The Right to Civil Legal Aid in South Africa: *Legal Aid South Africa v Magidiwana*

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I Introduction

On 16 August 2012, 34 mineworkers, who had embarked on a strike, were killed by South African Police Service members. Scores more mineworkers were injured and arrested. The incident would later become known in South Africa as the 'Marikana Massacre'. The decision of the Court in *Legal Aid v Magidiwana* was, at one level, just one episode in the lengthy drama that ensued from the shootings.[1] The legal proceedings that followed, and which continue to unfold, centre on attempts to secure justice for the mineworkers and their families in the civil and criminal arenas. Amidst these proceedings is a decision of the Court that, almost unnoticed, has affirmed the constitutional right to civil legal aid.

There is no provision in the Constitution that expressly guarantees the right to civil legal aid. The Constitution does expressly guarantee legal aid in criminal matters and in matters affecting children, where 'substantial injustice would otherwise result'.[2] In relation to civil legal aid, the right has its roots in s 34 of the Constitution, the right of access to courts, which provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. The right to a 'fair hearing' requires the state, in

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[1] *Legal Aid South Africa v Magidiwana & Others* [2015] ZACC 28, 2015 (6) SA 494 (CC), 2015 (11) BCLR 1346 (CC)('*Magidiwana II (CC)*').

[2] Section 35(2) of the Constitution provides: 'Everyone who is detained, including every sentenced prisoner, has the right – (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. Section 35(3) provides further: 'Every accused person has a right to a fair trial, which includes the right -(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; …(o) of appeal to, or review by, a higher court.' Section 28(1) provides, in relation to children: 'Every child has the right, (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'.

at least some civil matters, to provide legal representation at state expense, where the failure to do so would deprive a person of a fair hearing. Until *Magidiwana*, the legal position on whether there is a right to civil legal aid was uncertain. Legal Aid South Africa (LASA) adopted what Bentley characterised as 'tacit denial … that access to justice includes the right to [civil legal aid]'.[3] LASA prioritised criminal matters and provided legal representation in civil matters only in very limited circumstances. After *Magidiwana*, tacit denial of the right is no longer possible.

While the Marikana massacre continues to have profound political consequences, the unheralded recognition of a right to civil legal aid is in some ways a more significant long-term development in our constitutional democracy. Section II begins by tracing the factual background to the Marikana massacre and the particular history of the dispute regarding legal representation for the injured and arrested mineworkers. We then engage with the legal history of the funding dispute, which ran though the court hierarchy and, after a false start in unsuccessful urgent proceedings, culminated in the decision by the Constitutional Court. In section III we analyse the decision of the Court on the issue of the right to civil legal aid and ask when, in principle, the Constitution guarantees a right to state-funded legal representation in civil matters. Against this constitutional backdrop, we look to the future. Section IV identifies the current provision that LASA makes for civil legal aid, both in its regulatory framework and its budget. Lastly in section V, we consider whether LASA's provision for civil legal aid is likely to face constitutional challenges and, if so, what form such challenges may take and in what types of case they are likely to arise.

II THE *MAGIDIWANA* LITIGATION

A The Marikana Commission of Inquiry

In early August 2012, mineworkers employed by Lonmin Plc at Marikana in the North West province of South Africa embarked on a wage strike. There followed two weeks of violence in which 44 people were killed, approximately 70 injured and 250 arrested.[4] Of the 44 people killed, two were members of the SAPS and three were mine security.[5] On 16 August 2012, in what came to be known as the 'Marikana massacre', 34 striking

[3] K Bentley 'Access to Justice: The Role of Legal Aid and Civil Society in Protecting the Poor' in K Bentley, L Nathan, & R Calland (eds) *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (2013) 35.

[4] *Magidiwana II (CC)* (note 1 above) at para 4.

[5] Final Report of the 'Commission of Inquiry Into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenburg in The North West Province, South Africa, On Or About 11–16 August 2012' (2015) 128, available at http://www.gov.za/sites/www.gov.za/files/marikana-report-1.pdf ('Final Report of the Marikana Commission of Inquiry').

mineworkers were killed by SAPS members during a targeted policing operation aimed at terminating the strike.[6]

The violence that took place at the platinum mine was widely publicised by foreign and local media. The killings by the SAPS on 16 August 2012 were the single largest use of lethal force by the police against civilians since the Sharpeville massacre in 1960.[7] The Marikana Commission of Inquiry (the Commission) was established by President Zuma[8] on 26 August 2012 to investigate and report on 'matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana'.[9] The President appointed retired appeal Judge Ian Farlam as Chairperson, along with two senior advocates as Commissioners.[10] The Commission was characterised by quasi-adversarial procedures which included cross-examination and argument on points of law by senior counsel.[11] Initially the Commission was given four months to complete its investigation. However, its term was extended several times. In November 2014, almost two years after it began, it concluded hearings and then released its report the following June.[12]

Apart from the Truth and Reconciliation Commission, the Commission is arguably the most prominent South African commission of inquiry established in the democratic era. To date, the Commission stands as the most intensive investigation into the events at Marikana. Its budget ran into the tens of millions of rands. Over its two-year life span, it gathered oral and affidavit evidence and an extensive range of evidentiary exhibits, which are unlikely to be scrutinised to the same degree before any other forum, including a court. The investigation conducted by the Commission has at least provided the South African public with a factual matrix within which, in time, it may seek to understand what happened at Marikana. It is in the context of a commission of inquiry with this significance that a dispute emerged regarding whether the injured and arrested mineworkers had a right to state-funded legal representation in the commission proceedings.

B The Funding Dispute

The regulations adopted pursuant to the terms of reference of the Commission provided that: '[A]ny person appearing before the Commission may be assisted by an advocate or an attorney.'[13]

[6] Ibid at 270 and 308.

[7] *Magidiwana & Another v President of the Republic of South Africa & Others* [2013] ZAGPPHC 292, [2014] 1 All SA 76 (GNP)('*Magidiwana II (HC)*') at para 63.

[8] Empowered by Constitution s 84(2)(f).

[9] GN 35680 *GG* 50, 26 August 2012 (Terms of Reference).

[10] Proc 50 *GG* 35680 (2 September 2012) 3; and *Magidiwana II (HC)* (note 7 above) at para 14.

[11] *Magidiwana & Another v President of the Republic of South Africa & Others* [2013] ZAGPPHC 220, [2014] 1 All SA 61 (GNP)('*Magidiwana I (HC)*') at para 13.

[12] Final Report of the Marikana Commission Inquiry (note 5 above) at 4–5.

[13] Regulation 8.

However, when establishing the Commission, the President did not make funds available for the various participants' legal representation.[14] Those who were injured and arrested during the strike participated in the Commission as a single group. The claim for legal representation was made by this group of approximately 300 people (the miners).[15] The group initially sought and obtained funding from the Raith Foundation, a non-governmental Organisation, to cover six months of proceedings. However the Commission was extended beyond this six-month period, and by April 2013 they were unable to secure further funding.[16]

In contrast, the other parties were adequately resourced. The legal team representing the SAPS included five advocates instructed by private attorneys instead of the State Attorney. The Minister of Police was represented by a separate state-funded legal team, despite an overlap of interests with the SAPS. The miners alleged that the cumulative costs of the state parties participating at the Commission were between R2–3 million per month. This allegation was not denied or rebutted. [17]

The miners approached the Minister of Justice and Constitutional Development (the Minister) to fund their continued participation. The Minister declined the request on the basis that there was 'no legal framework through which government can contribute to the legal expenses of any of the parties who participate in the commission of inquiry'.[18] The miners also approached Legal Aid South Africa (LASA)[19] for funding.[20] When they made the request, the CEO of LASA had already committed to funding the legal costs of the families of the deceased miners. Although the Legal Aid Guide in operation at the time made no provision for the funding of legal costs at commissions of inquiry, the CEO had exercised the discretion to provide funding for the families of the deceased in terms of clause 10.2.3 of the 2012 Guide. The clause gave the general discretion to waive any condition, procedure, or policy as set out in the Guide. [21] The discretion covered requests not provided for in the Legal Aid Act as long as it was exercised within the overall authority of the Act. [22]

LASA refused the miners' request. It cited various grounds for the refusal: namely, its budgetary constraints; that the families had a substantial and material interest in the outcome of the inquiry (implying that the miners did not); and that there would be no substantial and identifiable benefit for the miners to be separately represented.[23] LASA also invoked its own policy documents, which at the time did not make specific provision for it to fund legal representation

[14] *Magidiwana II (CC)* (note 1 above) at para 35.

