

1. Introduction

It is appropriate to first define the concepts ‘detainee’ or ‘accused’ for purposes of this work. ‘Detainee’ in a narrow sense refers to someone who is detained by means of a process of court, for example a warrant of arrest under circumstances where he is suspected of having committed a crime even where he is not yet charged or by means of a detention warrant, where he is charged and awaits court appearance, or by means of a committal warrant where he is convicted and sentenced. In a broad sense it may mean someone who is charged with an offence, an accused therefore, or someone who is convicted of an offence and sentenced. In all cases, the situation is the result of a process of court as there is simply a change in status: from a detainee to an accused person and then a sentenced prisoner.¹ This dissertation seeks to address all situations although in some cases it may be appropriate to focus more on the one rather than the other.

The obligation of the State to provide legal representation to unrepresented detainee or accused derives from the Constitution.² The Constitution provides that in regard to a detainee or an accused person, detention or trial will be unfair where legal representation is not provided in circumstances where substantial injustice would otherwise result and the accused or detainee was not informed of the right to legal representation promptly. The obligation of the State to provide legal representation to unrepresented detainee or accused is a constitutional imperative

¹ Correctional Services Act 8 of 1959. Section 1 defines prisoner as ‘any person, whether convicted or not, who is detained in any prison...’ See also De Waal and Currie: *Bill of Rights Handbook* 4th ed (2001) at 596 –597 where detainee is defined as ‘someone who is deprived of freedom, accused as someone charged with a crime. Accused person, detainee and sentenced prisoner are detainees’.

² Constitution of the Republic of South Africa Act of 1996. Section 35 (2) (c) provides that every one who is detained, including every sentenced prisoner, has the right 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. See also section 35 (3) (g) dealing with accused.

which is entrenched. The State is obliged to respect, protect, promote and fulfil this right.³ The right, like all chapter 2 rights, can only be amended through a stringent procedure.⁴

2. Position before 1994

Traditionally, the right to legal representation was based on the fundamental notion of fair trial. This common law principle required that a detainee or an accused person appearing before the court must be legally represented by a legal representative of choice. A trial in which this basic requirement was not complied with would have been declared unfair.⁵

An entitlement in terms of section 73(2) of the Criminal Procedure Act⁶ was therefore necessary in order to strengthen the common-law position regarding legal representation. Even after the advent of this section, the position was never construed as obliging the State to provide legal representation to unrepresented detainees or accused persons despite the fact that even at that stage the Legal Aid Board, whose primary function was to provide legal representation to indigent persons was in existence.⁷ But its serious drawback was that it focused mainly on the provision of the service to accused persons who appeared in the higher courts through an institution of *pro deo* counsel. The large majority of detainees or accused persons who appeared in the lower courts did not benefit from that service.

³ Section 7(2).

⁴ Section 74(2) provides that Chapter 2 may be amended by a Bill passed by:
(a) the National Assembly with a supporting vote of at least two-thirds of its members; and
(b) the National Council of Provinces, with a supporting vote of at least six provinces.

⁵ *S v Khanyile and Another* 1988 (3) SA 795 (N) at 810C-D.

⁶ 51 of 1977. Section 73(2) provides that an accused shall be entitled to be represented by his legal adviser at criminal proceedings if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

⁷ The Legal Aid Board was established in terms of the Legal Aid Act 22 of 1969.

The above dispensation obtained until 1988 when Didcott J delivered a landmark judgment on this aspect in the case of *S v Khanyile and Another*.⁸ The question in this case was whether an indigent accused who desired legal representation but was unable to afford it should not be provided with legal representation and at State expense in the circumstances where he faced a possibility of direct imprisonment or a fine which would have a crippling effect. The court came to the conclusion that the presiding officer dealing with the case must consider factors such as the inherent simplicity or complexity of the case, personal equipment of the accused, namely his maturity, intelligence, sophistication as well as the gravity of the case. Should the presiding officer find that the accused would suffer hardships arising from the lack of legal representation, he had to refer the case to those dealing with legal aid and should decline to proceed with the trial until representation was procured through some other agencies. This and other cases that followed paved the way to the State obligation to provide unrepresented accused with legal representation at State expense if substantial injustice would otherwise result.

3. Position after 1994

3.1 Constitutional requirement

The dawn of democracy in South Africa represents a departure from a culture of parliamentary supremacy to one of constitutional supremacy,⁹ and one of human rights jurisprudence. All

⁸ At 815D-E.

⁹ See section 1(c) of the Constitution.

citizens of the country and non-citizens alike as well as detainees and accused persons are guaranteed equality and equal protection of the law.¹⁰

The Constitution imposes an obligation on the State to provide legal representation to unrepresented detainees or accused persons at State expense if substantial injustice would otherwise result and to inform them of this right promptly.¹¹ This is hailed as a milestone as it brought some significant improvements on the existing situation.¹²

Central to the obligation imposed on the State to provide legal representation to accused persons or detainees is the concept of ‘substantial injustice.’ What is substantial injustice for the purposes of State aided legal representation and who must decide whether or not substantial injustice would otherwise result?. *Cachalia and Steenkamp*¹³ deal with issues relating to who must make the decision relating to the appearance of ‘substantial injustice’; whether it must be the arresting officer or a prison warder in the case of a disciplinary hearing in prison or the prosecution in a criminal case. They do not provide a clear cut answer to these questions. It is submitted that during the arrest and detention stages it must be the arresting or detaining officer as the case may be, making the decision and that after the detainee is charged with an offence and his status changes to that of an accused person, the presiding officer. The decision of the Constitutional Court in *S v Vermaak, S v Du Plessis*¹⁴ where the court held that the decision to provide State funded counsel was that of the officer trying the case and cannot be applied in the

¹⁰ Section 9(1) of the Constitution.

