IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **18417/2017**

In the matter between:

DAVID ROBERT LEWIS Applicant

and

LEGAL AID SOUTH AFRICA Respondent

Coram: ***Martin AJ***
Date of Hearing: **28 February 2019**
Date of Judgment: **11 March 2019**

JUDGMENT

MARTIN, AJ

[1]

Mr Lewis applied to court to review and set aside the decision of Legal Aid South Africa (Legal Aid SA) refusing to provide him with legal representation to prosecute a case before the Equality Court. The impugned decision is to the effect that *"Considering the above, your appeal against the refusal of legal aid is unsuccessful as there are no prospects of success"* (record 143).

[2]

Procedurally, the review was launched in terms of rule 53 (1) of the Uniform Rules of Court. Nothing turns on any matter of procedure, but it might be apposite to indicate that the court paid no heed to any infelicities in Lewis's pleadings and the presentation of his case.

[3]

The matters which Mr Mthati, the Acting Chief Legal Executive, Legal Aid SA, referred to by the word "above" are the following considerations that he had regard to in taking his decision:

(a) The relief Lewis sought in the Equality Court,

(b) Numerous documents available to him,

(c) Lewis failed the means test,

(d) The requirements for legal aid and

(e) An in-depth analysis of the merits of the application.

Mthati discusses all these matters in his letter of 23 August 2017 to Lewis (annexure DRL 9 to Lewis's founding affidavit, deposed to on 11 October 2017; record 45 – 49; hereafter referred to as the founding affidavit).

This was the third time Legal Aid SA refused Lewis legal aid for the Equality Court matter.

[4]

Lewis first applied unsuccessfully for legal aid on 22 August 2016 (record 117-118). Ms Karen Nel notified Lewis of the outcome of his application, in an e-mail dated 1st September 2016 (Annexure DRL 4: record 33). She, somewhat clumsily, advises Lewis that Legal Aid SA *"would like [you] to know how do you go about appealing the refusal of legal aid"*, as well as indicating that the reason for the refusal was that Lewis *"exceeded the means test by R2500."*

[5]

Lewis appealed the refusal in a letter dated 1 September 2016 (Annexure DRL 11; record 171-174). It is not clear whether pursuant to his letter, but subsequent to Lewis' appeal, Legal Aid SA undertook an examination of the merits of the application, and prepared a report on them (record 121-126. Mr.

John Van Onselen compiled the report for and on behalf of Legal Aid SA. During argument, Lewis acknowledged that Van Onselen had interviewed him for about one hour. The fact that he was interviewed and the content of the report indicate that Lewis provided much of the information. It is important to note that Lewis provided the information because during proceedings he objected to Legal Aid SA having referred to the Labour Court case. He had volunteered the information during the interview; Legal Aid SA was therefore entitled to seek further information about the case to assist it in assessing the merits of Lewis' Equality Court action. Lewis canvassed a broad swathe of matters in his papers, which leads this me to find that the Legal Aid SA was justified in holding that

> "to enable Legal Aid SA to prepare a substantive report it would be necessary to consider all the various pieces of legislation applicable, the findings of the report of the Truth and Reconciliation Commission together with any other relevant documents".

I am also satisfied that Legal Aid SA justifiably concluded that "to do so would take a lengthy period of time."

[6]

On 9 November 2016, Ms Cordelia Robertson, the Regional Operations Executive of Legal Aid SA: Western and Northern Cape wrote to Lewis, indicating that his appeal was unsuccessful (DRL 3 record 32). I find myself

duty bound to express some displeasure concerning the letter. The subject line of the letter reads REASON FOR REFUSAL OF LEGAL AID, but the document provides no reason. Officers of the writer's standing should exercise their functions with greater care. This criticism does not mean that I find the decision deficient, invalid or unjustified in any way.