[15] See *Magidiwana I (HC)* (note 11 above) at para 27 (certified the class action in terms of Constitution s 38).

[16] *Magidiwana & Others v President of the Republic of South Africa & Others* [2013] ZACC 27, 2013 (11) BCLR (CC)('*Magidiwana I (CC)*') at para 2.

[17] *Magidiwana II (HC)* (note 7 above) at para 49.

[18] *Magidiwana I (CC)* (note 16 above) at para 3.

[19] LASA is the statutory body whose function is to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution.

[20] *Magidiwana I (CC)* (note 16 above) at para 4.

[21] *Magidiwana II (CC)* (note 1 above) at para 37.

[22] *Magidiwana II (HC)* (note 7 above) at para 18.

[23] *Magidiwana II (CC)* (note 1 above) at paras 6–7.

at commissions of inquiry. Moreover, LASA sought to distinguish the injured and arrested miners from the deceased miners (whom it had agreed to fund) on the basis that the families of the deceased consisted of women, children and the elderly, whom LASA recognises as vulnerable groups needing priority attention. LASA also contended that the miners' interests would be represented by their respective unions who were parties to the Commission.[24]

The miners, in response to LASA's refusal, denied that they had no interest in the outcome of the Commission and that their interests and those of the Unions were aligned in all respects. Despite this response, LASA persisted with its refusal.[25] As a result, the injured and arrested withdrew from the Commission's proceedings. The Commission's legitimacy was threatened by the withdrawal. It was during this period that the miners initiated litigation to secure funding.

Prior to the hearing of the appeal in the Supreme Court of Appeal in 2014, LASA and the miners concluded a settlement agreement to the effect that LASA would provide for the full legal fees of the miners for the remainder of the Commission's proceedings. In addition, LASA relinquished any right to reclaim the funds even if successful in the appeal.[26] As discussed below, the settlement would render the dispute moot and fatally affect LASA's appeal to the Supreme Court of Appeal and thereafter, the Constitutional Court. However, despite this settlement the litigation rumbled on through the court hierarchy and produced five judgments – a High Court judgment on the urgent application, a Constitutional Court urgent appeal, the main High Court judgment and judgments on appeal against that judgment by the Supreme Court of Appeal and then the Constitutional Court. We refer to these judgments as '*Magidiwana I* (HC)', '*Magidiwana I* (CC)', '*Magidiwana II* (HC)', '*Magidiwana II* (SCA)' and '*Magidiwana II* (CC)'. The most important of these judgments are the High Court decision in *Magidiwana II* (HC) upholding the claim for state-funded legal representation and the Constitutional Court judgment in *Magidiwana II* (CC) dismissing the final appeal against that decision.

C A False Start: The Urgent Proceedings

Unable to secure private funding for legal representation, in June 2013 the miners launched an application in the High Court. The application was made on behalf of a class of approximately 300 persons cited as the 'injured and arrested'.[27] Those in the class had either been injured during the policing operation at Marikana or subsequently arrested.[28] At the time of approaching the High Court, the Commission's term had again been extended to October 2013.[29]

The application before the High Court was brought in two parts. Part A sought urgent interim relief whilst Part B requested long term and final relief. The

[24] Ibid at para 7.
[25] Ibid at para 38.
[26] *Legal Aid South Africa v Magidiwana & Others* [2014] ZASCA 141, 2015 (2) SA 568 (SCA)('*Magidiwana II (SCA)*') at para 19; *Magidiwana II* (CC) at para 14.
[27] *Magidiwana II (CC)* (note 1 above) at para 34.
[28] *Magidiwana II (HC)* (note 7 above) at para 1.
[29] Final Report of the Marikana Commission Inquiry at 4–5.

nature of the relief sought in both parts was the same, namely that the President, Minister and LASA provide funding for the legal representation of the miners at the Commission.[30] Under Part A, the Miners were successful in having the application heard as urgent and also securing certification of the class of 'injured and arrested'.[31] However, the court dismissed the application for interim relief citing a lack of fraud or unlawfulness in the state's conduct, requirements for an interim interdict. The court also noted its hesitance to interfere in the polycentric nature of the allocation of public funds.[32]

Following the dismissal of Part A of the application by the High Court, the miners sought urgent and direct leave to appeal to the Constitutional Court. The miners' application for leave to appeal related to the merits of both Part A and Part B of the original application. At this point, Part B, which was directed at securing final relief, had not been heard. In a succinct 11-page judgment, the Court dismissed the appeal. It held that only Part A of the application was before it, and confined itself to considering the dismissal of the interim relief sought.[33] The Court emphasised that it is not well-equipped to hear urgent matters. It also cited the additional difficulty of the relief sought being temporary and that such relief was susceptible to reconsideration by a lower court tasked with determining final relief (Part B). [34]

Whilst the Court briefly touched on the merits of the pending review, it cautioned that its consideration of the High Court's judgment should not be seen as an anticipation of the main review. The Court pronounced on the role of commissions of inquiry in assisting the President with correcting policy and also ensuring overall accountability and transparency. It stated that equal opportunity should be afforded to interested parties to participate in a commission's proceedings; absent their participation a commission's purpose may be compromised. It went further to note that the failure to provide adequate legal representation may result in unfairness.[35] Despite these findings the Court concluded that it was not in the interests of justice to grant the leave to appeal.[36]

D The Main Proceedings in the High Court and SCA – The Right to Civil Legal Aid

After the Court's dismissal of the appeal against Part A, the miners pursued Part B of the application in the High Court. Part B challenged the refusal of the President, the Minister and LASA (the respondents) to provide the miners with funding for legal representation before the Commission. The issue was whether the miners were 'entitled to state-funded legal representation for their

[30] *Magidiwana I (CC)* (note 16 above) at para 5.
[31] *Magdiwana & Another v President of the Republic of South Africa & Others* [2013] ZAGPPHC 220, [2014] 1 All SA (GNP)('*Magidiwana I (HC)*') at paras 19 and 27.
[32] *Magidiwana I (HC)* (note 11 above) at paras 44 and 45.
[33] *Magidiwana I (CC)* (note 16 above) at para 6.
[34] Ibid at para 8.
[35] Ibid at paras 15–16.
[36] Ibid at para 17.

participation in the proceedings of the commission'.[37] The challenge was brought by way of review in which the miners sought an order declaring the respondents' conduct unconstitutional and invalid, and setting aside the decision refusing state-funded legal representation. [38]

In relation to the challenge to the President's and Minister's refusal, the High Court concluded that 'no legal framework exists within which the President and the Minister can lawfully, or are authorised to, fund the legal representation' of the miners.[39] LASA's decision to refuse funding for the miners' legal representation was, however, deemed irrational and inconsistent with both ss 9 and 34 of the Constitution. The High Court found that LASA had unfairly distinguished between the two groups of victims.[40] The court held that LASA's budgetary constraints were not an obstacle to the court's determination of an effective remedy. It concluded that the miners' participation in the Commission was essential, and in order to secure their meaningful participation provision needed to be made for state-funded legal representation.[41] LASA was ordered to take steps to fund the miner's legal representation at the Commission's proceedings. The High Court went further to remark that it would be commendable if LASA's funding would ensure that the miner's legal team remained unchanged. [42]

The findings and order by the High Court eased the mounting tension caused by the withdrawal from the Commission of the injured and arrested and those in solidarity with them. In accordance with the High Court's order, LASA funded the Miners' legal representation whilst deliberating and ultimately pursuing the appeal process.