¹¹ Section 35(2)(c) and (3)(g).

¹² Cachalia Azhar & Steenkamp Anton: ‘Detained and Arrested Persons’ in Cheadle D et al (ed): *Fundamental Rights in the Constitution: Commentary and Cases* 1st ed (1997) at 168.

¹³ See note 12 at 168.

¹⁴ 1995 (3) SA 292 (CC), 1995 (2) SACR 125 (CC) at para.15

sphere of detention, where no case is being tried, settled the question. The prosecution is a party to the dispute and cannot be seized with discretion to make the decision.

Neither the Criminal Procedure Act of 1977¹⁵ as amended, nor the Constitution¹⁶ defines the phrase 'substantial injustice'. The definition of 'substantial injustice' appears in the Legal Aid Guide (Guide).¹⁷ According to the Guide the phrase 'substantial injustice' means without legal representation and or:

- in relation to an accused person that he/she is unable to afford the cost of his/her own legal representation and is likely if convicted to be sentenced with or without the option of a fine, to a period of imprisonment of three months or more and if granted the option of a fine that he/she is unable to pay the said fine within two weeks of having been sentenced.
- in relation to a sentenced person that he/she is unable to afford the cost of his/her own legal representation and has been sentenced, either with or without the option of a fine, to a period of imprisonment of three months or more and if granted the option of a fine that he/she is unable to pay such fine within two weeks of sentence.
- in relation to a detained person that he/she is unable to afford the cost of consulting with a legal practitioner and reasonably needs to do so in relation to his/her continued detention.

¹⁵ 51 of 1977

¹⁶ Constitution of the Republic of South Africa Act of 1996.

¹⁷ The Legal Aid Guide 10th ed (2002) at 4.

- in relation to a child that he/she is unable to afford the cost of his/her own legal representation in civil proceedings affecting the right of the child.’

*De Waal, Currie and Erasmus*¹⁸ submit that ‘substantial injustice’ has acquired a specific meaning for purposes of trial, without attempting a definition. They settle the question with reference to factors¹⁹ which may assist to determine whether the State should provide legal representation to unrepresented detainee or accused. The learned authors refer to the case of *S v Mfere*²⁰ where the court held that the right must be explained to the indigent persons who are detained in connection with a charge which may lead to imprisonment.

It is submitted that the failure by the learned authors to attempt a definition signifies the difficulty in conceptualizing ‘substantial injustice’.

The criteria laid down by the court are confusing. Many crimes have a potential of direct imprisonment as a sentence option. It is conceded however that there may be cases where a person is not facing the danger of imprisonment but another form of punishment which may cause similar hardship if legal representation is not provided, for instance, a charge of negligent or reckless driving which may not be considered to be serious to pass the test of ‘substantial injustice’. Even in this case, failure to provide legal assistance to a taxi driver who earns his livelihood from driving a vehicle and who faces potential loss of livelihood by having his driving licence suspended if convicted may constitute substantial injustice. It is submitted

¹⁸ *Bill of Rights Handbook* 4th ed (2001) at page 610.

¹⁹ ‘But the same factors, such as the personal characteristics of the detainee, the complexity of the issues and the consequence faced by the detainee (seriousness of the charge or the situation generally) may generally be employed when determining whether the state should provide representation for a detainee.’

²⁰ 1998 (9) BCLR 1157 (N).

that convincing criteria need to be developed with reference to specific crimes. The courts, however, seem settled with a number of factors as determinant of ‘substantive injustice’. In *Nkuzi Development Association v Government of the Republic of South Africa*²¹ the court referred to situations where the potential consequences for the person concerned were severe, which would be so ‘if the person concerned might be deprived of a home and will not readily obtain suitable accommodation, he or she is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure and the education, knowledge and skills of the person concerned.’

In *Mgcina v Regional Magistrate, Lenasia and Another*²² the court examined the minimum content of the words ‘where substantial injustice would otherwise result’ and found that their practical meaning was not that any indigent person who was tried without legal representation could not be sent to prison without substantial injustice resulting. According to the court ‘substantial injustice’ exists where an indigent accused is charged with an offence which in the event of conviction, might lead to imprisonment. The decision of the court in *Mgcina’s case* underscore the proposition advanced above that the criteria developed and adopted by the courts are confusing. The foregoing notwithstanding, the State is obliged to provide legal representation to an accused or detainee where substantial injustice would otherwise result.

3.2 Legal Aid Board

3.2.1 Indigence.

²¹ 2002 (2) S A 733 (LCC) at 737D-F.

²² 1997 (2) SACR 711 (W).

