



**HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No.: 16869/23

SHAUN ROGER VAN SCHALKWYK

First Applicant

SESTOLENE THERESA VAN SCHALKWYK

Second Applicant

vs

LEGAL AID SOUTH AFRICA

Respondent

JUDGMENT

MTHIMUNYE AJ:

Introduction

[1] This is an application for the review and setting aside of the respondent's decision to decline the applicant's application for legal aid in Western Cape High matter 16067/2017. The matter had in the meantime, been finalized on 20 October 2024, before appearing before this court on 27 August 2024.

[2] The first and second applicants being married to each other respectfully seek a declaratory order that the respondent's decision be amended to exclusively reconsider the applicants' financial means by excluding a designated asset when conducting the means test.

[3] The applicant's applied for Legal Aid in October and November 2022 and Legal Aid South Africa (LASA) refused legal aid on 28 September 2023 after it received credible information that the applicants are not indigent and, as a result, do not qualify for legal aid under case number 16067/2017. Furthermore, that the matter under case number 16067/2017 for which the applicants seek legal aid was already finalised on 20 November 2023, when the High Court delivered judgment.

[4] There are accordingly three issues for determination in this matter:

- 4.1 First, whether the applicant has succeeded in showing that the respondent has committed a reviewable irregularity by refusing legal aid to the applicant.
- 4.2 Second, if a reviewable irregularity has been shown, the question arises as to whether, the appropriate remedy is to set aside the decision of the respondent.
- 4.3 Determining whether matter under case number 16067/2017 has become moot.

The Applicants Case

[5] The first applicant who is the husband of the second applicant formally applied for legal aid from the respondent on 19 October 2022, while the second applicant made

a similar request on 14 November 2022. Subsequently, on 28 September 2023, both applications were rejected by the respondent on the grounds that they exceeded the means test.

[6] First applicant a part-time worker at the time challenged the legal aid's decision and was subsequently contacted by the respondent in 2023 for a reassessment of his means test. He was asked to provide the respondent with proof of income for both himself and the second applicant (his wife), as well as for a house he co-owns with his siblings.

[7] Notwithstanding receipt of all the documentation requested from the first applicant, the respondent declined the first applicant's application due to his non-disclosure of the transfer of a property to his daughter and failure to disclose that he and the second applicant share co-ownership in a property with siblings.

[8] According to the applicants they only reside at the property of SESTNIC company, owned by their daughter, and contribute an amount of R1200 towards the monthly rental. The applicants further aver that they find it challenging to pay even this monthly rental and have to be assisted by family members to cover the rental costs.

[9] The applicants believe that they were prejudiced by the erroneous consideration of the respondent, in considering the property belonging to their daughter as part of their assets. As according to them, they claim to have no rights or obligations over the property.

The Respondent's Case

[10] In summary, the answering affidavit of the respondent, deposed to by Patrick Robert Hundermark, the Chief Legal Executive ("CLE") and Acting National Operations Executive is as follows:

[11] The purpose of the review application submitted to the court is to seek an order requiring the respondent to provide the applicants with legal representation in the matter of Patrick O'Connor and the applicants, under case number 16067/2017.

[12] The respondent stated that the case involving Patrick O'Connor, and the applicants has already been finalised on 20 October 2023, wherein the High Court gave judgment in favour of Patrick O'Connor. The respondent asserted that the review application by the applicants' is moot.

[13] The respondent stated that the applicants applied three times for legal aid at Legal Aid South Africa, all of which were refused by the respondent on grounds that the applicants had exceeded the means test set by Legal Aid. I now turn to set out briefly the facts of each application.

[14] On 19 October 2022, the first applicant approached the respondent's Athlone office to apply for legal aid for the first time. This application was subsequently refused on 19 October 2022, as the first applicant exceeded the household means test applicable at the time by R5824.

[15] Subsequently, the first applicant lodged an appeal on 26 October 2022 against the refusal of legal aid. Consequently, the second applicant then applied for legal aid on 14 November 2022. This application was also refused by the respondent, resulting in the second respondent lodging an appeal against the refusal of legal aid on 14 November 2022.

[16] Respondent accordingly advised the first applicant to submit a salary advice, and/or bank statements in support of his appeal. Notwithstanding, the first applicant serving his leave to appeal within the prescribed timeframe on the respondent, the appeal process could not be completed and submitted to the Provincial Executive or Chief Legal Executive (PCLE) timeously, as the first applicant failed to provide the aforementioned supporting documents for the appeal.

[17] On 22 August 2023, the second applicant attended the respondent's Athlone legal aid office where she advised the respondent of an alleged alteration of her financial circumstances. She stated that she had lost her job and as a result no longer had an income. Consequently, a revised application for legal aid and means test was taken, resulting in both applicants qualifying for legal aid since they no longer had an income.

[18] At the time of granting legal aid to the applicants, no investigation of the applicants' financial circumstances was done by the respondent. The respondent subsequently conducted an investigation into the claims that the applicants were indigent and possessed no income or any assets and discovered that the claims that were made by the applicants regarding their financial circumstances were inaccurate,

as it transpired that the applicants were not only not indigent, but owned properties and companies. Consequently, the respondent revoked the legal aid that was granted to the applicants.