LASA was granted leave to appeal to the Supreme Court of Appeal by the High Court. LASA argued that the High Court had erred in finding that s 34 of the Constitution applied to the Commission and gave rise to a right to legal representation at the state's expense. LASA also sought to appeal the finding that the refusal to provide funding was irrational and contrary to s 9 of the Constitution. LASA argued that should the High Court's order remain unaltered, it would have a significant and the detreminetal effect on its ability to fulfil its statutory mandate.[43] Despite advancing these arguments, prior to the hearing of the appeal LASA undertook to provide legal funding to the miners for the remainder of the Commission. As a result of this settlement agreement, the dispute ceased to exist.[44] Therefore the primary issue before the appeal court became whether the appeal would have any practical effect.[45] The Miners declined to cross-appeal the dismissal of the application against the President and the Minister. Accordingly, both chose to abide by the Supreme Court of Appeal's decision.[46]

[37] *Magidiwana II (CC)* (note 1 above) at paras 41–42.
[38] *Magidiwana II (HC)* (note 7 above) at para 2.
[39] *Magidiwana II (CC)* (note 1 above) at paras 9–10.
[40] Ibid at paras 9–10.
[41] *Magidiwana II (HC)* (note 7 above) at paras 63 and 68.
[42] *Magidiwana II (CC)* (note 1 above) at para 48.
[43] Ibid at para 48.
[44] *Magidiwana II (SCA)* (note 26 above) at para 20.
[45] Ibid at para 4.
[46] Ibid at para 9.

The appeal was dismissed. The Supreme Court of Appeal found that the appeal would not have any practical effect or alter the result.[47] The court split as to whether it had the discretion to enter into the merits of an appeal which was moot. It did, however, reach a unanimous agreement that the appeal should be dismissed, even if the Court had such discretion.[48]

E The Constitutional Court's Cautious Recognition of a Right to Civil Legal Aid

LASA pursued a final appeal to the Court. LASA submitted that it was in the interests of justice for the Court to enter into the merits of the appeal, specifically the findings relating to LASA's funding obligations. LASA argued that the High Court's decision, if left unaltered, would impact its 'polycentric budget-allocation decisions' and 'fundamentally alter the manner in which Legal Aid operates'. LASA expressed particular concern about the High Court's findings regarding the application of s 34 to inquiries and investigatory tribunals. It contended that resources will be directed away from indigent persons to commissions of inquiries.[49]

The Miners, the families of the deceased and AMCU opposed the appeal. They argued that any determination of the appeal would have no practical effect.[50] The families and AMCU submitted that the High Court's determination rested upon the unique circumstances of the Marikana tragedy. They further contended that LASA overemphasised the impact of the judgment, which simply required it to act within the confines of just administrative action.[51] The legal representatives of the Ledingoane family made submissions supporting the High Court's decision that in certain circumstances s 34 may give rise to a right to legal representation at state expense.[52] LASA replied that the High Court laid down incorrect principles of law that would negatively impact on the work of LASA, and limit the ambit of its CEO's discretion.

In the majority judgment, written by Theron AJ,[53] the Court dismissed LASA's application for leave to appeal. It found that the matter was moot as an appeal from the decision of the High Court would have no practical effect. Whilst the Court has the discretion to hear a moot matter, the Court held that there were no exceptional circumstances to justify this departure from form. [54] Theron AJ expressly referred to, and implicitly endorsed, the 'test' developed by the High Court, by Makgoka J

[47] Under s 16(2)(a)(i) of the Superior Courts Act 10 of 2013; *Magidiwana II (SCA)* at paras 3, 22 and 24.

[48] *Magidiwana II (CC)* (note 1 above) at paras 10–11.

[49] Ibid at para 52.

[50] Ibid at paras 1–2.

[51] Ibid at para 53.

[52] Mr Ledingoane was a miner and victim of the Marikana massacre. His family was separately represented by the Legal Resources Centre, both at the Commission and throughout the funding litigation. *Magidiwana II (CC)* at para 54.

[53] Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Molemela AJ and Tshiqi AJ concurring.

[54] *Magidiwana II (CC)* (note 1 above) at para 28.

had ordered LASA to provide legal aid to the injured and arrested persons.[55] Makgoka J had held as follows:

> [T]he right to legal representation at commissions is not an absolute one, but depends on the context. Counsel for Ledingoane family asserted that the right arises in the following circumstances:
> (a) when the nature and type of inquiry demands that some or all interested parties be legally represented;
> (b) when the interests of justice and the rule of law would be undermined by a failure to uphold the right;
> (c) when the constitutional rights of parties or witnesses appearing before a commission are implicated or potentially threatened.

And:

> I find the above proposition both attractive and persuasive as a basis for a general framework, in each commission regard would be had to the context-specific factors of the commission to determine whether s 34 finds application. It is therefore not feasible, nor desirable, to lay down an inflexible list of such considerations. For the present purposes I take the following into consideration:
> (a) substantial and direct interest of the applicants in the outcome of the commission;
> (b) the vulnerability of the applicants as participants in the proceedings of the commission;
> (c) the complexity of the proceedings and the capacity of the applicants to represent themselves;
> (d) the procedures adopted by the commission;
> (e) Equality of arms
> (f) the potential consequences of the findings and recommendations of the commission for the applicants.[56]

Theron AJ for the majority did not contradict this test adopted by the High Court.[57] She commented that '[i]t is clear from the [High Court] judgment that whether the right to representation arises will depend on the context of each commission and would only be granted in exceptional and rare circumstances'.[58] This remark constitutes an obiter dictum endorsement of the High Court's finding that a right to legal representation arises in at least some civil matters. However, Theron AJ emphasised the narrow reach of the High Court decision, adding that the Court had not considered its merits and made no pronouncement in that regard.[59] The Court held that the High Court's interpretation of the right to a fair hearing did not affect the discretionary power of LASA, and imposed no obligation on it to fund legal representation at commissions of inquiry in the future.[60] In such matters, an applicant will have to apply for funding from LASA, which will 'consider the application in terms of the relevant law and regulations'.[61] These

[55] *Magidiwana II (CC)* (note 1 above) at fn 24.
[56] *Magidiwana II (HC)* (note 7 above) at paras 37–38.
[57] *Magidiwana II (CC)* (note 1 above) at para 22.
[58] Ibid at para 22.
[59] See *Magidiwana II (CC)* (note 1 above) at fn 26.
[60] Ibid at para 26.
[61] Ibid at para 26.

later statements are best understood in the light of the principle of subsidiarity. The right to state-funded legal representation must be given content in legislation and regulations, and litigants will not ordinarily be entitled to rely directly on the constitutional right to claim legal representation. We return to this issue in section V below when we consider the form that future claims for civil legal aid are likely to take.

In a lone dissenting judgment, Nkabinde J held that, although the matter was moot, it was in the interests of justice for the Court to hear it. In her view, the High Court judgment rested on a novel and expansive interpretation of s 34 that would have a practical effect on the operations of LASA. Nkabinde J confirmed that s 34 may provide for the right to legal representation at state expense in civil matters, but that 'it will do so only in exceptional circumstances'.[62] She held that s 34 does not grant a right to state-funded legal representation before commissions of inquiry.[63] Nkabinde J was concerned that to find otherwise would prioritise the interests of participants in commissions above those of the indigent and vulnerable people who are expressly entitled to state-funded legal representation under statute and the Constitution. She reasoned that commissions of inquiry do not finally determine rights of individuals.[64] The dissent concluded that the High Court erred in finding that LASA had acted irrationally and breached the miners' right to equality, and that a proper interpretation of the right to access courts does not oblige LASA to fund legal representation before commissions of inquiry.[65]

Read together, the majority and minority judgments recognise that the right of access to courts in s 34 of the Constitution may require the state to provide legal representation in civil matters. Both judgments indicate that s 34 requires legal representation at state expense only in 'exceptional' circumstances. In our view, it will be required where the failure to provide legal representation would deprive a litigant of a 'fair hearing'. It will be necessary for the courts to develop these principles in future cases.

III When does the Right to a Fair Hearing Require State-Funded Legal Representation?

