



# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable  
Case no: 332/05

In the matter between:

**THE LEGAL AID BOARD (EX PARTE)**

Appellant

and

**JOHAN PRETORIUS**

First Respondent

**WILHELM PRETORIUS**

Second Respondent

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**Coram:** *Harms, Streicher, Navsa, Brand et Van Heerden JJA*

Date of hearing: **22 May 2006**

Date of delivery: **31 May 2006**

**Summary:** Application for leave to appeal – trial judge directing Legal Aid Board to provide alternative legal representation on basis that counsel representing accused together with others had too heavy a workload to provide effective representation – challenged by Board on basis that it is not within his power to do so – held that s 3B of the Legal Aid Act 22 of 1969 was properly resorted to by judge and that it was within his province and power to ensure a fair trial – application dismissed – matter struck from the roll.

**Neutral citation:** This judgment may be referred to as *Legal Aid Board v Pretorius* [2006] SCA 81 (RSA).

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**JUDGMENT**

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NAVSA JA

NAVSA JA:

[1] This matter concerns the right to legal representation at State expense. It has its genesis in the assertion of constitutional rights by two accused in a high profile trial in the Pretoria High Court, which, in popular parlance, has become known as the 'Boeremag treason trial'.

[2] To enable a proper appreciation of the background facts and an understanding of the conclusions reached, it is regrettably necessary, in relating the history of the matter, to describe relevant communications between interested parties in some detail and, in a number of instances, to provide the entire text of written communications.

[3] The two accused, Messrs Johan and Wilhelm Pretorius (accused no's 19 and 21, respectively) and many others were charged with treason, sabotage, terrorism, murder, attempted murder and a range of other counts. I shall, for convenience, refer to accused no's 19 and 21 as J and W respectively.

[4] The trial commenced on 19 May 2003. At its commencement J and W were represented by a legal representative of their own choice and at their own expense. During May 2004, presumably after J and W's funds were exhausted, the Legal Aid Board (the Board), which is the statutory body and organ of State established in terms of the Legal Aid Act 22 of 1969 (the Act) that provides legal representation at state expense to those who qualify in terms of certain criteria, appointed Adv Brümmer (Brümmer) to represent them. Brümmer was also appointed to represent 3 other accused, namely accused no's 6, 7 and 20. By this time the trial record comprised more than 5000 pages and the police docket consisted of 16 ring binder files, all of which Brümmer was required to study and consider.

[5] During November 2004 J and W terminated Brümmer's mandate, alleging that, because of his workload, he was unable to devote sufficient time to safeguard their interests and that they had thus lost confidence in his ability to represent them effectively. He consequently withdrew as their legal representative. Brümmer was required to report to the Board concerning his reasons for withdrawing, which he duly did.

[6] In Brümmer's letter to the Board, dated 22 November 2004, he explained that he had initially thought that there might have been a conflict of interests between accused 20, on the one hand, and J and W on the other, and had communicated this to the court believing that it disqualified him from continuing to represent any of these accused. Later, after W had addressed the court, Brümmer realised that his initial impression was incorrect and that in effect J and W lacked confidence in his ability to represent them effectively.

[7] Whilst the trial proceeded on the basis that issues were being dealt with that did not affect J and W and that there was therefore no *immediate* need for them to have legal representation, the Board was nevertheless expected to decide on its position concerning the termination of Brümmer's mandate speedily.

[8] The Board's management took legal advice and did not reach a quick decision. At the beginning of December 2004 the trial had reached a stage that made it imperative that J and W be represented. The further cross-examination of a crucial witness was postponed pending a decision by the Board.

[9] On 3 December 2004, a senior executive of the Board, Mr P J Brits (Brits), wrote letters in identical terms to J, W and Brümmer. Since this letter set out the attitude of the Board which ultimately led to the present litigation, it is necessary to quote it in full:

'Mr Brümmer's letter of 22 November 2004 refers.

There is clearly not a conflict of interest between Mr Brümmer's clients.