The Legal Aid Board is a vehicle to provide legal representation at State expense. It is State aided, but has developed its own policies regarding criteria to be employed in determining whether or not to grant applications submitted to it. It is established and manages legal aid in accordance with the provisions of a statute.²³ Its primary function is to provide legal representation to indigent persons free of charge so as to give content to the rights guaranteed in the Constitution. In relation to indigent persons Legal Aid Board provides legal aid at State expense provided they pass the means test adopted by it. The Legal Aid Act of 1969 defines ‘indigent person’ as follows:

Indigent person means a natural person who qualifies for legal aid in terms of the means test set out in this Guide or a natural person who is unable to afford the cost of his/her own legal representation (in circumstances where substantial injustice would otherwise result) or a person other than a natural person, but not including a close corporation or a company (except a company registered in accordance with section 21 of the Companies Act No. 61 of 1973 as amended), in circumstances where legal personality is unable to afford the cost of its own legal representation and where the CEO considers it to be in the interests of the administration of justice that such legal personality be granted legal aid.²⁴

It laid down criteria in order to determine the indigence for purposes of providing legal aid. The criteria laid down are collectively referred to as means test. The means test refers to the calculation of financial situation of the applicant or other resources and therefore the Board will not provide legal aid if it is satisfied that the applicant possess sufficient disposable assets which may be utilized to raise finance to pay for the required legal aid. An applicant who does not comply with the means test as determined by the Board will not be provided with legal aid. Thus whether or not an applicant complies with the means test is a discretionary matter seized with the Chief Executive Officer of the Board. The criticism which may be leveled against the discretionary powers of the Chief Executive Officer, it is submitted, is that he may under-rate

²³ Legal Aid Act 22 of 1969. Section 3 provides that the object of the Board shall be to render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution. See also section 3 (d) A which provides for legal representation at State expense as contemplated in section 35 (2) (c) and 35 (3) (g) of the Constitution where substantial injustice would otherwise result.

²⁴ Note 23, page 2.

the presence of the means test and refuse legal aid in deserving cases or exaggerates compliance with the means test and grant legal aid in undeserving cases.

Notable is the distinction between providing legal aid on the basis of the means test and the appearance of substantial injustice as contemplated in section 35 (2) (c) and 35 (3) (g) of the Constitution although it is conceivable that legal representation may be provided in respect of the same application on the ground of substantial injustice. This view is supported by the court in *S v Makhandela*.²⁵ In this case the accused were charged and convicted of robbery. One of them was unrepresented at trial because he was too poor to afford legal aid - failed the means test- and the magistrate did not inform him that the State is obliged to provide him with legal representation and at State expense if substantial injustice may result. The Appeal Court found that an irregularity had occurred because the magistrate failed to inform the accused that failure to obtain legal aid was not the end of the matter.²⁶

Where the court found that substantial injustice would other wise result if legal representation at State expense was not provided under circumstances where it should have been provided, which would be so where the accused faced the possibility of imprisonment, or the charges he/she is facing are complex, or he/she is unsophisticated, the means test plays no part at all. The Board is constitutionally obliged to provide legal representation.²⁷

To conclude the discussion on this topic, two issues must be considered: (1) whether the decision of the Board not to provide legal aid where the applicant failed the means test can be

²⁵ 2007 (1) SACR 620 (WLD)

²⁶ At 626d-e.

²⁷ *S v Cornelius and Another* 2008 (1) SACR 96 (CPD) at 102g-i.

challenged and (2) remedies available to him/her. As regard (1) an applicant has a right to challenge the decision of the legal aid officer in an appeal to the Chief Executive Officer against the refusal of a legal aid officer to assist him. In *S v Ambros*, the Court explained the importance of legal representation at State's expense thus:

The presiding officer should inform the accused person:

- (a) that he or she has a right to legal representation at State expense if substantial injustice would otherwise result.
- (b) that he or she has a right to appeal to the director of the Legal Aid against the refusal of legal aid by the legal aid officer and how to exercise that right;
- (c) that if the Legal Aid Board refuses to provide legal representation, he or she may ask the court to make an order that he or she be provided with legal representation at State expense.²⁸

As regard (2), a detainee whose detention was declared unlawful may claim damages from the relevant authority or a court may order his release from further detention while in the case of an accused, the trial may be declared unfair. In conclusion it is important to consider the nature of the Chief Executive Officer's conduct. Does it amount to an administrative action? Administrative actions are defined in the Promotion of Just Administration Act²⁹. It is submitted that the Chief Executive Officer's conduct amounts to administrative action which is subject to judicial review in terms of the provisions³⁰ of Promotion of Administrative Justice Act.³¹

The provision of legal representation to unrepresented detainees or accused persons, serves very important objectives. *De Waal, Currie and Erasmus*³² suggests three objectives sought to be achieved by this namely:

- detainees may need legal representation to challenge the unlawfulness of their detention or conditions of their detention or to challenge a refusal to allow them

²⁸ 2005 (2) SACR 211 (C) at 217g-j.

²⁹ 3 of 2000. Section 1 defines administration acts as any decision taken, or any failure to take a decision, by -

- (a) an organ of State, when-
 - (i) exercising a power in terms of the Constitution or a Provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.

- (b) ...

which adversely affects the rights of any person and which has a direct, external legal effect....

³⁰ Section 6 (1) provides that any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.

³¹ Note 29

³² At 610.

to communicate with or be visited by their spouses or partners, next of kin, chosen religious counsellors or medical practitioners,

- detainees who are arrested for having committed an offence may need legal representation in order to enforce their rights to remain silent and not to be compelled to make confessions or admissions that could be used against them. They may also need legal representation to assist them with bail application, thus guaranteeing fairness of their continued detention; and
- the detainees who have been charged and therefore accused persons may need legal representation to enforce their right to fair trial.