The majority decision in *Magidiwana* deals tersely with the right to civil legal aid under s 34. As we traced above, the majority dismissed the application for leave to appeal primarily on the basis of mootness but, in doing so, referred with apparent approval to the High Court's reasoning on the substantive right to civil legal aid. Nkabinde J, in dissent, expressly holds that s 34 confers a right to civil legal aid in civil matters in 'exceptional circumstances' but held that the right cannot arise in proceedings before a commission of inquiry. The judgment therefore offers little guidance on when s 34 requires state-funded legal representation in civil proceedings. In this section we consider the scope of the right to civil legal aid by

[62] Ibid at para 110.
[63] Ibid at para 113.
[64] Ibid at para 112.
[65] Ibid at para 122.

looking to the relevant constitutional provisions in the context of international and foreign law.

A The Constitutional Provisions

As we noted in the introduction, the Constitution expressly guarantees legal aid in criminal matters and matters affecting children using the threshold criterion of 'substantial injustice'. In civil matters, s 34 of the Constitution does not refer to this criterion but rather provides for a right to a 'fair hearing'. Fairness, then, is the relevant constitutional standard. In an early decision in *Bernstein*, the Court observed that substantive fairness of legal proceedings can never be secured without 'equality of arms'.[66] While the Court in *Bernstein* made this statement in apparently absolute terms, as the *Magidiwana* Court confirmed, s 34 does not require legal representation at state expense in all civil matters. It is necessary to consider what 'fairness' requires in the circumstances of each case. Fairness in civil matters requires consideration of factors different from those that apply to determining whether 'substantial injustice' will result in the criminal context. While these factors can be gleaned from the limited South African jurisprudence, international and foreign law on civil legal aid provide clearer guidance.

In *Nkuzi Development Association v Government of South Africa*, the Land Claims Court held that the Constitution does confer a right to legal representation at state expense in respect of land tenants, in the circumstances of that case.[67] The court held that there is no logical basis for distinguishing between criminal and civil matters, as civil matters are equally complex.[68] The court held that persons who have a right to security of tenure under the Extension of Security of Tenure Act,[69] and whose security of tenure is threatened or infringed, have a right to legal representation at state expense if substantial injustice would otherwise result, and if they cannot afford the cost of representation.[70] The court held that substantial injustice would result where the potential consequences of the matter are severe and the person concerned is not likely to be able to present their case effectively without representation.[71] Although the court in *Nkuzi* borrowed the 'substantial injustice' yardstick from ss 28 and 35, its approach remains instructive in identifying the threshold at which the constitutional duty to provide civil legal aid arises and the considerations that go into the assessment.

B International Law on the Right to Legal Aid in Civil Proceedings

In terms of s 39(2) of the Constitution, read together with ss 7(2) and 233, international law has an important role to play when interpreting s 34.[72] There are three categories of international law instruments that are relevant: (i) treaties;

[66] See *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) at fn 154.
[67] 2002 (2) SA 733 (LCC).
[68] Ibid at 737.
[69] Act 62 of 1997.
[70] *Nkuzi* (note 67 above) at para 1.1 of the order.
[71] Ibid at para 1.3 of the order.
[72] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) at paras 201–202.

(ii) declarations and resolutions of the African Commission on Human and Peoples' Rights (African Commission) and the United Nations; and (iii) the reports of the committees of treaty bodies. The second and third categories do not contain binding obligations, but are nevertheless relevant.[73] The right to legal aid has been explicitly recognised in certain conventions, including treaties that have been ratified by South Africa. The International Covenant on Civil and Political Rights (ICCPR), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the European Convention on Human Rights embrace this right.

Article 14 the ICCPR[74] contains an explicit guarantee of a right to free legal assistance.[75] As appears from the wording of art 14, similarly to the Constitution, the ICCPR expressly guarantees a right to free legal assistance in criminal matters where the interests of justice so require. However, the ICCPR has been authoritatively interpreted to guarantee a right to free legal assistance in other legal proceedings as well. In *Currie/Jamaica*,[76] the Human Rights Committee (HRC) held that art 14 required the provision of legal aid not only in the criminal proceedings, but in a constitutional motion. In addition, general comment expressed the view that art 14 also requires the provision of legal aid in some civil matters, for the purpose of securing a fair hearing.[77] Significantly, art 14(1) has been interpreted to apply not only to courts and tribunals, but also 'whenever domestic law entrusts a judicial body with a judicial task'; this has been held to include, for instance, disciplinary proceedings against a civil servant and extradition proceedings.[78]

Regional instruments in Africa and Europe are also instructive. Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[79] provides that state parties must take measures to ensure 'effective access by women to judicial and legal services, including legal aid' and 'support to local, national, regional and continental initiatives directed at providing women access to legal services, *including legal aid*'.[80] Article 6(1) of

[73] Ibid at para 187.

[74] South Africa ratified the ICCPR on 16 December 1966, and acceded to the Optional Protocol to the ICCPR on 28 August 2002.

[75] Article 14 of the ICCPR reads in relevant part as follows:

(1) *All persons shall be equal before the courts and tribunals*. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

(3) *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality*: …

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and *to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*. (Emphasis added.)

[76] *Currie/Jamaica* Human Rights Committee communication no 377/1989 (25 October 1989) at paras 8, 10 and 13.

[77] *General Comment No 32: Article 14 'Right to equality before courts and tribunals and to a fair trial'*, CCPR/C/GC/32 (23 August 2007) at para 13.

[78] *General Comment 32* at para 7.

[79] South Africa ratified the Women's Protocol on 17 December 2004.

[80] Emphasis added.

the European Convention on Human Rights refers to a 'fair and public hearing', in similar language to s 34 of the Constitution which guarantees a 'fair public hearing'. The European Court of Human Rights has interpreted art 6 to include a right to representation in some civil cases. In *Airey v Ireland*, the European Court held that the Irish government's failure to provide Mrs Airey with free representation for the purpose of securing a judicial separation violated her right of access to court in art 6(1).[81] Research presented as evidence could not provide a single instance in which a decree of judicial separation had been obtained in Ireland without legal representation.[82] The effect of *Airey* is that a fair civil hearing may require the provision of legal representation at state expense. Article 6 of the European Convention is almost identical to s 34 of the Constitution. This provides strong grounds for interpreting s 34 to impose a similar duty on government in circumstances where a litigant is unlikely to be able to obtain the relief sought without representation. In a line of subsequent cases, the European Court has reaffirmed this principle.[83]

The second category of international law instruments consists of declarations and principles that are not binding, but are important interpretive tools. There are three significant instruments. Firstly, the Dakar Declaration, adopted by the African Commission in its Resolution on a Right to a Fair Trial and Legal Representation in Africa refers in art 9 to both *accused* and *aggrieved* persons, which contemplates criminal and civil proceedings, and places a duty on government to provide legal assistance to indigent persons.[84] Secondly, in terms of the Basic Principles on the Role of Lawyers, adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, states should ensure the provision of 'sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons'.[85] Thirdly, in 2002, the United Nations General Assembly passed a Resolution on Human Rights in the Administration of Justice which affirmed the duty of states to adequately fund

[81] *Airey v Ireland* (1979) 2 EHRR 305 at para 28.

[82] Ibid at para 24.

[83] *Tabor v Poland* Application no 12825/02, ECtHR (2006) paras 31 and 39; *Bertuzzi v France*, Application no 36378/97, ECtHR (2003) paras 21, 24 and 31; *McVicar v UK*, Application no. 46311/99, ECtHR (2002) paras 33, 40, 47, 48, 49, 50, 52 and 53; *P, C, and S v UK*, Application no 56547/00, ECtHR (2002) para 89; *Steel and Morris v UK,* Application no 68416/01, ECtHR (2005) paras 53,55, 59 60, 61 and 63.

[84] Article 9 provides:

> Access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. *It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective. The contribution of the judiciary, human rights NGOs and professional associations should be encouraged.* (Emphasis added.)

[85] Article 3 of the Basic Principles. The Basic Principles do not stipulate the type of proceedings for which these legal services must be provided. The only qualifier is that the persons must be poor and/or disadvantaged.

legal aid in order to promote and protect human rights.[86] Importantly, these instruments do not restrict the provision of free legal assistance to criminal matters.