Our Legal aid Guide provides (chapter 3, paragraph 1.5):

“(b) An accused shall not be entitled, as of right, to the provision of a second or subsequent legal practitioner on a legal aid basis if the accused has dismissed the first legal practitioner or has caused the first legal practitioner to withdraw through lack of co-operation or otherwise, unless the accused can satisfy the CEO that the first legal practitioner *was dismissed* or obligated to withdraw *for good cause*.”

We have now had the advantage of consulting with senior counsel who confirms that what is set out in the Legal Aid Guide is a correct interpretation of the Constitutional right to legal representation at State expense.

No facts have as yet been put to us that would constitute “good cause” for either the dismissal of Mr Brümmer by Messrs J Pretorius and W Pretorius or for his withdrawal from their representation alongside his other clients.

All we have been told to date is that Messrs J Pretorius and W Pretorius no longer enjoy a relationship of trust and confidence with Mr Brümmer. This conclusion has been presented to us without any supporting facts. We in any event doubt whether our Constitution guarantees any more than legal representation at State expense.

Mr Brümmer or his clients are at liberty to present facts to the Legal Aid Board in writing that would justify the appointment of a second legal representative.” ‘

(Emphasis added).

A copy of this letter was sent to the trial judge (Jordaan J).

[10] In a letter dated 8 December 2004, after a consultation with a director of the Board and J and W at C-max prison, Brümmer wrote to the Board, confirming that in representing five accused he was confronted by a workload he was unable to manage effectively. Brümmer provided details of the many tasks he was expected to perform to properly represent the accused. He recorded that, given the magnitude of the trial, he was required on a daily basis to complete a summary of all the evidence to enable him to obtain instructions from each of his clients. At that stage he was dealing with more than 9000 pages of evidence. Each client had to be individually consulted to ensure confidentiality, candour and trust. The consultations were not always restricted to the merits of the trial. They included consultations concerning prison visits and transfers and bail applications – in the context of this long-running trial these issues arose repeatedly. It was

also expected of Brümmer to contact defence witnesses who are located across the length and breadth of the country, to arrange consultations and to take witness statements. Brümmer emphasised that he had reached a stage where he just could not keep up with what was required of him. He reached the conclusion that he could not do justice to his clients and could not afford them effective legal representation. Brümmer criticised the Board for failing or refusing to understand the time and volume pressures under which he was required to represent his clients. He recorded that J and W were more demanding than the other three accused he represented. He ended the letter by stating that it was only fair that J and W be afforded alternate representation by the Board.

[11] On 11 December 2004, W wrote to the Board pointing out, inter alia, that Brümmer was unable to devote as much time to his case as was necessary for effective representation. He stated that Brümmer's workload was far too heavy, that he lacked time to perform essential tasks and was therefore unable to provide effective legal representation.

[12] On 11 January 2005 Brits wrote to W, stating that that it was the Board's policy that an accused who had no good cause for dismissing his legal representative may be required to represent himself and that a mere lack of trust and confidence did not in itself constitute good cause. He also stated that an accused who sought to have a second or subsequent legal representative appointed by the Board would have to 'show facts' from which it could be deduced that good cause had been established. In respect of W's assertion that Brümmer lacked time for preparation, Brits suggested that the appropriate remedy was for Brümmer to request the court to adjourn to enable him to do what was necessary. Brits stated further that he had consulted a Board employee, Ms Veenendal (who, from the letter, appears to have been in attendance at the trial) who had informed him that Brümmer was not, as suggested by W, unprepared to cross-examine a witness, a Mr Van Zyl. Brits went on to state that Brümmer had been prepared when he cross-examined Mr

Crous, an essential witness. (In his judgment dealing with J and W's right to separate representation the judge recorded that this statement by Brits was incorrect as Crous had at that stage not yet been cross-examined by Brümmer.)

