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AIDS HELPLINE: 0800-123-22 Prevention is the cure

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GENERAL NOTICE

NOTICE 898 OF 2001**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT****DIRECTIVES UNDER SECTION 4 OF THE CRIMINAL PROCEDURE
AMENDMENT ACT, 1997 (ACT NO. 76 OF 1997)**

The Legal Aid Board has under section 4 of the Criminal Procedure Amendment Act, 1997 (Act No. 76 of 1997), and in consultation with the Minister for Justice and Constitutional Development, drafted the directives in the Annexure, which directives were submitted to Parliament.

In view of the judgement of the Constitutional Court in *S v STEYN* (2001 (1) BCLR 52 (CC)), the directives will be reconsidered after amendments to sections 309B and 309C of the Criminal Procedure Act, 1977 (Act 51 of 1977) have been effected.

ANNEXURE

**Directives in terms of Section 4 of the Criminal
Procedure Amendment Act, 1997
(Act No. 76 of 1997)**

1. Definitions

Act means the Legal Aid Act, 1969 (Act 22 of 1969) as amended.

Board means the Legal Aid Board established in terms of the Act.

Constitution means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

Director means the Chief Executive Officer of the Board or any person delegated by him, in writing.

Guide means the 1996 Legal Aid Guide, issued by the Board pursuant to its powers in terms of section 3(d) of the Act, as amended by Circulars issued by the Director from time to time.

Legal Aid Officer means a legal aid officer or assistant legal aid officer in the employ of the Board or any person in the employ of the Department of Justice delegated to carry out the functions of a legal aid officer on an agency basis.

Rotation List means the rotation list compiled from time to time by a legal aid officer acting in terms of the Guide.

2. Substantial Injustice

2.1 The right to an appeal is an integral part of the right to a fair trial and, where substantial injustice would otherwise result, the accused is entitled to legal representation at State expense for the purposes of an appeal. This does not however mean that every accused who is convicted is forthwith entitled to legal aid for purposes of an appeal.

2.2 Substantial injustice will, for present purposes, be assumed to arise in respect of a contemplated appeal in a criminal matter if legal representation is not made available to the accused at State expense in circumstances where:

2.2.1 the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated appeal; and

2.2.2 the accused has been sentenced to direct imprisonment without the option of a fine; and

2.2.3 there is a reasonable prospect of success in relation to the contemplated appeal.

2.3 An accused must comply with all three of the criteria set out in paragraph 2.2 above.

- 2.4 Whether or not the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated appeal is a matter to be determined by legal aid officers as follows:
- 2.4.1 The legal aid applicant completes the means test as provided in Chapter 2 of the Guide (see Annexure LA. 13B hereto). If the legal aid applicant qualifies for legal aid in terms of the means test the legal aid applicant is indigent and is obviously unable to afford the cost of his/her own legal representation. Consequently, if the legal aid applicant qualifies in terms of the means test, the enquiry in respect of the legal aid applicant's ability to pay for the cost of his/her own legal representation need proceed no further.
- 2.4.2 If the legal aid applicant does not qualify for legal aid, then Annexure LA. 13C hereto is to be completed and forwarded to the Director who will consider whether or not the legal aid applicant qualifies for the assignment of legal representation at State expense, taking into account the income, expenditure, assets and liabilities of the legal aid applicant, the nature and number of the charges involved, the number of co-accused involved, the forum in which the proceedings are to take place, the anticipated duration of such proceedings and any factors relating to the complexity of the matter which may be drawn to the attention of the Director.
- 2.5 In relation to criminal appeals, the legal aid officer should ascertain from the accused whether he/she has been sentenced to direct imprisonment without the option of a fine. If in any doubt the legal aid officer may peruse the relevant charge sheet.
- 2.6 Sections 309B and 309C of the Criminal Procedure Act, 1977, as amended, for the most part relieves the Board of the responsibility of determining whether or not a legal aid applicant in respect of a criminal appeal has a reasonable prospect of success.
- 2.6.1 A legal aid applicant who has been granted leave to appeal by the court *a quo* will be deemed to have a reasonable prospect of success in the immediately superior tribunal.
- 2.6.2 A legal aid applicant who has been granted leave to appeal by the petition process will be deemed to have a reasonable prospect of success before the court which granted the petition.
- 2.6.3 Any legal aid applicant who has neither obtained leave to appeal nor been granted leave to appeal by the petition process will be deemed not to have a reasonable prospect of success and not to be entitled to legal representation on State expense in terms of section 35(3)(g) of the Constitution. The Director will however have a discretion to authorise legal aid for a further petition to the Supreme Court of Appeal.