Lastly, the third category of international law instruments consists of reports of committees of treaty bodies. Three treaty bodies have recognised an obligation on state parties to provide free legal aid in civil matters (notwithstanding there being no express requirement in the treaties themselves to provide this).[87] South Africa has ratified all three of the relevant treaties – the ICESCR,[88] CERD[89] and CEDAW.[90] In all of these treaties, including the ICCPR, the relevant committees have come to expect from the state, in varying degrees, the provision of legal aid in civil matters in appropriate circumstances.

Section 34 of the Constitution must be interpreted in light of the international law instruments mentioned above. A proper construction of s 34 when read together with the requirements in s 7(2) of the Constitution to take reasonable and effective steps to respect, protect, promote and fulfil the rights in the Bill of Rights,[91] and the decision in *Magidiwana*, entails that the right to a fair hearing may require the provision of legal aid in certain civil matters.

C Foreign Law on the Right to Legal Aid in Civil Proceedings

Comparable foreign law also provides assistance in determining when the right to a 'fair hearing', in s 34, requires state-funded legal representation. It is instructive in this context to look to Canada and Namibia.

The Canadian Supreme Court in *New Brunswick (Minister of Health and Community Services) v G (J)* confronted the question in the context of art 7 of the Canadian Charter of Rights and Freedoms.[92] Article 7 reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'[93] The Court held that the consequences that might result from a custody suit are sufficient to constitute a restriction of security of the person.[94] In deciding whether 'fundamental justice'

[86] The resolution noted that the right of access to justice as contained in various international human rights instruments forms an important basis for strengthening the rule of law through the administration of justice. To this end, the resolution called on states to '*allocate adequate resources for the provision of legal aid services with a view to promoting and protecting human rights*'. (Emphasis added.)

[87] The Committee on Economic, Social and Cultural Rights ('CESCR') in its May 2006 review of Canada's fulfilment of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'); The United Nations Committee on the Elimination of Racial Discrimination in its 2007 review of Canada's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'); and the United Nations Committee on the Elimination of Discrimination against Women in its 2008 review of Canada's compliance with the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW').

[88] South Africa ratified the ICESCR on 12 January 2015.

[89] South Africa ratified CERD on 10 December 1998.

[90] South Africa ratified CEDAW on 15 December 1995.

[91] *Glenister* (note 72 above) at para 189.

[92] *New Brunswick (Minister of Health and Community Services) v G (J)* 66 CRR (2nd) 267 (1999)('*New Brunswick*').

[93] Canadian Charter of Rights and Freedoms, Constitution Act 1982.

[94] *New Brunswick* (note 92 above) at 289.

necessitates the provision of legal representation in a particular case, the court referred to the interests at stake, the complexity of the proceedings and the capacities of the parent.[95] In the circumstances of the case, the Supreme Court held that the government was under an obligation to provide the appellant with state-funded counsel.[96] It is worth noting that art 7 of the Canadian Charter, dealing with threats to 'life, liberty and security of the person', is significantly narrower than s 34, which encompasses *all* civil matters. In *British Columbia (Attorney General) v Christie*, the Canadian Supreme Court held that there is no *general* right to legal representation at state expense in Canadian courts in all cases.[97] However, the case did not overturn *New Brunswick* nor foreclose the possibility of a right to counsel in specific situations. Although there is no general requirement that the state provide legal representation to every party in all proceedings, the Canadian Charter does so require where the failure to provide representation would violate art 7 or another Charter right.[98]

The Namibian position is also instructive when interpreting s 34 and giving content to the right to civil legal aid. Two provisions of the Namibian Constitution address the state's obligations to provide civil legal aid. First, art 95 sets out the non-binding 'principles of state policy' under the Namibian Constitution.[99] It provides, in relevant part:

> Article 95 Promotion of the Welfare of the People
> The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: …
> (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.

[95] Ibid at 292–293.

[96] Ibid at 296.

[97] *British Columbia (Attorney General) v Christie* 2007 SCC 21. The Canadian Bar Association argued for a general right to legal counsel in *Canadian Bar Association v British Columbia*. 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, [2006] B.C.J. No. 2015 (S.C.). The case was dismissed for lack of standing, therefore the substantive issue was not decided. The issue of access to justice has come up more recently in *Vilardell v Dunham*. 2013 BCCA 65. The British Columbia Supreme Court held that hearing fees imposed an unconstitutional impediment to access to justice. On appeal, the British Columbia Court of Appeals agreed that the fees posed an impediment to justice but held that the definition of indigency that allows an exemption to the payment of hearing fees should be changed rather than eliminating the fees entirely. The case is currently on appeal to the Supreme Court of Canada.

[98] In relation specifically to proceedings of commissions of inquiry, the 'Reference Guide for Judges Appointed to Commissions of Inquiry' adopted by the Canadian Judicial Council in April 2011 notes at page 9 that authority is provided under various Orders-in-Council for commissioners to:

> recommend to the Clerk of the Privy Council that funding be provided, in accordance with terms and conditions approved by the Treasury Board, to ensure the appropriate participation of any person granted standing at the Inquiry under subparagraph (ix), to the extent of the person's interest, if the Commissioner is of the view that the person would not otherwise be able to participate in the Inquiry.

[99] Article 101 states: '[T]he principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.'

The second provision of the Namibian Constitution that has a bearing on civil legal aid is art 12, which guarantees the right to a fair trial. Article 12 confers the right to a 'fair hearing' in both civil and criminal matters. Article 12(1)(a) provides, in relevant part, that '[i]n the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing'. Article 12 is therefore similar to s 34 of the Constitution in guaranteeing a 'fair hearing', but differs in that it applies the same criterion of fairness to both civil and criminal proceedings.

The Namibian Supreme Court considered the interpretation of these constitutional provisions in *Government of the Republic of Namibia & Others v Mwilima & Others*.[100] The case concerned an application to secure legal aid for the accused in a serious criminal matter, in which a number of accused were charged with offences that included treason, sedition and murder. Although concerned with criminal proceedings, the Namibian Supreme Court confirmed that the commitment to a policy of providing legal aid in art 95(h) applies to both criminal and civil matters.[101] The court noted that the principles of state policy, including art 95, are not enforceable in the courts and cannot give rise to a legal remedy, and that it is expressly limited by the resources of the state[102] However, the right to a fair trial in art 12 is justiciable. The court held that 'there may be instances where the lack of legal representation due to the fact that an accused person is indigent, and where statutory legal aid was or could not be granted, have the effect of rendering his or her trial unfair and where this happens it would result in a breach of such person's guaranteed right to a fair trial in terms of article 12'.[103] Accordingly, *Mwilima* established that the Namibian Constitution commits the state to a policy of providing legal aid in criminal and civil matters. Read with art 12, this commitment will constitute a justiciable legal obligation where the failure to provide legal representation will deprive a person of a fair hearing. Given the textual similarities between art 12 of the Namibian Constitution and s 34 of our Constitution, as well as the similar constitutional histories and socio-political context, the Namibian approach is significant.

International and foreign law supports the interpretation of s 34 that a fair hearing may, in appropriate circumstances, require the provision of state-funded legal assistance for civil proceedings. Drawing from international and foreign law, the main factors relevant to determining whether 'fairness' in terms of s 34 requires the provision of legal representation at state expense include: the capacity of the litigant to represent herself, the complexity of the proceedings, and the potential consequences of the case. These factors would have to be weighed together to determine whether a failure to provide representation would render civil proceedings unfair or not.

[100] [2002] NASC 8 ('*Mwilima*').

[101] Ibid at para 52 (Court holds that 'article 95(h) is not limited to criminal cases only or civil cases only but is intended to include the whole spectrum of instances where the need for legal aid may exist.')

[102] Ibid at para 53.

[103] Ibid at para 62.

Fairness, then, is the constitutional standard that triggers the duty of the state to provide civil legal aid. As the High Court held in *Magidiwana II* (HC), in dismissing the application against the President but upholding it against LASA, the state discharges that obligation through the statutory framework that establishes LASA. In the next section, we consider that framework and the provision currently made for civil legal aid by LASA in the regulatory framework and its budget.