[13] Following on these exchanges J and W informed Jordaan J that they intended to bring an application in terms of s 38 of the Constitution to compel the Board to recognise their right to effective legal representation which was an essential component of the right to a fair trial.

[14] On 22 January 2005 Brits wrote an uncompromising letter to Brümmer, the material parts of which appear hereunder:

'Your contract with the Legal Aid Board is for the representation of five accused. You are currently representing three accused. The situation is untenable. Your erstwhile clients could be prejudiced.

In the circumstances the Legal Aid Board offers to release you from your contract with immediate effect and with no claims on either side except such claims as you may have for outstanding fees. Alternatively, you are required to immediately recommence representation of accused 19 and 20 alongside your other clients. In the event of your clients refusing to be represented by you, the Legal Aid Board would require an unequivocal written assurance that you are willing and able to represent all five of the clients you contracted to represent.

Further alternatively, in the event of you failing to recommence compliance with your contractual obligations by 10:00 on Friday 2005, the Legal aid Board will elect to accept your repudiation of your contract as evidenced by your breach of the terms thereof. The Legal Aid Board will thereafter proceed to appoint another legal practitioner to represent the five clients formerly represented by you.'

[15] To enable J and W to bring the proceedings referred to in para [13], Jordaan J contacted the Pretoria Bar, with a request that it appoint *pro bono* counsel in this regard. Adv Klein was duly appointed. In the interim, W debated with the trial judge as to whether the trial should continue even though witnesses were testifying about events in which he and J were not directly implicated. He pointed out that the question of common purpose was a continuing important issue in the trial. Jordaan J recognised that to continue without J and W being

legally represented would cause problems and might prejudice them. He undertook, in the event of alternative legal representation being procured, to allow both of them to recall witnesses for further cross-examination. At this stage the learned judge was rightly concerned about the integrity of the trial.

[16] During the first half of February 2005 Adv Klein lodged a ‘versoek van beskuldigdes 19 en 21 dat die hof in terme van artikel 3B van Die Wet op Regshulp 32 van 1969 optree’.

S3B(1) of the Act reads as follows:

‘(1) Before a court in criminal proceedings directs that a person be provided with legal representation at State expense, the court shall —

(a) take into account —

- (i) the personal circumstances of the person concerned;
- (ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be;
- (iii) whether any other legal representation at State expense is available or has been provided; and
- (iv) any other factor which in the opinion of the court should be taken into account; and

(b) refer the matter for evaluation and report by the board.’

Of course, this subsection should be seen against the Board’s objects, as set out in s 3 of the Act, namely, to make available legal aid at State expense to those who qualify for it *and* to ensure that the guarantee of legal representation at State expense, if substantial injustice would otherwise result, as an integral part of the right to a fair trial as contemplated in s 35(3)(g) of the Constitution, is met.

[17] Section 3B(2) of the Act reads as follows:

‘2(a) If a court refers a matter under subsection 1(b) the board shall, subject to the provisions of the Legal Aid Guide, evaluate and report on the matter.

(b) The report in question shall be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the court and the person concerned.

(c) The report shall include —

- (i) a recommendation whether the person concerned qualifies for legal representation;
- (ii) particulars relating to the factors referred to in subsection (1)(a)(i) and (iii); and
- (iii) any other factor which in the opinion of the board should be taken into account.'

[18] On 14 March 2005 Jordaan J wrote to the Board. It is necessary to quote the letter in full:

'Mr Brümmer was instructed by the Legal Aid Board to represent accused nos 6, 17, 19, 20 and 21.

As you are aware accused nos 19 and 21 are of the opinion that the workload on Mr Brümmer is too heavy which results in them not being effectively represented in this case.

As a result thereof they indicated during November 2004 that they no longer wish to be represented by Mr Brümmer. Since November 2004 accused nos 19 and 21 have been appearing in person.

The circumstances of this case may warrant that a direction in terms of section 3B of Act 22 of 1969 (as amended) be made that accused nos 19 and 21 be provided with alternative counsel. I am therefore considering such a direction and hereby refer the matter to you for evaluation and report.