3. Applications for leave to appeal

- 3.1 The mandate of a legal practitioner instructed on a legal aid basis in respect of the defence of the accused in the court *a quo* will extend to include the bringing of an application for leave to appeal on a legal aid basis provided such application for leave to appeal is brought within the time periods prescribed by section 309B or section 316 of the Criminal Procedure Act, 1997, as the case may be.

- 3.2 Where any application for leave to appeal needs to be accompanied by an application for condonation, the legal aid applicant will have to apply for legal aid anew and the Director will have to be satisfied by the legal aid applicant or his legal representative that the contemplated application for condonation has a reasonable prospect of success.
- 3.3 Legal practitioners have a continuing obligation, in terms of paragraph 5.11 of the Guide to ensure that their legal aid clients continue to qualify for legal aid and to draw any change in the circumstances of the legal aid applicant to the attention of the Director.
- 3.4 Whenever possible an application for leave to appeal must be brought on the same day sentence is handed down. Where this is not possible, for whatever reasons, a detailed written explanation as to why it was not possible to bring the application for leave to appeal on the same day on which sentence was handed down must accompany the account of the legal practitioner.
4. **Petitions, applications to lead further evidence and applications for bail pending appeal**
 - 4.1 The legal aid mandate of a legal practitioner who was instructed in respect of the trial in the court *a quo* will in future extend to the launching of a petition on a legal aid basis provided such petition is delivered within the time periods specified in Sections 309C or 316 of the Criminal Procedure Act, 1977, as the case may be and further provided that no legal practitioner shall launch any petition on behalf of any legal aid applicant unless such petition has a reasonable prospect of success. Any judge who refuses a petition and who is of the view that such petition never had a reasonable prospect of success and ought not to have been launched may bring such view to the attention of the Director in writing within 14 days of the refusal of the said petition. In the event of a judge communicating to the Director that a petition launched on a legal aid basis never had a reasonable prospect of success the Board shall be entitled to and will refuse payment to the legal practitioner concerned of any fees or disbursements relating to the petition in question or reasonably incidental thereto.
 - 4.2 Where no petition is brought timeously and where an application for condonation becomes necessary, a fresh application for legal aid by the legal aid applicant will be necessary and it will be necessary for the Director to be satisfied that the contemplated application for condonation has a reasonable prospect of success.
 - 4.3 Where leave to appeal against a judgement or order of the lower court has been refused by the rejection of a petition by the High Court no further petition to the Supreme Court of Appeal may be launched on a legal aid basis without the Director first having been satisfied that the contemplated petition to the Supreme Court of Appeal has a reasonable prospect of success. In such an instance it will be necessary for the legal aid applicant to make a fresh application for legal aid.
 - 4.4 An application for the adducement of further evidence is not to be brought on a legal aid basis unless the Director has first been satisfied that the application to lead further evidence has a reasonable prospect of success save in those instances where such application to adduce further evidence is brought simultaneously with the petition at no additional cost to the Board.

- 4.5 A legal practitioner who is entitled to bring an application for leave to appeal or to launch a petition shall be entitled to apply on behalf of the accused for bail pending the determination of the contemplated appeal provided the accused was not *de facto* in detention prior to his/her conviction and further provided that no appeal against any refusal of bail pending an appeal may be conducted on a legal aid basis without the Director's consent.