IV Legal Aid South Africa's Current Provision for Civil Legal Aid

A The Legal Framework – The Legal Aid Act, Guide and Regulations

LASA was established by the Legal Aid Act 22 of 1969, which was later replaced by the new Legal Aid South Africa Act 39 of 2014 (2014 Act). The repeal of the 1969 Act was initiated with a view to reform existing legal aid structures and facilitate greater access to legal representation.[104] In the preamble to the 2014 Act LASA's mandate is defined as follows:

> To ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available; for that purpose to establish an entity called Legal Aid South Africa with a Board of Directors and to define its objects, powers, functions, duties and composition; to provide for the independence and impartiality of Legal Aid South Africa.

Section 3 of the 2014 Act provides for the objects of LASA as follows:

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

Section 24 of the 2014 Act requires the Board of LASA to particularise the scheme under which legal aid is to be rendered or made available. In the past, and during the *Magidiwana* litigation, the Legal Aid Guide (the Guide) accomplished this task. The Guide represented LASA's policy approach to the provision of legal aid and is binding on the Board as well as all employees of LASA. The LASA Board must submit the Guide to the Minister before it is tabled before Parliament.[105] As we describe below, regulations have since been promulgated to govern these matters. At the time that the Miners made their request for funding the 2012 Guide was applicable. In November 2013, the Guide was revised.

Under the 2012 Guide, item 10.2.3(a) granted the CEO of LASA discretion to provide funding for matters not expressly contemplated in the Guide, as long

[104] C Theophilopoulos 'Constitutional Transformation and Fundamental Reform of Civil Procedure' (2016) *Tydskrif vir die Suid-Afrikaanse Reg* 68, 72.

[105] 2014 Act s 24.

as such discretion fell within the overall authority of the Act.[106] The Guide did not prohibit funding for the participants in a commission of inquiry, however such funding was not explicitly provided for either. Therefore, it was solely in the discretion of the CEO.[107] In relation to the Marikana Commission, the CEO exercised her discretion favourably in respect of the families of the deceased but not the miners, triggering the *Magidiwana* litigation.

After the High Court's decision, the Guide was amended to provide expressly for the funding of legal representation before commissions of inquiry. The 2014 Guide stipulates that LASA may provide funding to participants before commissions of inquiry in two defined sets of circumstances.[108] The first is where funding has been made available by the establishing authority (the President), LASA would only provide funding if the standing of the participants had been certified by the relevant commission. The second scenario provided for the instance where the establishing authority had not made funding available, LASA would then impose the threshold of 'exceptional circumstances such as where a person has a substantial and material interest in the outcome of the commission and which could materially influence the outcome of any potential civil claim', when determining if it would fund legal representation.

The Guide was again amended in February of 2015. It deleted the provisions relating to the scenario where the establishing authority does not provide for

[106] Item 10.2.3(a) of the 2012 Guide provided:

The CEO may exercise a general discretion to:

- Waive any condition, procedure or policy set out in this Guide as long as this is within the overall authority of the Legal Aid Act.
- Provide for any issue not covered in this Guide.

However, when the CEO exercises this discretion, he/she must report on it to the Board or Board Executive Committee at the next regular meeting.

[107] *Magidiwana II (HC)* (note 7 above) at paras 18–19.

[108] Item 4.20 of the 2014 Guide provided, in relevant part:

> Where funds are made available by the establishing authority of the commission, legal aid should be provided for the purpose of legal representation at commissions for persons appearing before a commission of inquiry where the commission has certified that they have standing before the commission. Where such funding is not made available, then legal aid will only be made available in exceptional circumstances such as where a person has a substantial and material interest in the outcome of the commission and which could materially influence the outcome of any potential civil claim, provided that:
>
> (a) such person/s are indigent and qualify in terms of the means test;
> (b) such person/s has/have been certified by the Commissioner that they have a proper standing before the commission;
> (c) the prospect of hardship to the person/s if assistance is declined;
> (d) the nature and significance of the evidence that the person/s is/are giving or appears likely to give;
> (e) the extent to which representation is required to enable the inquiry to fulfil its purpose;
> (f) whether the interests of a person will be advanced by any other person/association certified to appear before the commission;
> (g) any other matter relating to the public interest.

the funding of legal representation.[109] The amendment attempts to limit LASA's obligations to fund legal representation before commissions of inquiry. LASA took the position that the duty rests with the establishing authority and should be provided for in the relevant commission's terms of reference. Then, in July 2017, the Minister of Justice and Constitutional Development made regulations under the Legal Aid Act 39 of 2014.[110] The Legal Aid Regulations now govern the provision of legal aid, including in civil matters.

Throughout the post-apartheid constitutional era, LASA has interpreted its constitutional obligations narrowly, as creating categories of vulnerable persons for whom it must prioritise legal aid assistance. Under previous legal aid Guides, legal representation had to be afforded to these vulnerable persons in the event that they would suffer 'substantial injustice' if they were not provided with representation.[111] LASA prioritised these vulnerable persons through its policies and operational procedures, such as the Guide. For example, LASA identified women, in family-related matters, as vulnerable persons deserving special consideration when applying for legal aid assistance.[112] A significant portion of LASA's civil legal aid budget each year has been utilised in maintenance and domestic violence matters when the other party has legal representation.[113] Similarly, in the funding dispute between the mineworkers and LASA, LASA had prioritised funding for the families of the deceased as they were recognised as vulnerable persons (women, children and the elderly).[114]

Civil legal aid is now governed by regs 9 and 10 of the Legal Aid Regulations. Regulation 9 deals generally with 'civil matters', while reg 10 deals with 'civil cases for the protection of constitutional rights'. Regulation 9(1) provides that LASA 'may grant legal aid to a litigant in any civil matter' if three cumulative requirements are met:

(a) in the opinion of Legal Aid South Africa, the matter has good prospects of success;
(b) in the opinion of Legal Aid South Africa, the mater has good prospects of enforcement of a court order; and
(c) Legal Aid South Africa has the necessary resources available, based on a written merit report, where such reports is applicable.

Regulation 9 therefore makes the provision of civil legal aid in general matters

[109] Item 4.20 of the 2015 Guide reads:
Where funds are made available by the establishing authority of the commission, legal aid should be provided for the purpose of legal representation at commissions for person/s appearing before a commission of inquiry where such persons have been certified by the Commissioner as having proper standing before the commission.

[110] Legal Aid South Africa Regulations *GG* 41005 of 26 July 2017 ('Legal Aid Regulations').

[111] Item 4.1 of the 2015 Guide.

[112] Vulnerable persons are described in the Legal Aid Guide as '[p]eople, who may be at risk of being abused, unfairly discriminated against or exploited, eg women, children, people living with HIV, refugees, farm workers'.

[113] *Country Report of Legal Aid South Africa* (Presented at ILAG conference in Scotland, June 2015) available at http://www.legal-aid.co.za/wp-content/uploads/2015/05/ILAG-Report-2015-Final.pdf at 10.

[114] *Magidiwana II (CC)* (note 1 above) at para 7.

subject to a merit report, on the basis of which LASA must form an opinion on the prospects of success and of enforcement of an order. The third requirement is objective – LASA must have the 'necessary resources'. Regulation 9(3) excludes the requirement of a merit reports in certain types of case, including divorces, evictions, domestic violence matters; administration of estates and maintenance matters.

Regulation 10 extends this regime, providing that, subject to the availability of resources, 'legal aid may be provided to progressively implement section 7 of the Constitution'. It is unclear what category of civil matters this covers, as s 7 of the Constitution applies to all rights in the Bill of Rights, but the reference to 'progressive realisation' appears to contemplate the socio-economic rights in the Bill of Rights that are subject to progressive realisation. This regulation is vague and requires a clarifying amendment. The second part of reg 10 sets out the factors that LASA 'must consider' in deciding whether to provide legal aid under this provision:

(a) the seriousness of the implications for the legal aid applicant;
(b) the complexity of the relevant law and procedure;
(c) the ability of the legal aid applicant to represent himself or herself effectively without a lawyer;
(d) the financial means of the legal aid applicant;
(e) the legal aid applicant's chances of success in the case;
(f) whether the legal aid applicant has a substantial disadvantage compared to the other party in the case; and
(g) whether the other requirements of these regulations are met.

