt as follows with the respondents' financial position and information regarding the respondents' financial position:

on the basis of the report furnished to me by Legal Aid South Africa, which amongst others, contain both the accused personal circumstances and as well as financial circumstances, I could not come to the conclusion that the accused were, in the first instance, possessed of assets in the order of a R120 million in the instance of first accused, and R14 million in the instance of the second accused, nor could I conclude that the accused were possessed of assets, in the form of ownership, to the value asserted by the Legal Aid South Africa.

[28] Mr Budlender submitted that the above passage from the judgment of the court a quo embodies an incorrect approach to the matter, because the enquiry made by the court in terms of section 3B is that of the court and because there is no onus on the LAB or anyone else to prove what the assets of the respondents are. These submission are borne out by the judgment of the SCA in Legal Aid Board v The State (363/09) [2010] ZASCA 112 (21 September 2010) which was delivered on 22 September 2010, after the hearing of the appeal before this court. The SCA was concerned with an appeal against an order similar to the order made in this case by a court in criminal proceedings. Borchers, J in the court a quo made two findings. The first concerned the question whether legal aid should be granted at state expense. The court a quo found that legal representation of the accused in that matter was necessary, that the accused had *shown themselves to be indigent as defined* and that the LAB should consequently be directed to provide them with legal representation. Borchers, J then turned to consider a further question, namely, the scope and the extent of the legal representation to be provided by the state. And in this latter regard, Borchers, J ordered the LAB to provide two legal practitioners to represent each of the accused, such

practitioners to be remunerated at the maximum fee permitted by the Legal Aid Guide.

[29] The SCA considered both these questions, namely whether the legal aid should have been afforded to the accused at the expense of the state and, secondly, whether the court had the power to prescribe the scope and extent of the legal representation to be afforded to the accused at the expense of the state.

[30] The SCA first considered the question whether legal aid should be afforded to the accused and at paragraph [29], held (in a unanimous decision, per Ponnan, JA) that a court undertaking an enquiry in terms of section 3B must ask itself two questions:

1. would substantial injustice ensue were the accused to proceed to trial without representation, and if so,
2. could the costs of the representation been borne by the accused from his or her own resources?

[31] The answer to the first of these questions was not in dispute in that case and, in this case it is also not in dispute. The accused in that case required and the respondents in this case clearly require legal representation given the serious charges and complex nature of the trial.

[32] In paragraph [33] of the judgment Ponnan JA stated the following in regard to the approach to be adopted by the court when it considers the

second of the two questions, namely, whether the accused was able to bear the costs of representation from his or her own resources:

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 3B(1). 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.

[33] In paragraph [36] Ponnau, JA stated that the responses of both the accused in that matter, to information which was sought by the LAB and which information was peculiarly within the knowledge of the accused, fell "far short of satisfying one that their personal circumstances are such that they do indeed qualify for legal representation at state expense". The court therefore set aside the order made by the court a quo in terms of which the LAB was ordered to provide legal representation to the accused.

[34] At paragraphs [39] to [49] of the judgment, Ponnau, JA considered the further question mentioned above, namely, whether the court had the power to prescribe the scope and the extent of the legal representation to be afforded to the accused at state expense and whether the right to be assigned counsel by the LAB comprehended a right as generous as that discerned by the court a quo.

[35] The SCA came to the conclusion that the court a quo 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 maximum rates permitted by the legal aid tariff. The court held at paragraph [45] that it was not for the courts but that

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 a superior wisdom to themselves in respect of matters entrusted to other branches of government.

The court found the LAB undoubtedly be such an institution with specific expertise in the area whose opinion must be shown respect by the courts. Therefore, the SCA held at paragraph [48], that save where a decision by such an institution is objectively irrational, in which case a court would have the power to intervene and set aside the decision, the courts do not have the power to intervene and substitute its opinions as to what is appropriate, for the opinion of the institution in whom the power vests.

[36] Section 3B (1)(a)(i) of the Act provides in peremptory terms that before a court in criminal proceedings directs that a person shall be provided with legal representation at state expense, the court shall take into account the personal circumstances of the person concerned. The court must therefore have before it the personal circumstances of the person concerned in order to be able to take them into account and for the court to be competent to exercise the power conferred on it. It is therefore a jurisdictional fact for the court's exercise of the power to make the order.