[7]

Lewis states under oath that on 11 January 2016 the Equality Court referred to his complaint to Judge Veldhuisen (paragraph 15 of his founding affidavit; record 9). Lewis states further that he and the other parties met with Judge Veldhuisen in Chambers on 26 January 2016. It is perhaps appropriate to mention that in between Judge Veldhuisen meeting with the parties and his letter to the chief operating officer of Legal Aid SA, Mr Nair on 17 April 2017, a number of steps were taken in relation to this matter (see founding affidavit paragraphs 17 and 18; record 10). Judge Veldhuisen requested Nair to provide the reasons for Legal Aid SA refusing to afford Lewis legal aid. Legal Aid SA responded to Judge Veldhuisen on 24 May 2017 (annexure DRL6 to the founding affidavit; record 35). Mr Mthati, in the reply, indicated that Legal Aid SA had refused Lewis legal aid as the matter had "prescribed" and had "very little prospect of success" (para 4 of the letter; record 36). It is important to mention that in his letter, Mthati points out that Lewis can still appeal to the chief legal executive (paragraphs 5 and 6 of annexure DRL6). Mthati clearly discharged his duty to provide Lewis with information.

[8]

Lewis launched his final internal appeal to Legal Aid SA in a letter dated 30 June 2017, addressed to the Chief Legal Executive (DRL8; record 41). Lewis did that on the advice of the Deputy Judge President, Judge Goliath which Lewis indicates she gave when she met with the parties. Judge Goliath temporarily took charge of the matter because Judge Veldhuisen had retired from active judicial service. Judge Goliath then appointed Judge Bozalek to preside over the Lewis case in the Equality Court.

[9]

Mthati, who was by then the Acting Chief Legal Executive, Legal Aid SA, responded to Lewis letter on 23 August 2017 (DRL9; record 45 to 49). Mthati's detailed letter, explains fully why Legal Aid SA once more turned down Lewis's appeal. Mthati does so as follows:

1) He sets out the relief Lewis is seeking (para 2);

2) He tabulates the documents submitted for consideration in the course of the appeal (para 3);

3) He indicates that Lewis's income exceeds the means test (para 4);

4) He sets out the requirements for obtaining legal aid, emphasising the importance of the prospects of success because Legal Aid SA has limited resources (para 5);

5) He analyses the merits of Lewis's application in detail (para 6); and

6) He advises Lewis that his appeal is unsuccessful "as there are no prospects of success in your matter" (para 7).

Mthati couches the refusal perhaps somewhat inelegantly. That notwithstanding, it would be disingenuous to assert that the absence of prospects of success is the only reason for the refusal: if one takes a holistic view of the letter, the lack of prospects of success is perhaps a convenient shorthand for the sum total of the reasons for the refusal.

[10]

I would be failing in my duty if I did not point out that there were some procedural peccadilloes in the sinuous course through which these proceedings, as well as those before the Equality Court, have wound. In my view, however, none of these is sufficiently serious to constitute an irregularity such that it denied Lewis substantial justice or that justifies my concluding Legal Aid SA did not afford Lewis just administrative action.

[11]

The respondent, in my view, correctly characterises Lewis's complaint as being that Legal Aid SA acted unreasonably and irrationally and as a result

arrived at a decision which no other decision-maker would have reached under the circumstances (see *Dumani v Nair & Another*, [2012] ZASCA 196).

[12]

The right to just administrative action derives from section 33 of the Constitution. Headed "just administrative action" s 33 reads as follows:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must —
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

[12]

Section 2 of Act 39 of 2014 established Legal Aid South Africa. Section 3 provides Legal Aid SA with its mandate, by setting it the following objectives:

> "(a) render or make available legal aid and legal advice;
>
> (b) provide legal representation to persons at state expense;
>
> (c) provide education and information concerning legal rights and obligations, as envisaged in the Constitution and this act."

Section 4(1)(f) of the Act invests Legal Aid SA with the power to provide legal representation where substantial injustice would otherwise result or make legal advice and legal aid available.

[13]

The framework within which Legal Aid SA exercises its mandate is elaborated on in the Legal Aid manual and the regulations promulgated by the Minister of Justice and Correctional Services under section 23 (1) of the Act.