The first three criteria map very closely onto the factors that we discerned in the relevant international and foreign law authorities on the right to civil legal aid.

B 'Polycentric Budget-Allocation' – LASA's Budget and Resourcing of Civil Legal Aid

For its first 20 years of existence, LASA enlisted the services of lawyers in private practice to represent persons requiring state funded representation.[115] This legal aid system is known as 'judicare'. The philosophy behind judicare is to provide indigent clients with the same standard of representation they would receive if they had the means to afford private legal services.[116]

During the 1990s this model started to change into an 'institutional' system in which community law centres (Justice Centres) were established and staffed by full-time lawyers.[117] The institutional system was gradually implemented through the creation of various pilot locations. By 1997, LASA had permanently moved to

[115] For an account of the development of LASA's role, see Bentley (note 3 above) at 34–57.
[116] J R Midgley 'Access to Legal Services: A Need to Canvass Alternatives' (1992) 8 *South African Journal on Human Rights* 74, 77.
[117] Ibid at 78.

salaried employees whose primary role was to provide legal services to indigent clients.[118] As of 2015, only 5 per cent of LASA's clients are represented on a judicare basis.[119] Currently, LASA has three main avenues of service delivery: Justice Centres, co-operation agreements and special litigation.

LASA's Justice Centres operate as law clinics where walk-in clients can attend to apply for legal assistance. The Centres are staffed by attorneys, candidate attorneys, paralegals and professional assistants.[120] The primary services offered to clients include legal advice, the uptake of litigious matters or referrals. Currently, LASA maintains 64 Justice Centres, in addition to its six regional offices.[121] LASA also has longstanding co-operation agreements with various university law clinics, providing services to the most proximate community. In the 2015/2016 financial year, LASA's co-operation partners took on 3 928 new civil matters.[122] In some circumstances LASA will fund 'special litigation' which has the potential to create precedent or impactful jurisprudence and/or involve large groups of persons. This form of litigation often requires specialised teams of legal representatives which may involve private counsel and attorneys. LASA has also established an Impact Litigation Unit at its Head Office. The unit takes on high impact litigation matters referred to it by the various offices.[123] For the year 2015/2016, LASA approved 15 new impact matters, 14 of which were finalised within the year with a 93 per cent success rate.[124] In the previous financial year LASA achieved an 89 per cent success rate in impact matters.[125]

Whilst LASA has had the freedom to implement different models, its ability is ring-fenced by the finite funding it receives from the National Revenue Fund. In the 2014/2015 financial year, LASA's annual budget totalled R1,638 billion. [126] LASA stands at the coalface of the demand for access to justice in South Africa. It provides the majority of its services in the lower courts: only 1 per cent of its matters take place in the superior courts.[127]

During the 2012/2013 financial year LASA's budget of R1.4 billion gave legal assistance to 434 844 clients in legal matters and provided a further 297 835 clients with legal advice. Eighty-seven per cent of the new legal matters were criminal whilst 13 per cent were civil.[128] In the 2014/2015 year LASA provided services to 394 172 persons in criminal matters (88 per cent) and 54 023 persons in civil matters (12 per cent).[129] In the 2015/2016 financial year, 441 056 new matters were taken on of which 388 692 (88 per cent) were criminal and 52 364 (12 per cent)

[118] Guide 2014 at 50.
[119] *Country Report of Legal Aid South Africa* (note 113 above) at 14.
[120] Ibid at 13.
[121] Legal Aid South Africa *Integrated Annual Report 2015–2016* (2016) 22.
[122] Ibid at 34–35.
[123] *Country Report of Legal Aid South Africa* (note 113 above) at 10.
[124] Legal Aid South Africa *Integrated Annual Report 2015–2016* at 36.
[125] LASA (note 121 above).
[126] Ibid at 3.
[127] Ibid at 2.
[128] Para 10.2 of LASA's answering affidavit in *Magidiwana I* (HC).
[129] LASA Media Statement (note 125 above) at 2.

were civil.[130] The great majority of LASA's budget is spent on criminal matters. One of the consequences of the limited allocation of resources for civil legal aid matters is that litigants resort to representing themselves or, more worryingly, abandon the legal process entirely.[131]

In order for an applicant to qualify for legal aid in civil matters, the matter must be provided for in the Guide and have merit. The applicant must meet LASA's means test.[132] LASA utilises a financial means test to determine the client's indigence, revised periodically. At present, an individual must earn less than R5 500 per month or if a household, the income received by the household must not exceed R6 000 per month. Another limitation is if the individual owns immovable property valued at more than R500 000 or if no immovable property is owned, if the individual's assets exceed R 100 000.[133] This threshold excludes a large portion of the population, namely the working poor and middle class, who earn above the relevant means but cannot afford private legal representation – the 'missing-middle'.[134]

One of the greatest hurdles to access to justice in South Africa is the current approach of LASA. LASA takes on only a very limited number and proportion of civil matters and the strict financial means test excludes a large portion of the population. In the next section we contemplate the effect of the *Magidiwana* judgment on future civil legal aid claims.

V Life after *Magidiwana* – Future Claims for Civil Legal Aid

A Areas in which Claims for Civil Legal Aid are Likely

In section III above, we set out our construction of the content of the constitutional duty to provide state-funded legal representation in civil matters. The *Magidiwana* Court affirmed the existence of this duty without drawing its contours. We argue that the duty arises where the failure to provide legal representation deprives a person of a fair hearing under s 34. This process involves a weighing of all the relevant factors, including in particular the capacity of the litigant to represent herself, the complexity of the proceedings, and the potential consequences of the case. At its core, and as exemplified by *Airey*, the question is whether a person be able to engage effectively in litigation without representation and therefore exercise right to a 'fair hearing'. If not, the duty to provide civil legal aid arises. The state discharges this constitutional obligation primarily through the Legal Aid Act and the Legal Aid Regulations, with LASA designated as the organ of state charged with providing legal aid as required by the Constitution. There

[130] Legal Aid South Africa *Integrated Annual Report 2015–2016* 34–35.

[131] Theophilopoulos (note 104 above) at 72.

[132] Guide 2014 at 35–36.

[133] Chapter 5 of the Legal Aid Guide 2014 and Country Report of Legal Aid South Africa (Presented at ILAG conference in Scotland, June 2015, available at http://www.legal-aid.co.za/wp-content/uploads/2015/05/ILAG-Report-2015-Final.pdf at 7.)

[134] Statistics South Africa *Quarterly Employment Statistics* (June 2016), available at http://www.statssa.gov.za/publications/P0277/June2016.pdf (Average monthly earnings, in the formal non-agricultural sector, stood at R18 045 as at May 2016.)

are three features of the statutory scheme that potentially conflict with the constitutional duty.

The first feature is the threshold adopted by the Legal Aid Regulations. The Legal Aid Guide had previously the criterion of 'substantial injustice' as the yardstick even for civil legal aid. The Legal Aid Regulations apply 'substantial injustice' only in criminal matters and matters affecting children. This accords with the constitutional position. The Legal Aid Regulations do not expressly provide a threshold for the provision of civil legal aid. Regulation 9 applies to all civil matters. Regulation 10 apples to civil matters where the purpose is 'to progressively implement section 7 of the Constitution'. This provision is unclear and requires amendment. The reference to s 7 of the Constitution suggests that it means that reg 10 applies to any matter involving a constitutional right, but the words 'progressively implement' seem to refer to the socio-economic rights in the Bill that are subject to progressive realisation. As we have argued above, the applicable constitutional standard governing the obligation to provide civil legal aid is whether the failure to provide it would deprive a person of a fair hearing. The Legal Aid Regulations are therefore required to be interpreted – as far as possible – consistently with 'fairness' under s 34. To the extent that they raise the bar or set a different test, this constitutes a limitation of s 34 that would be required to pass muster under s 36.