I shall appreciate it if you would take the following into consideration:

- (i) It is common cause that the personal circumstances of the accused justifies the appointment of legal assistance to them at state expense.
- (ii) The nature and gravity of the charges speak for themselves. The charges include high treason and murder to mention but two of the 43 charges.
- (iii) Although Mr Brümmer has been instructed by the Legal Aid Board to appear on behalf of accused nos 19 and 21 the practical situation is that they are at the moment unrepresented. *Prima facie I am of the view having regard to the evidence that has been led so far before me, that the perception of the accused that the workload of Mr Brümmer is too high to represent all five of the accused assigned to him, is not without merit.* I am further of the opinion that what is envisaged by the Constitution and the Legal Aid Act is that effective legal representation be provided at state expense to an accused.
- (iv) Substantial injustice may well result if the present situation is allowed to persist, and if the situation persists it may well be argued that the accused did not have a fair trial in the event of them being convicted. I am of the view that the case against accused nos 19 and 21 should not proceed without at least considering a direction that other counsel be provided at state expense.

A direction in terms of section 3B would not necessarily mean that a new counsel or attorneys be appointed on their behalf as there are legal representatives appearing at present in the case available to represent them without the danger that there will be a conflict of interests.

I hereby direct that the report reach me within two weeks from date hereof.'

(Emphasis added).

[19] On 17 March, by which time the impasse had not been resolved, one of the other accused in the trial brought an application in which J and W had an interest. It now became essential that they be represented.

[20] On 7 April 2005 the attorney representing the Board replied to Jordaan J:

' . . .

Our client has carefully considered the contents of this letter and is of the respectful view that:

1. It has complied with its obligations in terms of the Constitution and the Legal Aid Act to provide accused no's 19 and 21 with legal representation at their trial. This was done by appointing Adv BJ Brümmer to represent them.
2. Inasmuch as Adv Brümmer has indicated in open court that he is willing and able to continue to represent accused 19 and 21 and further, inasmuch as it is common cause that Adv Brümmer has provided these two accused with proper and effective legal representation at their trial, their reasons for stating that they no longer wish him to act on their behalf are without foundation.

Accused 19 and 21 have been advised that the Legal Aid Board is prepared to continue to instruct Adv Brümmer to appear on their behalf, but they have elected not to accept this offer. This offer was conveyed to the accused by Adv Klein who also conveyed their decision to the Board's representative.

We are also, in this regard, instructed to respectfully draw your attention to the provisions of Section 1(5)(b) of Chapter 3 of the Legal Aid Guide which reads as follows:

. . .

It is the Board's contention that accused no's 19 and 21 have not satisfied its CEO that Adv Brümmer's services were terminated for good reason.

It is therefore the Legal Aid Board's respectful view as conveyed to the court, that if accused 19 and 21 are dissatisfied with the Board's decision to continue instructing Adv. Brümmer to act on their behalf and not to appoint a new legal representative for them, it is open for them to take the decision on review before an appropriate court. The Board agrees that it is common cause that

accused 19 and 21 are entitled to legal assistance at state expense. It is for this reason that Legal Aid was granted to them and Adv Brümmer was appointed. It is respectfully submitted that the question in issue at this stage is whether in the circumstances which prevail the Board is obliged to appoint a second legal representative. In the circumstances it is the Board's contention that Section 3B of the Legal Aid Act has no application in this matter at this stage because the Board has already appointed Adv Brümmer to represent accused No's 19 and 21 and is prepared to continue to do so. If these accused elect not to accept the Board's decision as stated above, it is open for them to take the Board's decision on review.'

[21] Jordaan J decided that the question of the applicability of s 3B of the Act should be argued before him. Another request for assistance was made to the Pretoria Bar, which responded admirably. Senior and junior counsel were assigned to represent J and W on this issue.