5. Reports to the Director

- 5.1 Where any application for condonation is necessary, or when an application to lead further evidence is contemplated, or where the court *a quo* was a Magistrate's Court and a petition to the Chief Justice is contemplated, or where an appeal against the refusal of bail pending an appeal is contemplated, it will be necessary for the Director to be satisfied in advance that the contemplated step has a reasonable prospect of success.
- 5.2 Where it is necessary in respect of a criminal appeal or any ancillary step to satisfy the Director that any such step has a reasonable prospect of success, a written report must be submitted to the Director by the legal practitioner instructed by the Board setting out:
- 5.2.1 the full names of all the contemplated appellants;
 - 5.2.2 a proper description of the court *a quo*, the case number and the date or dates of conviction and sentence;
 - 5.2.3 the charge or charges in respect of which the legal aid applicant contemplates an appeal and the sentence imposed in respect of each such charge;
 - 5.2.4 the nature of any evidence wrongly admitted at the trial and the reasons, with authority, for submitting that such evidence was wrongly admitted;
 - 5.2.5 the nature of any misdirection on any point of law by the presiding judicial officer and the reasons, with authority, for submitting that such misdirection took place;
 - 5.2.6 the nature of any erroneous deductions and/or conclusions reached by the judicial officer and the reasons, where appropriate with authority, for believing that such deductions/conclusions are erroneous;
 - 5.2.7 any appropriate submission, with authority, as to why the sentence or any portion thereof was strikingly inappropriate;
 - 5.2.8 whether it will be necessary for the accused to launch an application for condonation and, if so, the precise nature of the condonation required, including the extent of the delay to be condoned and the reasons, supported by authority, for believing that such condonation will be granted;
 - 5.2.9 if any petition to the Chief Justice is contemplated against a conviction and/or sentence of a Magistrate's Court, detailed submissions will be required, with authority, as to why the Judge President or the judges delegated thereto by him/her erred in refusing leave to appeal;

5.2.10 if any application to lead further evidence is contemplated, the precise nature of such evidence must be set out together with a detailed explanation as to why such evidence was not available and was not placed before the court at the time of the trial together with any submissions, with authority, as to why such application is likely to be granted;

5.2.11 the prospects of success with reasons for such submissions in respect of a contemplated appeal against a refusal of bail pending an appeal;

5.2.12 the costs of the contemplated proceedings in terms of the tariff herein set out and how such costs are computed;

5.3 When an accused, who was not legally represented in the court *a quo*, applies for legal aid in respect of a contemplated appeal but requires condonation because no application for leave to appeal has been brought timeously or no petition has been brought timeously, the legal aid officer shall determine whether the accused qualifies for legal aid in terms of the directives set out in paragraphs 2.2 to 2.5 above and the legal aid officer shall thereafter issue an instruction to a legal practitioner to read as follows:

- "1. To consult with the accused in terms of section 35(2)(c) of the Constitution.
2. To obtain a copy of the record in terms of rule 66(9) of the Magistrate's Court Rules.
3. To report to the Director of the Board on the merits of the contemplated appeal and application for condonation and to obtain his response before proceeding therewith."

5.4 Where an accused who qualifies for legal aid in terms of paragraphs 2.2 to 2.5 above was not represented before the court *a quo* but applies for legal aid in respect of an appeal within the time limits prescribed for the bringing of an application for leave to appeal, or if leave to appeal has already been refused, within the time limits prescribed for the bringing of a petition, the legal aid officer shall issue a legal aid instruction to a legal practitioner which should read as follows:

- "1. To assist the legal aid applicant with an application for leave to appeal and/or a petition against conviction and/or sentence under case number handed down by the Court at on
2. To obtain a copy of the record in terms of rule 66(9) of the Magistrate's Court Rules.
3. To report in due course to the Director of the Board on the outcome of the application for leave to appeal and/or petition."