The second potential limitation arises in the specific requirements that the Legal Aid Regulations impose in civil matters. Regulation 9, dealing with civil matters generally, provides three cumulative requirements – prospects of success, prospects of enforcement and the availability of resources. In reg 10 dealing with civil legal aid in constitutional matters, the Legal Aid Regulations identify essentially the same set of factors as we have suggested apply under s 34, but in addition requires consideration of the financial situation of the person; the person's chances of success in the case; and whether the applicant has a substantial disadvantage compared with the other party in the case. Each of these factors constitutes a potential limitation of the s 34 right. Much will depend, though, on how each factor is interpreted by LASA. If 'good' prospects of success are required, for example, the consequence would be to exclude persons with arguable cases, which might constitute an unjustifiable limitation of the right. Similarly, the use of a financial means test is a paradigmatic limitation of the right. It draws a line between those who qualify for civil legal aid and those who are disqualified, and in doing so excludes from the right the 'missing middle', namely people who cannot afford private representation but are disqualified by LASA. If challenged, the means test would have to be justified on the basis of the state's resource limitations under s 36. Lastly, the factor of relative disadvantage between the parties may also be constitutionally problematic. It may be interpreted to disqualify a person who would otherwise qualify for civil legal aid because they are poor and involved in a complex case with high stakes simply on the basis that their opponent is also poor and unrepresented. This would be an 'equality of the grave' approach, unlikely to survive constitutional challenge.

The final potential limitation of the right in the LASA scheme is the identification of 'vulnerable groups' and categories of cases in which civil legal aid

will be provided, which by implication excludes other persons and types of cases. Using the constitutional yardstick identified above – namely whether a person is likely to be able to effectively represent herself and therefore secure a fair hearing without legal aid – it is likely that there will be areas of civil litigation that trigger the constitutional duty but in respect of which LASA does not provide legal aid.

There are three examples of areas where the Constitution would be likely to be found to require civil legal aid, and in which the Legal Aid Regulations have now introduced the power to provide it. The first is litigation to enforce socio-economic rights. By its nature, such litigation is complex and relates to vital interests of the litigants. In addition, following the approach of the *Airey* court in asking whether there is evidence that a person may conduct such proceedings effectively without representation, it is significant that there has not been a single socio-economic rights case adjudicated by the Court in which the litigants were unrepresented. The importance of representation in these cases appears to have been recognised by the inclusion of reg 10 in the Legal Aid Regulations, but it remains to be seen how it will be interpreted and applied by LASA. A second category of cases is evictions in which occupiers face the risk of homelessness if evicted. Even if the occupiers do not fall within the specific categories of 'vulnerable groups' drawn by LASA, they are at risk of grave rights violations. Regulation 9 appears to recognise the importance of representation in evictions by excluding the requirement of a merit report in eviction cases. A third category of cases would be immigration detention matters. These cases again involve highly vulnerable persons and implicate their most vital interests. Regulation 19 now provides specifically for the grant of legal aid to asylum seekers. These examples also illustrate that the consequences of some civil matters may be at least comparably serious to criminal matters in which LASA does provide legal aid. The provision for legal aid in socio-economic rights cases and evictions and for asylum seekers is a welcome development. However, these provisions are all couched in permissive language, providing that LASA 'may' grant legal aid. Much will depend on LASA's actual approach to deciding applications for legal aid in such cases.

B The Form of Future Claims for Civil Legal Aid

In our view there are aspects of the Legal Aid Regulations relating to civil legal aid that are arguably inconsistent with s 34. These include some of the requirements in reg 9 applicable to all civil matters and the factors set out in the reg 10 for constitutional matters. The Regulations do, however, make provision in principle for LASA to provide legal aid in civil matters. The decision in *Magidiwana* that it does so in fulfilment of a constitutional right has significant consequences for the *form* that future claims for civil legal aid and litigation to enforce them will take. Such claims will also depend on the factual situation.

There are three possible factual situations, the first two arising where the Legal Aid Regulations do, in principle, provide for LASA to grant legal aid in the particular case (for example, in evictions), and the third scenario arising where it does not. The first situation is where the regulations do provide for legal aid to be granted in the particular case and LASA decides to grant it, but fails to take

the steps to actually appoint (or pay) a representative. In this situation, it will be possible to institute proceedings to compel LASA to implement its own decision and provide legal aid in the form of a mandatory interdict. The second scenario is where the Legal Aid Regulations again cover the particular case but LASA fails to take a decision or takes a decision to refuse to provide legal aid. In this situation, it will be necessary to bring an application to review LASA's decision (including any failure to take a decision). The review would be brought under the Promotion of Administrative Justice Act 3 of 2000. It would be competent, and often appropriate, to seek an order of substitution replacing the refusal with a decision to provide legal aid in the event that the review succeeds. Substitution would be appropriate in cases where the Legal Aid Regulations provide for legal aid to be provided in the particular type of case and no ground of disqualification (such as the means test) has been triggered.

The final scenario is where the Legal Aid Regulations exclude the particular party or case from the scope of legal aid that LASA may provide. In that situation, it will be necessary to bring a direct constitutional challenge to the Regulations, which constitute delegated legislation.[135] The person seeking the provision of legal aid will have to bring an application to strike down the relevant provision of the Legal Aid Regulations. This will involve the usual two-stage inquiry. At the first stage, the court will consider whether the right to a fair hearing in s 34 is limited by the impugned regulations. This inquiry will centre on whether the person will be able to enjoy a fair hearing without state-funded legal representation, having regard in particular to the capacity of the litigant to represent herself, the complexity of the proceedings, and the potential consequences of the case. If the conclusion at the first stage is that s 34 is limited, it will be necessary for LASA to seek to justify that limitation under s 36. This inquiry will centre on the resource limitations of the state and the manner in which LASA has prioritised different claims. LASA may need to justify the particular restriction or exclusion, its means test or its prioritisation of criminal matters, including relatively minor criminal offences, over civil matters that might include evictions resulting in homelessness, immigration detention and deportation, and other similarly serious civil matters. LASA's current approach, which provides only very limited civil legal aid, subject to a range of restrictive criteria beyond what s 34 entails, may be constitutionally vulnerable.

One potential problem with litigation to secure legal aid by litigation, as illustrated by *Magidiwana*, is urgency. In any such case, the main litigation will already be either underway or due to be launched. The person seeking legal aid will be subject to a ticking clock. Accordingly, any litigation to secure legal aid – whether by mandamus, review or constitutional challenge – is likely to arise as urgent litigation. One option to mitigate the prejudice to the claimant in such a case, as LASA appropriately did in *Magidiwana*, is for LASA to provide legal aid pending the resolution of the claim, without seeking to recover its funds in the event that the court finds that it was not constitutionally obliged to do so.

[135] The doctrine of subsidiarity requires this approach. See *My Vote Counts NPC v Speaker of the National Assembly & Others* [2015] ZACC 31, 2016 (1) SA 132 (CC).

However, as the facts of *Magidiwana* illustrate, LASA faces the risk if it does so that the court will refuse to reach the merits of the legal aid claim because it has been rendered moot. This approach should be avoided by the courts if we are to develop a coherent jurisprudence on the right to civil legal aid that will guide LASA.

VI Conclusion

The recognition of the right to civil legal aid in *Magidiwana* has gone almost unnoticed, overshadowed by the political significance of the underlying claims of the victims of the police shootings at Marikana. But for the future of our constitutional enterprise, the recognition of a right to civil legal aid is vital. The promises of the Constitution rest on the assumption that people have the ability to vindicate their rights through the legal process. Where they cannot do so, transformative constitutionalism becomes a burden to be borne only by the limited public interest and pro bono sectors.

The *Magidiwana* Court has laid the foundations, however, for the development over time of a principled jurisprudence governing the right to civil legal aid. Section 34 of the Constitution requires the provision of state-funded legal representation where the failure to grant it will deprive a person of a fair hearing. The key factors in the fairness inquiry will be the capacity of the litigant to represent herself, the complexity of the proceedings, and the potential consequences of the case. Where the right in s 34 is limited, LASA will have to justify its limitation by putting up a compelling case that meets the limitations test under s 36. A hollow claim of resource limitations will not suffice, but will require proper substantiation. LASA should also be required to show that it is increasing coverage over time. In the next decade, we should expect to see a body of law emerge that will give content to the right to civil legal aid and provide LASA with guidance in the discharge of its crucial constitutional mandate.