[37] The main source of information placed before the court a quo was the section 3B report by the LAB, and the annexures to that report. The list of companies referred to in the report is taken from the affidavit deposed to by Mr van der Merwe on behalf of those companies and in his capacity as a trustee of the Eagles Trust in the matter of GW van der Merwe and 14 Others v The Additional Magistrate Cape Town & 4 Others Case Number 5880/2008. One of these companies is Zonnekus Mansions Pty Limited, a company which according to a Deeds office search, is the owner of 5 immovable properties. Each of these properties is bonded, but it was not possible from the information available to the LAB to determine what value those properties have to Zonnekus Mansions Pty Limited.

[38] In an affidavit dated 7 May 2009 deposed to by Mr van der Merwe in the matter of Antares and Another v Executive Helicopters (Pty) Limited, Western Cape High Court Case Number 8853/2009, Mr van der Merwe stated that he is a director of Executive Helicopters Limited which "has assets comprising helicopters, engines, spares, plant and equipment and motor vehicles having a value in excess of R200 million rands". It is further stated by Mr van der Merwe in that affidavit that the company has no liabilities save for current liabilities not yet due for payment and that it does not have any borrowings and that against current liabilities the company had a "comfortable surplus of current assets". In a further affidavit dated 19 May 2009 in the same matter, Mr van der Merwe stated "these assets (against which there are neither borrowings nor amounts due to creditors) have a value in excess of R200 million rands".

[39] These statements made under oath by Mr van der Merwe on 7 May and 19 May 2009 must be contrasted with the statement made by him in his 6 August 2009 letter to the LAB wherein he stated that Executive Helicopters Limited no longer had any assets and that he has no shares in that company. There is no explanation whatsoever of what had happened in the intervening three months to the very substantial assets he alleged the company had.

[40] In his letter of 6 August 2009 to the LAB, Mr van der Merwe stated that he is not a beneficiary of any trust. However, according to the trust deed of the Eagles Trust, Mr van der Merwe is the donor to the trust, is a trustee of that trust and is both an income beneficiary and a residual capital beneficiary of the trust. Mr van der Merwe has made no disclosures with regard to the Eagles Trust and it is consequently not possible to know what the current assets of that trust are. Mr. Budlender did point out in argument, however, that according to the audited annual financial statements for the period up to 31 July 2001 of Wellness International Network Ltd one of the companies, the sale of whose shares forms the subject matter of the first three fraud charges against the respondents, the Eagles Trust had made an interest free loan of R9,8 million to the company. Incidentally, the same financial statements reflect that Mr. van der Merwe had also made an interest free loan, as a shareholder, to the company in the amount of R28, 4 million.

[41] Mr van der Merwe stated in his application for legal aid that he is unemployed. However, during the course of several hearings before the court

a quo, Mr van der Merwe stated that he is a pilot and is employed to recovered helicopters in Africa. He does maintenance, the retrieval, rebuilding and repair of helicopters. He is according to him, also involved in a certain amount of property transactions. From his statements to the court it further appears that he has often travelled to destinations elsewhere in Africa, Mauritius and Germany. In an affidavit deposed to by Mr van der Merwe on 24 September 2009 in an application for an amendment of his bail conditions he stated that since his arrest in 2004 he had travelled internationally on 35 occasions. In 2007 for instance he planned a three week trip to the United States of America.

[42] At a hearing in the court a quo on 9 September 2009 Mr Botha, the representative of the State suggested that Mr van der Merwe's financial position must have changed since he applied for and was granted bail in 2004 as he had told the LAB that he was unemployed and no longer had any assets and did not have any money. Mr van der Merwe responded by saying "my financial position has not changed since the day I was arrested. So that is a lie from Mr Botha's side".

[43] In an email dated 29 September 2009, Mr van der Merwe repeated that "my personal financial position has not changed since my arrest." He was arrested during 2004 and was granted bail on the 28 October 2004.