5.5 In other instances where an application for legal aid/a new application for legal aid needs to be made prior to the finalisation of the application for leave to appeal/petition procedure, the legal aid officer should ascertain whether the legal aid applicant qualifies for legal aid as set out in paragraphs 2.2 to 2.5 above and if so satisfied, the legal aid officer shall issue a legal aid instruction in favour of a legal practitioner to read as follows:

- "1. To consult with the accused in terms of section 35(2)(c) of the Constitution.

2. *To obtain a copy of the record in terms of rule 66(9) of the Magistrate's Court Rules.*
3. *To report to the Director of the Board on the merits of the contemplated application for condonation/application to lead further evidence/petition to the Chief Justice (in respect of an accused convicted and sentenced in a Magistrate's Court), appeal against the refusal of bail pending appeal, on the merits of the contemplated appeal/petition/application and to obtain his response before proceeding therewith."*
- 5.6 Where in any instance a legal practitioner is required to submit a report to the Director of the Board on the merits of the matter, the legal practitioner may, pending the reply by the Director, take all such steps on a legal aid basis as are necessary to prevent:
 - 5.6.1 the accused having to apply for condonation provided no application for condonation was already necessary at the stage where the merit report was submitted to the Director;
 - 5.6.2 the appeal being struck off the roll provided the report was submitted to the Director at least twelve weeks prior to the date appointed for the hearing of the appeal.
- 5.7 After any application for leave to appeal and petition is disposed of either favourably or otherwise, the mandate of the legal practitioner instructed on a legal aid basis in respect thereof will *ipso facto* terminate. The legal aid applicant/accused may thereafter reapply for legal aid in respect of the proceedings before the court which is to hear the appeal. The basis on which the legal aid officer will decide whether or not the legal aid applicant is to receive legal aid in respect of the actual appeal is the same as that set out above but the legal practitioner instructed in respect of such appeal will be a legal practitioner practising within the Magisterial District where the seat of the court which is to hear the appeal is situate and whose name appears on the Rotation List in respect of criminal matters in the High Court. If the legal practitioner who represented the legal aid applicant in the court *a quo* appears on the relevant Rotation List in respect of criminal matters in the High Court and if such information is drawn to the attention of the legal aid officer, the legal aid officer shall instruct such legal practitioner in respect of the appeal, unless the Director directs otherwise. Save with the leave of the Director, only one legal practitioner shall be instructed on a legal aid basis in respect of a criminal appeal.
6. **Fees and disbursements payable to legal practitioners in respect of criminal appeals.**
 - 6.1 The fees and disbursements payable to legal practitioners who undertake criminal appeals and/or related matters incidental thereto shall be in accordance with Annexure E.3 hereto.
7. **General**
 - 7.1 In the event of the Director exercising the discretion vested in him/her in terms of these directives in favour of any legal aid applicant and/or in favour of any legal practitioner details of the matter in respect of which such discretion was exercised, the extent to which any legal aid recipient exceeded the means test, details of any increased or additional fees and/or disbursements authorised and the reasons for the exercise of such discretion shall be recorded in a report submitted by the Director to the Minister of Justice.

2.9.2 Meanwhile, Telkom has stressed that its profitability has been considerably reduced by its overarching obligation to have an additional 2.7m working lines in place by May 2002. Many of these lines are not profitable and the costs of providing and maintaining them without a sufficient return to cover costs is placing the company under considerable financial strain. As Telkom points out, its shouldering of this burden was a key reason for limiting the value of X in the price control formula to - 1.5 %, rather than a more conventionally higher figure.

2.9.3 While accepting these general points, the Authority has concluded that the time has come for greater transparency in the costs of extending the network towards providing universal service. Until these costs can be established on an acceptable basis, telecommunications users are, in effect, being asked to take on trust the extent to which prices need to be kept higher than they would otherwise be in order to finance the required network extension. This situation cannot be regarded as satisfactory.