[22] The Board was represented and persisted in its position as reflected in its last written communication to the trial judge. The Board *chose* not to provide a report to the court below, contending that s 3B of the Act was inapplicable. The Board submitted that, in the event the court decided otherwise, it should then be afforded an opportunity to provide a report. This was ultimately rejected by the judge who held, that given the Board's intractable attitude as reflected in the correspondence, no purpose would be served by doing so.

[23] The Board adopted the attitude before Jordaan J that J and W ought to have taken the Board's decision not to provide alternative representation on review and that that was the only path through which they might secure relief. Jordaan J rejected this too, stating that review proceedings were time consuming and expensive and therefore inaccessible to indigents.

[24] In his judgment on the issue Jordaan J considered that an indigent accused could apply for legal aid in the conventional manner or a court could, following the prescripts of s 3B of the Act, direct that representation be afforded

to him. In his view the provisions of s 3B did not bind a court to the recommendation or report by the Board. He accepted that in making such a recommendation the Board was bound to follow the Legal Aid Guide in determining whether such a person met the criteria for the provision of legal representation at state expense. In his view the court was not so bound. He stated further that when a court decided to make a direction in terms of s 3B the provisions of the Legal Aid Guide are no longer applicable.

[25] Jordaan J rightly held that the provisions of s 3B had to be construed against the fundamental rights guaranteed in the Constitution. He went on to consider the stage the trial had reached and the attitude of the leader of the prosecution, a senior advocate and a deputy director of public prosecutions who expressed himself on the issue as follows:

'[D]it word gevra dat twee onverdedigde beskuldigdes hulself moet hanteer, die staat sê eenvoudig dit kan nie gebeur nie en dan daarna gesê word dit is 'n billike verhoor nie. Dit is net onmoontlik . . . [D]ie hof moet onthou . . . mnr Brümmer het aanvaar. Hy het sy werk begin doen en toe op 'n stadium . . . gesê . . . ek kan nie verder nie.'

[26] In his judgment, Jordaan J observed that the legal issues in the case were of a complex nature and that the law of common purpose is a minefield, even for an experienced jurist. In the trial he would be called upon to consider whether J and W were responsible for acts committed by others in their absence. The question might arise whether, on the evidence, they are guilty of attempted murder on President Mandela or whether any acts found to be perpetrated by them were merely preparatory acts. Foreseeability might also become an issue. The evidence-in-chief of Crous, the witness implicating them directly, runs into almost 500 pages. His uncompleted cross-examination consists of approximately 1000 pages. The judge stated the following:

'To expect of a layman to cross-examine him, is asking the impossible. *As presiding judge who is acquainted with the evidence led so far, I state that as a fact categorically.*'

(Emphasis added).

[27] The following part of the judgment is significant:

‘Neither I, nor the Legal Aid Board, are privy to the nature and magnitude of Mr Brümmer’s instructions from the accused. I can only draw from what I have seen and heard in this case so far and my experience in the law as practitioner and judge. The evidence of Crous alone led me to the conclusion that the fears of accused no’s 19 and 21 that, in spite of the apparent abilities of Mr Brümmer, they will die due to his workload, not be effectively represented, are well founded.’

[28] In the result, Jordaan J held that that the representation provided by Brümmer could not be said to constitute effective representation, and, since that standard was required by the Constitution, he made the following order:

‘In terms of section 3B of the Legal Aid act, in the interests of justice and in order to ensure that this trial will remain fair, I direct that accused no’s 19 and 21 be provided with alternative legal aid at state expense forthwith.’

[29] The Board provided the alternative representation as directed. They nevertheless applied for leave to appeal on the basis that the issue was one of principle that was wrongly decided and that it should be reconsidered on appeal. The court below refused to grant them leave to appeal. This matter is before us in terms of a direction of this court, in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959, that the application for leave to appeal is referred to oral argument and that the parties be prepared, if called upon to do so, to address this court on the merits.