[44] The following document, purported to have been signed by Mr Killian, it seems in 2004, is an annexure to the LAB report to the court:

PROFILE – PAUL LAWRENCE COXIE KILLIAN

1. Date of birth: 5 January, 1950 – presently 54 years old.
2. Married to Sonja Rene Killian, by antenuptial contract, for 11 years.
3. Has 2 children, boys, Lawrence, 11 years old and in grade 5 at Redham School, Greenpoint. Luke, 9 years old, grade 3 at Redham School.
4. Businessman, a member of Skyforce CC as well as Silver Solutions 546CC and Silver Solutions 552 CC.
5. Carries on business at Skyforce CC in property development and property sales. Employs approximately 20 people.
6. Business address is 5 La Mer, Sluyjsken Avenue, Hout Bay.
7. Place of residence: 14 Hely Hutchinson Avenue, Camps Bay. The aforementioned property is registered in Mr Killian's wife's name and they have lived there for the last three years.
8. Mr Killian is a 50% member in the above mentioned Close Corporations, two of which own property valued at approximately R2.6 million, being numbers 5 and 6 La Mer, Sluyjsken Avenue, Hout bay.
9. Mr Killian is a South African citizen and holds a South African passport.
10. Mr Killian's average monthly income is between R25 000.00 and R30 000.00 per month.
11. Mr Killian intends travelling to Spain in December for approximately 2 weeks with his family on a family holiday.

[45] Mr Killian's attention was drawn to this document in the LAB's letter to him of the 18 August 2009. There has, however, been no response by Mr Killian in regard to this document. I agree with the submission by Mr Budlender that the picture painted of Mr Killian in this document, albeit it that it appears to reflect his position in 2004, is not one of a man who is without

income or resources or of a man who is dependant on the State for funding his legal representation in a criminal case.

[46] On 19 November 2009 Mr Killian provided certain further information in regard to his financial affairs pursuant the court order of 3 November 2009 and the request by the LAB dated 18 November 2009 to provide information regarding the various companies and trusts which he listed as part of his assets as well as the liabilities which he listed. On the basis of this document provided by Mr. Killian, the LAB compiled an estimate of Mr Killian's current financial position. This estimate is based on the values Mr Killian placed on the assets and liabilities which he set out in his response. It reflects a nett value of R14, 711 million. The LAB estimate listed the following information.

REPORT ON THE FINANCIAL POSITION OF PAUL KILLIAN

	ASSET	LIABILITY	NET VALUE
Pure Platinum Holdings	15 000 000	10 012 000	4 988 000
Summer Symphony	9 000 000	800 000	8 200 000
Pony Ranch Trust	2 000 000	1 350 000	650 000
Killian Family Trust	7 000 000	6 000 000	1 000 000
Mini	134 000	161 000	-27 000
Simply Export		100 000	-100 000
			14 711 000

[47] Mr Budlender conceded in argument that the estimate is unlikely to be a precise indication of the value of Mr Killian's assets. The amount may, with

fuller information being provided, have to be varied either upwards or downwards. No further information was placed before the court a quo nor has any such information been placed before this court on appeal. The court a quo, and this court for that matter, is therefore not in a position to make a decision on any other basis than that reflected in the papers that were before the court a quo.

[48] The preamble to the Legal Aid Act list as one of the objects of the Act as "to provide legal aid for indigent persons" and the objects of the LAB is stated in section 3 of the Act to be "to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the constitution". I agree with Mr Budlender's submission that that the court cannot make an order under section 3B unless the respondents are not able to fund their legal representation from their own resources.

[49] The LAB must, in carrying out the objectives of the Act and the objectives of the board make use of its resources as economically as possible. It should not be required by a court to provide legal representation at state expense where this is not necessary, because the person concerned is able to afford such representation him or herself.

[50] It is not clear from the order made by Yekiso J on 2 December 2009 that the learned Judge concluded that the respondents did not have sufficient

resources to be able to pay for their legal representation. However, the information which was before the court a quo, read in the context of statements made by the respondents on other occasions, suggest that the true picture of their personal circumstances, were not before the court. The information before the court a quo, did not, in my view, constitute a basis upon which the court a quo could reach the conclusion that the respondents could not afford the costs of legal representation and that the respondents qualify for legal representation at state expense or that substantial injustice will result if the respondents are not provided with legal representation at state expense. I agree with Mr Budlender's submission that, on the information before the court there is at least a probability that the respondents are in fact wealthy men. In these circumstances the court a quo should, in my view, not have made an order for legal representation at the expense of the state to be afforded to the respondents and, at best for the respondents the court should have conducted its own enquiry into the personal circumstances of the accused.