As stated elsewhere³³ in this presentation, the State obligation to provide legal representation to unrepresented accused or detainee arises when substantial injustice would otherwise result. The question is whether the nature of ‘substantial injustice’ is similar in both instances since the detainee is not charged of any offence yet whereas the accused is charged.

*Frank Snyckers and Jolandi le Roux*³⁴ deals with this aspect and submits that the ‘injustice’ for purposes of detainees as contemplated in section 35 (2) (c) involves the question of social justice – *i.e.* equality considerations. The nature of substantial injustice, it is submitted, will depend on the circumstance of each case. In the case of a detainee who enforces his pre-trial rights, for instance, right to be produced before the court and to be informed of reasons for detention, it may be found that substantial injustice may result if he/she desires State aided legal representation but it is refused, whereas in the case of an accused who is summonsed to appear before the court for contravention of a minor traffic legislation, it may not be found that

³³ Page 1.

³⁴ Frank Snyckers and Jolandi le Roux: ‘Criminal Procedure: Rights of Arrested, Detained and Accused Persons’ in Woolman et al (eds): *Constitutional Law of South Africa* 2nd ed (2006): vol. 3 at 51-58.

substantial injustice would result where he/she was refused State aided legal representation at State expense.

3.3 Right to be informed of the right to legal representation promptly.

Sections 35(2) (c) and 35(3) (g) of the Constitution oblige the court, after having explained to the unrepresented detainee or accused his/her right to legal representation at State expense if substantial injustice would otherwise result, to also inform him/her of that right promptly.

With reference to the unrepresented detainees the need to inform them of the right was articulated by the court in *S v Melanie & Others*:

The purpose of the right to counsel and its corollary to be informed of that right is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Section 35 (2) (c) make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at trial.³⁵

Unrepresented accused must be informed of the right so that they are able to protect their right to fair trial. Both unrepresented accused or detainees must be aware of the right at the earliest opportunity and be afforded reasonable opportunity to exercise the right so that he/she is able to make an informed choice.

The right to be informed promptly as a corollary to the right to be provided with legal representation at State expense where substantial injustice would otherwise result is best illustrated in the following cases. In *S v McKenna*³⁶ the accused, was a public prosecutor who was charged for having failed to start court proceedings at 9:00. She desired legal

³⁵ 1996 (1) SACR 335 (E) at 348-349.

³⁶ 1998 (1) SACR 106 (C).

representation and requested the court that she be given an opportunity to engage one. Her request was refused and she was convicted. On appeal the conviction and on appeal the court having asserted that the right of a person accused of a crime to legal representation was long established³⁷ reasoned that to give content to the right to legal representation the Constitution requires that a person accused of the crime be informed of the existence of this right, and that in addition, where substantial injustice would otherwise result, the Constitution requires that the accused person be provided with legal representation at state expense. The court held that if the right to legal representation was to have any meaning it must include the right to be afforded a reasonable opportunity to secure it. The conviction and sentence were accordingly set aside.

In *S v Cordier*³⁸ the accused was charged with and convicted of theft. The question on review was whether the accused was given the opportunity before commencement of the trial, to deal with the outcome of the application for legal representation after having been advised thereof and to consider the position before pleading to the charge, where he indicated he desired legal aid. Both the conviction and sentence were set aside on the basis that the trial was unfair.

The above exposition relates to situations where the unrepresented detainee or accused is apprised of the right to be provided with legal representation at State expense if substantial injustice would otherwise result, is informed of that right promptly, and he/she requires legal representation. What are the consequences facing the court in the event of failure to inform him/her accordingly. The problem arises where after being informed of the right, the detainee

³⁷ At 112c-d.

³⁸ 2004 (2) SACR 481 (T) at 485e-f.

or the accused chooses to conduct own defence. Generally the courts require that it appear *ex facie* the record of the proceedings that those rights were explained and in such a way that another court vested with the matter is properly informed of this fact. Where the accused is unrepresented and is facing serious charges, but elects to appear in person, the court should ask the accused why he/she wanted to appear in person, and if it appears that the accused is under some misunderstanding, that must be put right. Thus in *S v Nkondo*³⁹ the accused was charged and convicted of rape and robbery read with the provisions of the Criminal Law Amendment Act of 1997.⁴⁰ In terms of the provisions⁴¹ of this Act, the matter was referred to High Court having jurisdiction for sentence. The High Court referred the matter back to the magistrate and raised certain queries.⁴² After receiving the magistrate's comments in this respect, the High Court found that an irregularity had occurred and set aside the conviction.

The High Court is cautious to assume that the rights referred to above have been explained. Thus in *May v S*⁴³ the unrepresented accused was charged with and convicted of certain crimes. He appealed the convictions and sentences on the ground that the trial was unfair in numerous instances, amongst others, failure of the magistrate to inform him of his rights to

³⁹ 2000 (1) SACR 358 (W) at 360c-d.

⁴⁰ 105 of 1997.