[30] In 1988 Didcott J in *S v Khanyile* 1988 (3) SA 795 (N) asked the following question (at 810G-H):

‘And if a lawyer’s participation is deemed essential to the fair trial of somebody who has one either at hand or in mind, why should it be thought inessential to the fair trial of a man with nobody to whom to turn because he cannot afford the expense?’

At 815D-F, in arriving at his conclusion that to deny legal representation in certain circumstances might render a trial unfair, the learned judge followed the approach adopted earlier in the United States of America, in the case of *Betts v Brady* (1941) 316 US 455 (the right to representation has since been widened in

that country<sup>1</sup>). He held that in order to decide whether a trial was vitiated by a lack of legal representation a court had to take into account three factors:

- (i) the inherent simplicity or complexity of the case;
- (ii) the degree of intelligence, maturity and abilities of the accused;
- (iii) the gravity of the case.

These considerations are presently telescoped in the provisions of s 3B(1)(a) of the Act.

[31] Of particular significance is the following passage from *Khanyile* (at 815I-816D):

'What should be done in every trial . . . in which the person charged enters the dock with no lawyer defending him not because he has chosen freely and deliberately to dispense with one, but because he is too poor to pay for him[?] . . . [T]he *judicial officer* should examine all three aspects of the matter and illicit all the information which has a bearing on them. *He* should weigh the circumstances thus established by or otherwise apparent to him, together with any more of which he learns that are particular and pertinent to the case on hand. And *he* should ask himself whether their cumulative effect is such that the man would be placed at a disadvantage palpable and gross, that the trial would be palpably and grossly unfair, were it to go ahead without a lawyer for the defence. . . . If *he* answers the question in the affirmative, *he* should refer the case at once to those administering the legal aid scheme or to one or another of the various associations of lawyers that are willing and keen nowadays to offer assistance *pro bono*. *He* should decline to proceed with the trial, furthermore, until representation is procured through some such agency.

(Emphasis added).

[32] Subsequently, in *S v Rudman; S v Mthwana* 1992 (1) SA 343 (A), this court had the opportunity to consider the *Khanyile* decision. It was called upon to decide to what extent the state should be obliged to provide legal representation

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<sup>1</sup> In *Gideon v Wainwright* (1963) 372 US 335 the court held that all persons charged with a serious crime were entitled to representation. In *Argersinger v Hamlin* (1972) 407 US 25 it was held that no person may be imprisoned for any offence whether classified as petty, misdemeanour or felony, unless he was represented by counsel at his trial.

to accused persons. This court failed to confirm the *Khanyile* 'rule', holding (at 377B-C):

'The Court of Appeal does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with "the ideas underlying . . . the concept of justice which are the basis of all civilised systems of criminal administration". The enquiry is whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.'

[33] Our new constitutional dispensation changed the landscape dramatically. Section 25(3)(e) of the interim Constitution read as follows:

'Every accused person shall have the right to a fair trial, which shall include the right —

. . .

(e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights.'

In *Tshabalala & Others v Attorney-General of Transvaal & Another* 1996 (1) SA 725 (CC) para 28-29 Mahomed DP considered the above quoted dictum from *Rudman* and observed that the Constitution imported a radical movement away from the previous state of the law. We are primarily and continuously concerned with basic notions of fairness and justice. These are values that underpin our Constitution.

[34] Section 35(3)(g) of the Constitution provides that every accused person has the right to a fair trial, which includes the right '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;'. In deciding whether substantial injustice would otherwise result if legal representation at state expense is not provided, the factors set out in s 3B(1)(a) must of necessity be considered.

[35] The material part of s 38 of the Constitution reads as follows:

'Anyone . . . has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. . . .'

[36] This general power granted to courts should be seen against the duty of judicial officers to ensure that criminal trials are conducted in accordance with notions of fairness and justice. Section 3B recognises the role of a court in criminal proceedings to ensure that a trial is fair. A court which decides at the commencement of a criminal trial or in *media res* that substantial injustice might result if a legal representative is not assigned at State expense has the power, in terms of the Constitution, to make an order to that effect. Section 3B fits in neatly with the constitutional scheme.