[19] Notwithstanding the revocation of applicants' legal aid on 22 September 2023, the applicants once again attended the respondents' Athlone Office and applied for legal aid for the third time. The respondent's Athlone office again investigated on Lexis Windeed the assets of the applicants and discovered that the applicants were still the owners or directors of multiple companies.

[20] It further transpired that the first applicant owned a one-third interest in an immovable property belonging to his siblings to the value of R611,666.00. Furthermore, the applicants also had a company property, SESTNIC, which were under their control, which they had transferred to their daughter, with a municipal value of R1,850,000.00 and with an outstanding bond of R1,072,000.00 with ABSA bank.

[21] Consequently, legal aid was refused once again to the applicants on the grounds that they exceeded Part A of the means test by R8 976.79 and Part B of the means test by R666,765.06.

[22] As a result, the applicants filed an appeal with the respondent's CLE against the refusal of legal aid. The CLE after objectively applying his mind in considering the appeal by being guided by the applicable regulations and policies and by taking into account all the documents that accompanied the appeal application namely; the merit report, applications by the applicant for legal dated 22 September 2023, the joinder

application under case number 16067/2017, the letter of appeal with supporting documents, monthly expenditure and debts, bank statements of the entity of which their daughter is the director, and the Lexis Windeed searches in respect the applicants and their daughter as the director of SESTNIC, dismissed the applicants appeal application against the respondent's refusal to grant the applicants legal aid.

[23] The CLE further held the view that first and second applicants had control over of the company, SESTNIC as per regulation 28(3) of the Legal Aid Manual which reads as follows:

"28.3 any asset owned by a trust, company or other legal personality but is controlled, either directly or indirectly, by the legal aid applicant or his spouse, dependent, sibling, parent, descendant or nominee, for the direct or indirect benefit of the legal aid applicant or his or her spouse, dependent, sibling, parent, descendant or nominee, that asset will be deemed to be owned by the legal aid applicant for the purposes of determining whether the legal aid applicant qualifies for legal aid in terms of the means test. Provided that where there are beneficiaries other than the legal aid applicant, or his spouse, dependent, sibling, parent, descendant or nominee, the applicant is deemed to be the owner of his or her percentage share of that assets."

[24] The view held by the CLE was also confirmed by the applicants' own admission to the Head of Office ("HoO"), Nomawethu Mtebele, that the applicants' daughter as the director of the company SESTNIC, had granted the first applicant special power of attorney to manage the affairs of the company. Accordingly, the CLE determined that the entity alleged owned by the applicants' daughter was maintaining the bond

payments of this property since the inception of the bond with ABSA. CLE thus found that the property of SESTNIC formed part of the applicants' assets.

[25] The CLE did not proceed to consider the merits of the main claim due to the applicants' exceeding the means test. The CLE avers in the papers that if the court finds that the decision he made was not in compliance with Legal Aid South Africa's Regulations/ Manual and Delegation of Authority, the respondent should be afforded an opportunity to evaluate the merits of the main matter.

[26] Accordingly the respondent submitted in its papers that the review application has no merit and should be dismissed with costs.

The Applicable Law

[27] Section 1 of PAJA describes an administrative action as:

"any decision taken, or any failure to take a decision, by-

(a) an organ of state when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation..."

[28] Section 3(1) of the Promotion of Administrative Justice Act no 3 of 2000

("PAJA") provides that all administrative action which materially and adversely

affects the rights or legitimate expectations of any individual must be procedurally fair, whereas section 6(1) provides that any administrative action may be judicially reviewed. For any conduct that is subject of a complaint to be reviewable under PAJA, it has to fall within the definition of PAJA.

[29] It is undisputable that PAJA is applicable in this matter as in terms of section 1, the decision that was taken in this matter was by an organ of state as contemplated in section 239 of the Constitution.

[30] The Constitutional Court in *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29 said that the relevant considerations in deciding whether a matter is moot are whether the order that the Court may make will have any practical effect either on the parties or on others, whether it is in the public interest for the Court to exercise its discretion to resolve the issues and whether the decision will benefit the larger public or achieve legal certainty.

[31] In *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC) (5 October 2007), the Constitutional Court summarised certain factors a court ought to consider when determining whether it is in the interests of justice to decide a matter that is moot:

(a) the nature and extent of the practical effect that any possible order might have;

- (b) the importance of the issue;
- (c) the complexity of the issue;
- (d) the fullness or otherwise of the argument advanced; and
- (e) resolving disputes between different courts.

[32] The Constitutional Court in *Legal Aid South Africa v Magidwana and Others* [2015] ZACC 28, stated at paragraph 26:

"[26] The right to claim legal representation at state expense is limited to cases where substantial injustice would occur. Even where this right is available to an applicant, Legal Aid may still refuse to fund legal representations, if for example the applicant is a person who indisputably can afford to pay for legal representation."