⁴¹ Section 52(1) provides that if a Regional Court, following on-

(a) a plea of guilty; or

(b) a plea of not guilty, has convicted an accused person of an offence referred to in:-

(i) Part 1 of schedule 2; or

(ii) ... merits punishment in excess of the jurisdiction of a Regional Court in terms of section 51(2), the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51(1) or (2) as the case may be, by a competent High Court having jurisdiction.

⁴² '1It is not clear from the charge sheet or record whether the accused was informed of his rights to legal representation.

2....

3 if the accused was informed of the said rights, please explain why this fact does not appear anywhere on the record.'

⁴³ [2005] 4 All SA 334 (SCA).

legal representation, and that if he was unable to secure one at own expenses, one would be provided at State expense. The court said ⁴⁴ that judicial officers should not assume that accused persons were fully aware of their rights and of the implications of acting in the conduct of their own defence. Even if the assumption were correct, it was incumbent on the presiding officer at a criminal trial to ensure that the accused was fully informed, in an open court, not only of the right to legal representation but also of the consequences of not having a lawyer to assist in the defence. The right to legal representation, whether at State expense or otherwise included the right of an accused to choose and be represented by a legal practitioner and also have one assigned to him at State expense if substantial injustice would otherwise result. This right meant more than just having someone standing next to him or her and speaking on his/her behalf. The right to legal representation involved the attorney acting in the best interest of the accused and putting best possible case forward.

The above exposition was also the attitude of the court in *Beyers v Director of Public Prosecution*⁴⁵ where the accused was charged with and convicted of driving under the influence of liquor in contravention of section 122(1)(a) of the Road Traffic Act of 1989.⁴⁶ He launched review proceedings to have the conviction and sentence set aside on the ground that he was denied fair trial because he was rushed to trial when his usual attorney with whom he had consulted was unable to be at court and a request for postponement was declined. He alleged that he had had a hurried consultation for about ten minutes with an attorney just introduced to him, and who had been sent by the Legal Aid Board to stand in for his usual attorney. As a result of the hurried consultation, the attorney did not lead evidence in

⁴⁴ At 338a-d.

⁴⁵ 2003 (1) SACR 164 (SCA) at 166f-g, i-j.

⁴⁶ 29 of 1989.

mitigation and because the accused had numerous previous convictions for similar offences, he was imprisoned for a certain number of years. The court found that the accused did not have a fair trial and set aside the conviction and sentence.

In *S v Chabedi*⁴⁷ similar concerns were raised by the court. In this case the accused, who was represented was charged with and convicted of rape and was committed for sentence in the High Court in terms of the provisions of section 51(1)(b) of the Criminal Law Amendment Act of 1997.⁴⁸ On appeal, the court *mero muto* raised the question whether the accused was properly represented at trial. This stemmed from certain conduct displayed by the accused's legal representative in the conduct of and handling of certain aspects of the case. It appeared during the proceedings that the accused raised a concern that the legal representative never consulted with him properly and had also failed to recall certain State witnesses. The court held⁴⁹ that it had been the duty of the attorney, in the proper performance of his mandate to defend the appellant, to have recalled the witnesses in order to do justice to his client's defence. As he failed to do so the question was whether he was competent to conduct the appellant's defence. The court found that he did not and that the proceedings were vitiated by irregularities. The convictions were set aside and the matter was remitted back in order that it be tried *de novo* before another magistrate.

These cases raise very important questions. Very often in practice, particularly in lower courts where many attorneys, and advocates for that matter, make their first appearance, such instances do occur. It is conceivable that accused persons' cases are not properly advanced.

⁴⁷ 2004 (1) SACR 477 (W).

⁴⁸ 105 of 1997.

⁴⁹ Paragraph 18 at 483j – 484b.

The question is whether the presiding officer may, where the legal representative is wanting, assist in the proper advancement of the accused's case without being criticized for being on the side of the defence. It may sometimes be tempting for the presiding officer to do so in the quest for proper administration of justice, but it is submitted that were he/she to do that, he/she must guard against overstepping the dividing line between assisting the accused and himself/herself becoming a party to the proceedings.

The right to legal representation has three forms, an unrepresented detainees or accused, who have been informed of this right, have three options namely:

- to consult with a legal representative of choice;
- to be provided with a legal representation at State expense where substantial injustice would otherwise result; or
- to conduct own defence.

A detainee or accused who requires legal representation at State expense is not entitled to pick and choose legal representatives. In *S v Mamguanyana*⁵⁰ the appellant twice dismissed legal representatives assigned to him by the State and then sought postponement to secure his own legal representative. The court held that generally a person was not able to choose legal representation provided at State expense.

In practice if the unrepresented detainee or accused declares inability to secure an attorney of choice, and foregoes the right to conduct own defense, the presiding officer must apprise him/her of the right to be provided with a legal representation and at State expense if

⁵⁰ 1996 (2) SACR 283 (E).

substantial injustice may result, and refer him/her to the Legal Aid Board and various law clinics. This duty rests with the court; it cannot be delegated to other court officials for instance the public prosecutor or court interpreter. As stated elsewhere in this work⁵¹ the explanation must be made with sufficient particularity and must appear *ex facie* the record that it was done. It is submitted that the explanations are important because the detainee or the accused is enabled to make an informed decision as to whether or not legal representation is required.