2.9.4 As COSATU has pointed out, the assets acquired by Telkom in extending the network have a long-term strategic value which also needs to be taken into account. So does the contribution in terms of revenue received from unprofitable customers. What is needed, therefore, is a full analysis of the net cost to Telkom of providing universal service under the current arrangements.

LEGAL AID BOARD

ANNEXURE E.3

1. Fees and Disbursements payable to Legal Practitioners in respect of Criminal Appeals.

	Appeals to the High Court	Appeals to the Supreme Court of Appeal
1. Report to the Director of the Legal Aid Board on the merits of a matter.	R112,50	R150,00
2. Application for leave to appeal brought on the same day judgement was handed down.	R 75,00	R112,50
3. Application for leave to appeal brought on a date other than the date on which judgement is handed down and provided the Director is satisfied that there was good reason for the legal practitioner concerned not bringing such on the date on which judgement was handed down.	R112,50	R150,00
4. Application for leave to appeal on a date other than the date on which judgement is handed down but where the legal practitioner has failed to satisfy the Director that there was good reason for such application for leave to appeal being brought on another day.	Nil to R60,00	Nil to R90,00
5. Petition including all typing, copies and attendances relevant thereto.	R225,00	R300,00
6. Application for condonation including all typing, copies and attendances relevant thereto.	R 75,00	R112,50
7. Application to lead further evidence including all typing, copies and attendances thereto.	R 75,00	R112,50
8. Application for a copy of a record in terms of Rule 66(9) of the Magistrate's Court Rules/49A of the Uniform Rules/52 of the Uniform Rules including all typing, copies and attendances relevant thereto.	R 37,50	R37,50
9. Necessary perusal of any record after the granting of leave to appeal and pursuant to the issue of a fresh legal aid instruction or where otherwise permitted by the Director.	75c per page	75c per page
10. Heads of argument including all typing, copies and attendances relevant thereto.	R300,00	R300,00

	Appeals to the High Court	Appeals to the Supreme Court of Appeal
11. On appearing before court to argue appeal and including the noting of judgement, the final report to the Director and the report back to the legal aid applicant.	R750,00 This fee includes any consultations or perusal on that day and any application made on that day.	R1050,00 This fee includes any consultations or perusal on that day and any application on that day.
12. The fees in the preceding paragraphs shall be increased by 25% for each additional accused being represented to a maximum of an additional 150% for all co-accused.	25% extra on 1.11 above for each additional accused up to 7 represented by the practitioner on a legal aid basis.	25% extra on 1.11 above for each additional accused up to 7 represented by the practitioner on a legal aid basis.
13. Any necessary consultation with an accused or a witness whose evidence is yet to be led. Not more than one consultation per accused or per witness.	R112,50	R112,50
14. Application for bail pending appeal provided the accused was not in custody prior to conviction.	R 37,50	R 37,50
15. Necessary travelling costs.	R1,00 per kilometre including VAT where applicable for a total distance travelled in excess of 100 kilometres or economy class air fare whichever is the lesser.	R1,00 per kilometre including VAT where applicable for a total distance travelled in excess of 100 kilometres or economy class air fare whichever is the lesser.
16. Necessary accommodation and subsistence expenses. Such must be supported by relevant vouchers and tax invoices. Accommodation and subsistence are not permitted where the practitioner practises less than 200 km from the court which is to hear the matter.	Not more than R300,00 per night.	Not more than R300,00 per night.
17. Other disbursements.	As authorised by the Director in writing in advance.	As authorised by the Director in writing in advance.
18. VAT on fees in respect of those legal practitioners registered for VAT.	14%	15%

2. The Director has a general discretion to agree to special fees in circumstances which justify deviation from the above tariff.