Paragraph 3.8(b) of the manual sets out the factors that a merit report must incorporate. Van Onselen prepared a report merit report in this case (annexure DRL 9; record 45-49). Van Onselen found that there were no merits in this case and Legal Aid South Africa refused to provide Lewis with assistance.

The legal aid regulations also play an important role in the decision-making process. Regulation 9 (1) provides that Legal Aid SA may grant a litigant legal aid in any civil matter if "(a) in the opinion of legal aid South Africa the matter has good prospects of success" and "(c) legal aid South Africa has the necessary resources available". The regulations also provide specifically for legal aid in civil cases for the protection of Constitutional rights (regulation 10). Regulation 10 (1) subjects the provision of legal aid "to the provisions of the regulations and availability of resources", and makes it subject to consideration of a number of criteria, one of which is "legal aid applicants chances of success in the case" (regulation 10 (2) (e).

[14]

Our courts have firmly established that the starting point in dealing with applications for review is to recognise that all three branches of government, that is, the legislature, executive and judiciary each have their exclusive domains. The Constitutional Court expresses the position as follows in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*

> "the court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness" (2004 (4) SA 490 (CC) para 45).

The Court also expresses the following view in that case;

> "In treating the decisions taken by administrative agencies with appropriate respect, a court is recognising the proper role of the executive within the constitution" (para 48).

[15]

Legal Aid SA falls within the executive sphere of government and is properly entrusted with the power to decide whether to grant or refuse an applicant legal aid. Decision makers within the executive branch and other functionaries that the law entrusts with the power to make administrative decisions, are constitutionally obliged to act reasonably.

The Constitutional Court has held that in deciding whether or not the administrative agency or functionary acted reasonably "a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government" (*Bato Star* para 8). The Constitutional Court and Supreme Court of Appeal have authoritatively established that a court cannot interfere with the decision simply because it disagrees with that decision. The Constitutional Court made an important ruling in *Pharmaceutical Manufacturers Association of South Africa and Another: in re Ex Parte President of the Republic of South Africa*, 2000 (2) SA674 (CC). The Court held that standard of rationality set for the exercise of public power by the executive and other functionaries "does not mean that the courts can or

should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested" (para 90).

In *Dumani v Nair and Another,* the Supreme Court of Appeal expresses the test for whether or not a decision passes or fails the test of rationality as succinctly follows: "whether the decision... is so unreasonable that no reasonable person could have reached it".

[16]

When I have regard to the materials before me, the following factors play an important role in my finding:

(a) Legal Aid SA gave Lewis sufficient opportunities to put his case fully before the various officials;

(b) Lewis made a vast array of information made available to the decision-makers and they procured additional materials;

(c) The reasons the officials have provided, show clearly that the they duly considered the information before them; and

(d) they have done all of this in the pursuit of the proper utilisation of the limited funds made available to legal aid South Africa from the public purse (fiscus).

These considerations lead me to conclude that Legal Aid SA has acted fairly, rationally and within the bounds set by the constitutional injunction to, and

requirement of, "fair administrative action". The application, therefore, falls to be dismissed.

This brings me to the question of costs.

[17]

The respondent moved for the court to make a costs order against Lewis in dismissing the application.

It is trite law that the court has a wide discretion when it comes to making an order as to costs. The only clear limitation on this discretion is that the court must exercise it judicially.

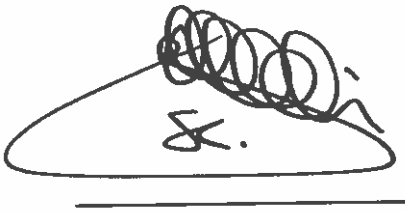
In my view, it would be unjust to order costs against Lewis in this case. The Constitutional Court has often eschewed making cost orders against litigants because that would have "a chilling effect" on individuals seeking to assert their constitutional rights. For the same reason, I propose making no order as to costs.

[18]

I therefore make the following order:

1) The application is dismissed.

2) There is no order as to costs.



BSC Martin

Acting Judge