[33] Paragraph 40 reads:

"[40] Section 3 of the Act provided that the objects of the Board shall be to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution..."

Analysis

Is the matter moot?

[34] It is an undisputable fact that the remedy sought by the applicants with this review application is to obtain legal aid in respect of the Patrick O'Connor matter under case number 16067/17, which has already been finalised on 20 November 2023. Accordingly, legal representation is no longer required for that matter. No indication has been given by the applicants in their papers or during argument that they intended to appeal the decision by the CLE. After taking into consideration the factors as set out by the Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay [supra]* it follows that any order made in this review application with regard to the applicants being granted legal representation or that their means be reassessed in terms of the Legal Aid means test will not only have no practical effect, but it will also not be in the interest of justice or the public interest for this court to make such an order because the matter is moot.

[35] Notwithstanding the finding I made above, for the sake of completeness I will consider the applicants' application on merits.

Whether decision to refuse applicant's legal aid was rational and lawful?

[36] To address this question, the court must examine whether the respondent has shown that the decision to refuse the applicants legal aid was taken in accordance with its legislative framework regulating Legal Aid South Africa (LASA). In addition, whether the decision by respondent was rational.

[37] The legislative framework regulating LASA's decision to grant or refuse legal aid is comprehensively set out in the respondent's answering affidavit deposed to by the Executive of LASA, Mr Wundermark. The relevant requirements for the applicants to qualify for legal aid in terms of the means test is set out in regulation 28 of the Legal Aid Manual and read as follows:

"Qualifying for legal aid and means test

- (1) *In order to qualify for legal aid in either civil or criminal cases, the legal aid applicant's gross monthly income less tax and net assets must fall within the parameters set by the means test contemplated in sub regulations (2), (3), (4), (5) and 6 before legal aid may be granted.*
- (3) *...*
- (4) *An applicant who applies for legal aid for a civil case and who has a spouse, or the applicant is a member of a household and whose household has a monthly income, after deduction of income tax, of R9 000 a month or less, may qualify for legal aid for that civil matter.*
- (5) *...*
- (6) *A legal aid applicant or an applicant who is a member of a household who owns immovable property and has net immovable assets and movable assets in value of up to R711,700 may qualify for legal aid for a civil or criminal matter: Provided that the legal aid applicant or the member of a household must physically reside in the immovable property or in at least one of the immovable properties, where there is more than one, unless Legal Aid South Africa decides to the contrary."*

[38] It is important to note that from the outset, the applicants did not qualify for legal aid in terms of the provisions of the Legal Aid Manual's means test and the applicable Regulations.

[39] The applicants exceeded the means test by R8 976,79 regarding the income and R665 765,06 on the assets part. The applicants also do not dispute that the respondent, after conducting a Lexis Windeed search discovered that they own companies and properties registered in their name.

[40] Even though the applicants deny ownership of the company SESTNIC'S property, they do not dispute that the first respondent hold the power of attorney to manage the said company's affairs. The assertion by the applicants that their daughter is the owner of the company is not substantiated, particularly in light of the first applicant's own admission to Ms Mtebele regarding their management of the company's affairs. Furthermore, regulation 28.3 of the Legal Aid Manual is clear that any assets controlled either directly or indirectly by a legal aid applicant or his spouse or dependent or sibling is deemed to be owned by the legal aid applicant.

[41] I am therefore of the view that in terms of the Regulation, it was correct of the respondent to regard or deem the aforesaid property as owned by the applicants for purposes of the means test, even if the aforesaid contention by the applicants that the daughter is the owner of the business property is found to be correct.

[42] In addition, full reasons for the decision to refuse legal aid to the applicants and the background to the matter is fully set out in the respondent's answering affidavit as

required by PAJA. Mr Wundermark explains how he has applied his mind and thoughtfully considered all three applications including the appeal against the refusal for legal aid before refusing these applications.

[43] In the result I find that the decision made by the respondent in refusing the applicants application for legal aid was not only rational and lawful but in accordance with LASA Manual, Regulations and LASA authority. As was held in *Magidwana [supra]*, even though a legal aid applicant has the right to claim legal representation at state expense, Legal Aid may still refuse to fund legal representation where the applicant is a person who indisputably can afford to pay legal representation. From the facts of the present matter there is no evidence to the contrary produced by the applicants that they are not owners of companies and properties and as such can afford to pay for their own legal representation.

Conclusion

[44] I find that the grounds of review as set out by the applicants do not demonstrate that the decision by the respondent was irrational, unlawful and reviewable. To be set aside, firstly, the applicants failed to show that they are indigent and qualified for legal aid. Secondly, the matter is moot as the case for which they seek legal aid has already been finalised.

[45] Consequently I make the following order:

- (a) The application to review LASA decision in refusing the applicants legal aid is dismissed.
- (b) Each party to pay their own costs.



S MTHIMUNYE
JUDGE OF THE HIGH COURT

Attorneys for the Applicants: Mr Van Schalkwyk (In person)

Attorneys for the Respondent: Mr Bodart (LASA)

Argument took place on 23 August 2024

Date of judgment: 6 January 2025