LEGAL AID BOARD

LA.13B

MEANS TEST IN CONSTITUTIONAL MATTERS

Location:	Applicant:	Ref No.:
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		Applicant	
GROSS INCOME: MONTHLY		Salary	R
	Plus	Allowances	+R
	Plus	Subsidy	+R
	Plus	Bonuses	+R
	Plus	Interest	+R
	Plus	Rentals	+R
	Plus	Other	+R
		TOTAL =	R
PLUS: PROPERTY			
IMMOVABLE:	Reasonable market value	R	
	Less Bonds	-R	
	Other Property	=R	
	Bank balances and savings	+R	
	Investments and Deposits	+R	
	Monies due to Applicant	+R	
	NETT value	=R	
	DIVIDED by 120	R	+R
		GROSS INCOME	=R
DEDUCTIONS			
	Income Tax	R	
	Unemployment Insurance	+R	
	Compulsory Group Insurance	+R	
	Medical Fund Contribution	+R	
	Pension	+R	
	Rent or Mortgage Instalment (Max R1000)	+R	
	Maintenance in terms of court order	+R	
	School fees and contributions*	+R	
*Not applicable to private schools	TOTAL DEDUCTIONS =		+R
	Calculated Income		= R
	Deduct R600 for Applicant		- R
	SUB-TOTAL		= R
	Deduct R150 per child (if applicable) ... x R180 =		- R
			= R
Dependents actually supported by the applicant			
Name	Age	Name	Age
Name	Age	Name	Age
Name	Age	Name	Age

Complete details of my salary, property and all other income and assets are correctly set out above. All details of my expenses are correctly set out. All the deductions listed above are actually and regularly paid by me on a monthly basis. I realise that if any of the information set out above is false or incomplete, legal aid will be suspended immediately, and I will be prosecuted for fraud.

Date: _____

Signature of Applicant: _____

Qualify for legal aid: YES/NO

Date: _____

Legal Aid Officer: _____

LEGAL AID BOARD

LA.13B

MEANS TEST IN CONSTITUTIONAL MATTERS

Location:	Applicant:	Ref No.:
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		Applicant	
GROSS INCOME: MONTHLY		Salary	R
	Plus	Allowances	+R
	Plus	Subsidy	+R
	Plus	Bonuses	+R
	Plus	Interest	+R
	Plus	Rentals	+R
	Plus	Other	+R
		TOTAL =	R
PLUS: PROPERTY			
IMMOVABLE:	Reasonable market value	R	
	Less Bonds	-R	
	Other Property	=R	
	Bank balances and savings	+R	
	Investments and Deposits	+R	
	Monies due to Applicant	+R	
	NETT value	=R	
	DIVIDED by 120	R	+R
		GROSS INCOME	=R
DEDUCTIONS			
	Income Tax	R	
	Unemployment Insurance	+R	
	Compulsory Group Insurance	+R	
	Medical Fund Contribution	+R	
	Pension	+R	
	Rent or Mortgage Instalment (Max R1000)	+R	
	Maintenance in terms of court order	+R	
	School fees and contributions*	+R	
*Not applicable to private schools	TOTAL DEDUCTIONS =	- R	
	Calculated Income	= R	
	Deduct R600 for Applicant	- R	
	SUB-TOTAL	= R	
	Deduct R130 per child (if applicable) ... x R130 =	- R	
		= R	

Dependents actually supported by the applicant			
Name	Age	Name	Age
Name	Age	Name	Age
Name	Age	Name	Age

Complete details of my salary, property and all other income and assets are correctly set out above. All details of my expenses are correctly set out. All the deductions listed above are actually and regularly paid by me on a monthly basis. I realise that if any of the information set out above is false or incomplete, legal aid will be suspended immediately, and I will be prosecuted for fraud.

Date: _____

Signature of Applicant: _____

Qualify for legal aid: YES/NO

Date: _____

Legal Aid Officer: _____