4. Legal Aid exclusions.

Legal aid cannot be provided where the accused is charged with the crime of drunken driving or dealing in liquor without a license.⁵² It is doubtful if a court may find that substantial injustice would result, where the accused is charged with minor traffic legislation for example, failure to indicate an intention to turn, or where the brake light failed because the bulb burst etc. In those situations an accused who cannot afford legal aid because he failed the means test, or cannot be provided with legal representation at State expense because the court considers the offence so trivial that no substantial injustice will result, will require assistance of the presiding officer. It is in that respect that the judicial assistance becomes paramount in order to ensure that the accused understands the proceedings and the risks of unfair trial are reduced. The main objective of judicial assistance is to ensure that the accused's rights to fair trial are protected in much the same way as the legal representative would have ensured. In this sense, it is submitted, that there is a direct link between judicial assistance and the obligation to provide unrepresented accused with legal representation whether at State expense or not.

⁵¹ Page 14.

⁵² Note 17, page 25-26.

5. Judicial assistance.

Judicial assistance may entail explanation by the presiding officer of the following, in no particular order:

5.1 Explanation of competent verdict.

The duty imposed on the courts to explain the foregoing rights entails a duty to assist an unrepresented accused in the conduct of his defence in order to ensure that the proceedings are conducted in accordance with the constitutional imperatives of fair trial. The court must, before a charge is put to the accused, explain the nature thereof and after plea, any possible competent verdict on which he/she may be convicted. In *S v Fielies*⁵³ the accused were charged with housebreaking with intent to steal and attempted theft. They were unrepresented and had pleaded not guilty but were eventually convicted of malicious damage to property which is a competent verdict in terms of section 262(2) of the Criminal Procedure Act of 1977⁵⁴ under circumstances where they were only informed of the competent verdict during judgment. The review court found that the right to be informed of the charge included the right to be informed of competent verdicts, not in the charge sheet, but before the accused pleaded. The court further found that failure to inform the accused of the competent verdict amounted to infringement of the right to fair trial. The conviction and sentence were set aside. However, in certain instances conviction and sentence may well stand even where the accused was not

⁵³ 2006 (1) SACR 302 (EC) at 307d.

⁵⁴ 51 of 1977.

informed of the competent verdicts. Thus in *S v Nyanga*⁵⁵ the conviction of theft and sentence were confirmed by the review court where the accused was initially charged with robbery under circumstances where the magistrate did not inform him of theft as a competent verdict, following conviction based on questioning in terms of section 112(1)(b) of the Criminal Procedure Act. The court found that the accused was not prejudiced as his conduct of the case would not have been different. Where the unrepresented accused enters a plea of not guilty, the court must explain the plea procedures and inform him/her that he/she need not give full account of his version and that he/she would be given an opportunity to do so after the State witnesses have testified.⁵⁶

5.2 Cross-examination of witnesses

During testimony of the State witnesses, the court must explain to the unrepresented accused the right to cross-examine them and put his version to them in order to elicit their comments. In *May's case*, the failure of the magistrate to explain the right to cross-examine State witnesses was also raised. It was contended by the accused that the nature of cross-examination and its importance were not fully explained and that when he attempted to cross-examine State witnesses, his cross-examination was curtailed. Dealing with the first leg of the ground of appeal, the court found⁵⁷ that the accused was given a full opportunity to indicate whether he

⁵⁵ 2004 (1) SACR 198 (C) at 203c.

⁵⁶ Section 115 of the Criminal Procedure Act 51 of 1977 provides:

(1) where an accused at a summary trial pleads not guilty to the offence charged, the Presiding Judge, regional magistrate or magistrate as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence;

(2) (a) where an accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in charge are in dispute.'

⁵⁷ At 340c-d.

understood what was expected of him and that included his right to contest the evidence of the State witnesses and to put his own version of events to them. As regards the second leg, namely curtailment of cross-examination, which the accused contended was contained in the magistrate putting questions on his behalf, the court found that it was not inherently inappropriate for a judicial officer to attempt to formulate questions more skilfully than the unrepresented person would do. The court found that no unfairness of trial resulted.

5.3 Assisting the accused at the end of the State case.

When the State closes its case, the judicial officer must apprise the unrepresented accused of the rights, namely that it is his/her chance to place his/her version before the court but that he/she is not compelled to do so, that he/she has a right to remain silent and not to incriminate himself/herself, that if he/she wished to give evidence, he/she may do so under oath,⁵⁸ that after the testimony, the State will cross - examine him/her to test his/her version, and that he/she will be obliged to answer questions put to him. The presiding officer must still inform the accused that the court may also put certain questions in order to clarify some matters resulting from the cross-examination by the prosecution, and that he may also call witnesses who may testify in support of his case.