[37] Section 3A(1)(b) makes the Legal Aid Guide binding on the Board, its offices and employees. Section 3A(3) provides:

'Whenever the Board considers an application for the rendering of legal aid, other than a matter referred to the Board in terms of section 3B(1), and whether the application is made in terms of section 25(1)(c) or (3) (e) of the Constitution or otherwise, the Board shall apply the provisions of the Legal Aid Guide.'

This subsection recognises that the Board's functions and operations are distinct from the responsibilities of a trial judge when he or she considers whether to issue a direction in terms of s 3B(1). It does not oblige the trial judge to follow the Legal Aid Guide in deciding whether an accused is entitled to legal representation. Naturally, in terms of s 3B, a trial judge has to consider the report by the Legal Aid Board and will take into account what the Board has to say.

[38] Section 3B(2)(a) it will be recalled, obliges the Board, in reporting to the court, to provide its evaluation and report 'subject to the provisions of the Legal Aid Guide'. This provision too, deals with the Board's obligations and not the judge's role in regulating the trial.

[39] There is no force in the submission by counsel for the Board that, by making the order in question, Jordaan J usurped the Board's statutory authority. It is common cause that J and W qualify for legal representation at State expense and that substantial injustice might arise if J and W continue participating in the trial without legal representation. The Board, on the one hand, and counsel for the defence and the State on the other, differed and continue to differ on whether J and W were entitled to insist that, because Brümmer has too great a work volume, they were entitled to alternative legal representation.

[40] Jordaan J was rightly concerned about the integrity of the trial. The learned judge, motivated as he clearly was by considerations of fairness and justice, sought the Legal Aid Board's views on whether he should issue a directive in terms of s 3B. His intimate knowledge of the trial led him to present his prima facie views to the Board concerning the question of whether, in the circumstances, Brümmer could represent J and W effectively. The Board chose, after taking legal advice, to submit that s 3B was inapplicable and that J and W's remedy lay in a review.

[41] The constitutional right to counsel must be real and not illusory and an accused person has the right to a proper, effective or competent defence. See *S v Halgryn* 2002 (2) SACR (SCA) para 14. This must now be considered axiomatic.

[42] In the event of a mistrial due to lack of effective representation the responsibility lies at the door of the trial judge. Jordaan J was not usurping the Board's powers or taking over its tasks and responsibilities. He was intent on ensuring a fair trial for J and W. It has not been suggested, nor can it be, that his concerns were not genuine. These concerns were shared by Brümmer and by the State. Jordaan J was acting within his constitutional duties as a judge in a criminal trial. In this regard the dictum from *Khanyile* quoted in para [32] above is apposite. His conduct was commendable.

[43] The learned judge was correct to reject the notion that review of the Board's decision was the only appropriate remedy on the basis of the reasons stated by him in para [24] above. Furthermore, it should be borne in mind that criminal trials, particularly one such as the trial in question, should be expedited rather than sidetracked. In any event, as pointed out repeatedly above, a decision on the fairness of a trial is rightly within the province and power of the presiding judicial officer. Jordaan J was correct to resort to the provisions of s 3B of the Act. The Board was wrong not to respond and provide the report and evaluation envisaged in that section. The responsibility and the power to issue a direction in terms of that section vests ultimately in a court. In the present case the Board acquiesced in the order made by Jordaan J. Its present endeavours are based on a misconception of a trial judge's powers and of its own.

[44] I pause to record this court's appreciation of the appearance by adv G T Langenhoven, *pro amico* on behalf of J and W in the best traditions of the Bar.

[45] For all the reasons stated, it is clear that the standard test for granting leave to appeal has not been satisfied. Consequently the application for leave to appeal is dismissed and the matter is struck from the roll.

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M S NAVSA  
JUDGE OF APPEAL

CONCUR:

HARMS	JA
STREICHER	JA
BRAND	JA
VAN HEERDEN	JA