[51] I turn to the orders made by the court a quo in paragraphs 4 and 6 of the order under appeal.

[52] In paragraph 4 the court a quo ordered, in terms of section 3B, that counsel appointed by the LAB for the respondents should

as far as is reasonably possible, and consistent with the principal of equality of arms, be of the same level of seniority as the most senior of the legal representatives representing the State,

and in paragraph 6, the court further ordered that

to the extent that the accused are alleged to possessed of assets, in the instance of accused number 1, in excess of R120 million rand, and in the case of accused number 2, in excess of R14 million rands, if it is proved that the accused are possessed of such assets in the context of ownership, then in that event Legal Aid South Africa shall be at liberty to proceed against each one of the accused of recovery of whatever any amount Legal Aid South Africa shall have disbursed on behalf of each accused.

[53] The Act as explained by the SCA in the Legal Aid Board v The State, supra does not contemplate that the court may make orders of the nature the court a quo made in paragraphs 4 and 6. The order in paragraph 4 seeks to prescribe who should be appointed by the LAB by specifying the seniority of the representatives which should be appointed. The order in paragraph 6 seeks to limit the right of the LAB to recover from the respondents monies paid over in respect of their legal representation, should it appear that the respondents misrepresented their financial positions. The right to recover cannot be restricted to the situation where it is proved that the respondents are possessed of R120 million and R14 million, respectively "in the context of

ownership". In my view the court does not have the power to make the orders set out in paragraphs 4 and 6.

[54] The LAB applied for condonation of its failure to file the notice of appeal timeously. The respondents opposed the application. The LAB has in an affidavit deposed to on its behalf by Mr. Mtati an executive of the LAB, explained that the delay occurred as a result of an oversight and misunderstanding as to the LAB's obligations as appellant. The notice was filed on 30 July 2010. It is not suggested in the affidavit of Mr. van der Merwe, filed in opposition to the application for condonation, that the respondents were prejudiced by the relatively short delay. The respondents were at all times aware of the fact that the LAB intended appealing the order of Yekiso, J and the LAB filed the record and its heads of argument timeously. The late filing of the notice of appeal must, in my view, be condoned.

[55] Mr. van der Merwe also sought the postponement of the hearing of the appeal for the finalisation of what he contended to be a pending application to the LAB for legal aid to be afforded to him for the appeal itself. The application was argued at the same time as the merits of the appeal and the application for condonation.

[56] There is no pending application for legal aid by Mr. van der Merwe in regard to the appeal. He did apply for legal aid in the LAB's application for leave to appeal. This application was turned down by the LAB and Mr. van der Merwe was so informed on 11 February 2010. Mr. van der Merwe did not

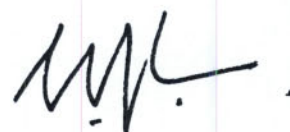
appeal this decision, but on 23 April 2010, he sought reasons for the refusal from the LAB, reserving his right to appeal. On 6 May 2010 the SCA granted the LAB leave to appeal, rendering the issue of whether leave to appeal should be granted, moot. Mr. van der Merwe did not thereupon apply for legal aid in respect of the appeal itself. There is therefore no pending application for legal aid.

[57] The application for postponement of the appeal therefore has no merit and should be refused.

[58] The LAB does not seek an order for costs if successful in the appeal.

[59] The following order is therefore made.

1. The application for the postponement of the appeal is refused.
2. The LAB's application for condonation of its late filing of the notice of appeal, succeeds;
3. The appeal succeeds; and
4. The orders made by the court a quo on 2 December 2009 are set aside.



W.J. LOUW
Judge of the High Court

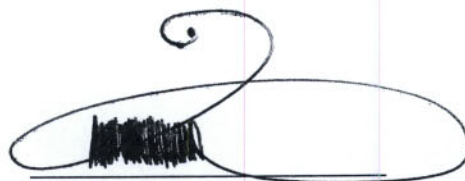
I agree.



R. ALLIE

Judge of the High Court

I agree



D.V. DLODLO

Judge of the High Court