The presiding officer must inform the accused that what he said during the explanation of the plea and his/her cross-examination of state witnesses do not amount to evidence and carry no weight as in the case of explanation of the plea, it was not tested through cross-examination nor

⁵⁸ Section 35 of the Constitution of the Republic of South Africa Act of 1996. See also section 151(b)(i) of the Criminal Procedure Act 51 of 1977 which provides that '...be called as a witness before any other witness for the defence'.

was it made under oath, and that if it has to be considered as evidence and accorded the necessary value, it should be repeated under oath. The accused must be warned that if he/she does not give evidence, the case will be decided on the basis of evidence before the court and in deserving cases be advised to give evidence in defence. Where the presiding officer has not informed the accused of these rights, the court on appeal or review will find that an irregularity had occurred and could set the conviction and sentence aside on the basis that the trial was not fair. Where there is insufficient or no evidence that the accused committed the crime, the presiding officer must inform the accused accordingly and discharge him.⁵⁹ As to what constitutes insufficient or no evidence for purposes of section 174 of the Criminal Procedure Act⁶⁰ and the criteria used are not within the scope of this dissertation, but suffice it to indicate that the amount of evidence required is one on which a reasonable court acting carefully may convict the accused.⁶¹ Where the accused, in the wake of a *prima facie* case, elects to give evidence in defence, the court must still assist him so that he is able to place a coherent version before it, but it is unlikely that the court will assist him/her in the sense of suggesting to him/her how to answer questions put in cross-examination by the prosecution. This is so because the court is a trier of facts and must as far as possible refrain from being perceived as a party to the dispute.

5.4 Closing arguments.

⁵⁹ Section 174 provides that if at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

⁶⁰ 51 of 1977.

⁶¹ *S v Swartz and Another* 2001 (1) SACR 334 (W) at 336b-c.

After the closure of the defence case, and during arguments on the merits of the case, the court, it is submitted, must actively assist the unrepresented accused and even advise him/her as to how to present arguments to the extent of even simplifying for him/her points of law raised by the prosecution. The presiding officer will be justified in doing so in order to ensure that the accused understands what is required of him at every stage of the trial. This is the essence of a fair trial requirement.

5.5 The sentencing stage.

During sentencing stage the presiding officer must explain the sentencing procedures⁶² and various sentence options.⁶³ Where the crime carries a mandatory sentence, such as that prescribed in sections 51, 52, and 53 of Criminal Law Amendment Act of 1997,⁶⁴ the court is obliged to warn the unrepresented accused that he faces a possibility of imposition of the minimum sentence. Where the sentence was severe and the accused was unable to

⁶² Section 274 of the Criminal Procedure Act 51 of 1977 provides:

- (1) a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
- (2) the accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

⁶³ Section 276 provides:

- (1) subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely
 - (a)
 - (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);
 - (c) periodical imprisonment;
 - (d) declaration as an habitual criminal;
 - (e) committal to any institution established by law;
 - (f) a fine;
 - (g)
 - (h) correctional supervision;
 - (i) imprisonment from which such person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

⁶⁴ 105 of 1997.

cross-examine state witnesses, it was held that his insistence to conduct his own defence was not an informed choice. The conviction and sentence were set aside on the basis of unfairness of trial. This was the approach of the court in *S v Mnguni*.⁶⁵ The sentiments expressed in *Mnguni's* case were echoed in subsequent cases. In *S v Ndhlovu*⁶⁶ the accused was charged with and convicted of unlawful possession of a firearm in contravention of section 2 of the Arms and Ammunition Act of 1969⁶⁷ and unlawful possession of rounds of ammunition in contravention of section 36 of the same Act. The offences were covered by the provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act of 1997⁶⁸ which prescribed a minimum penalty of 15 years for a first offender unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence. The court found no substantial and compelling circumstances and sentenced the accused as prescribed. On appeal the argument was amongst others that the appellant was never alerted to the fact that it was possible to be sentenced as prescribed by the above section. The question arose as to whether the accused received fair trial. The Supreme Court of Appeal *per* Mpati JA said:

By invoking the provisions of the Act without it having been brought pertinently to the appellant's attention that this would be done rendered the trial in that respect substantially unfair. That in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed.⁶⁹

Although the accused was represented during the trial, I submit that the views expressed by the Supreme Court of Appeal apply with even more force to unrepresented accused.

⁶⁵ 2002 (1) SACR 294 (T).

⁶⁶ 2003 (1) SACR 331 (SCA).

⁶⁷ 75 of 1969

⁶⁸ See note 64.

⁶⁹ At 377g-h.

The current judicial trend imposes a duty on the presiding officer to inform the accused, whether represented or not, that he faces a compulsory minimum sentence.⁷⁰ Failure to do so may result in unfairness of trial and setting aside of both the conviction and sentence. In *Dickson*' case the accused who appeared unrepresented on a charge of rape and robbery was convicted as charged. There was no indication that he was warned of the minimum sentence regime although it appeared that he was warned about the seriousness of the charge. The High Court found that the accused did not receive a fair trial and set aside the conviction and sentence and remitted the case for retrial before another magistrate. Despite the foregoing, there are decisions that point in the opposite direction. In *S v Cunningham*⁷¹ it was held that whilst it was desirable that specific reference should be made to any sentencing legislation upon which the State may seek to rely and to facts which the State intends to prove to bring the accused within the ambit of such legislation, this was not necessarily essential. Where there was no such reference, the issue was whether the accused had a fair trial. Similarly in *S v Ndhlovu*⁷² the court held that the possibility of convictions and sentences being overturned because the accused was not advised of the rights can be much reduced if every charge sheet relating to an offence carrying a minimum sentence stated so explicitly, and if every accused facing such charge was advised of the minimum sentence prior to the plea and was encouraged to obtain legal assistance.

5.6 After sentencing.

⁷⁰ *S v Dickson* 2000 (2) SACR 304 (C).

⁷¹ 2004 (2) SACR 16 (E).

⁷² 2004 (2) SACR 70 (W)

After sentencing the presiding officer must explain to the unrepresented accused both the rights of review⁷³ and appeal together with the procedure involved as well as the right to legal representation.⁷⁴ Section 35(2)(c) of the Constitution⁷⁵ requires that a detainee, including every sentenced prisoner, be provided with a legal practitioner and at State expense if substantial injustice would otherwise result and to be informed of this right promptly. For an entitlement to this right, it is required that substantial injustice should otherwise result. In *Ehrlich v CEO, Legal Aid Board and Another*⁷⁶ the question was whether the applicant who desired to prosecute an appeal following his conviction on the crime of indecent assault and who had been refused legal aid by the respondent was denied fair trial on the basis that the refusal to grant him legal representation at State expense constituted substantial injustice. The respondent found in the course of considering the applicant's application that the envisaged appeal lacked merits and that there was no prospect of success on appeal and informed the applicant accordingly. The applicant appealed that decision. The court dismissed the application and found that respondent's refusal to provide applicant with legal assistance did not amount to substantial injustice.

The question arises as to whether the accused is entitled to legal representation at State expense where substantial injustice would result for purposes of appeal. Because the right of appeal is an integral part of the right to fair trial and where substantial injustice would result, the accused would be entitled to legal representation as State expense for purposes of an appeal. There are cogent reasons for holding that he/she is, otherwise the right to appeal will be meaningless if

⁷³ Section 302.

⁷⁴ Sections 309C, 309D.

⁷⁵ Act of 1996.

⁷⁶ 2006 (1) SACR 346 (E).

indigent accused are not provided with legal aid and at State expense where substantial injustice would otherwise result.⁷⁷ Section 309D of the Criminal Procedure Act⁷⁸ dealing with appeals in criminal cases, imposes a duty on the presiding officer to explain certain rights to unrepresented and certain other accused. Failure by the presiding officer to explain these rights may in appropriate cases render the trial unfair.

6. Overstepping the bounds/ limits of judicial assistance.

The presiding officer must exercise care in assisting the unrepresented accused in the conduct of his/her case lest he/she oversteps the bounds and become one of the parties to the case. The dividing line between assisting the accused and becoming a party to the case is faint and difficult to determine. In *S v Molelekeng*⁷⁹ the accused, who was charged with trespass, did not in his explanation of plea advance a reason why he was on the complainant's property but the magistrate had in his questioning wanted to know whether he had permission of the owner of the property to be thereon. The review court found that the magistrate's questions could not be typified as questions clarifying the plea and found that an irregularity had occurred.

In *S v Mathabatha*⁸⁰ the unrepresented accused was charged with theft and after a plea of guilty and following questioning by the magistrate, a plea of not guilty was entered. When the State led the complainant in evidence, the magistrate took over and led the complainant. When the accused testified in his defence, the magistrate did not lead him and had on occasions also cross-examined him. The review court criticised the magistrate for having descended into the

⁷⁷ Section 35 (3) (o) of the Constitution.

⁷⁸ 51 of 1977

⁷⁹ 1992 (1) SACR 604 (T) at 607a.

⁸⁰ 2003 (2) SACR 28 (T).

arena and played the role of both the prosecutor and the judicial officer. The conviction and sentence were set aside on the basis that the accused did not receive a fair trial. These two cases reaffirm the difficulty in determining the extent to which the presiding officer must go in assisting unrepresented accused person. The difficulty obtains through the entire trial.

It is submitted that the difficulty may be overcome through experience and constant awareness that it is best, as far as possible, to leave the contest to the parties, the presiding officer only intervening when it is in the interest of justice to do so. Nothing may be more apposite than the following remarks made in the case of *R v Hepworth* where the court said:

a criminal trial is not a game where one side is entitled to claim the benefit of any mistake made by the other side, and the Judge's position in a criminal case is not merely that of an umpire to see to it that the rules of the game are observed by both parties. A Judge is an administrator of justice; he is not merely a figurehead, he has not only to direct the proceedings according to the rules of procedure, but to see that justice is done.⁸¹

Similar sentiments were expressed by the Supreme Court of Appeal in the case of *Take and Save Trading Store CC v Standard Bank of SA Ltd* where Harms JA said:

fairness of court proceedings requires of the trier of facts to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justified either in terms of fair trial requirement or in the context of resources.⁸²

In *S v Msithing*⁸³ the accused, together with others, were charged with robbery with aggravating circumstances, as well as a contravention of section 2, read with various other sections, of the Arms and Ammunition Act of 1969,⁸⁴ which deal with unlawful possession of firearms. He was convicted of robbery and unlawful possession of a pistol and was sentenced to 15 and 5 years respectively. He appealed both the convictions and sentences. On appeal the issue was whether or not the magistrate did not descend into the arena and by so doing caused

⁸¹ 1928 AD 265 at 277

⁸² 2004 (4) SA 1 (SCA).

⁸³ 2006 (1) SACR 266 (N)

⁸⁴ Note 67

a situation where he was disabled from making findings of credibility and whether or not he had brought a situation where the fairness of the trial could be called in question. The court said:

it cannot be said objectively that the magistrate conducted the trial in such a manner that his open-mindedness, his impartiality and his fairness are manifest to all who are concerned in the trial and its outcome, specifically the accused.⁸⁵

The court found that the magistrate, by questioning the appellant in a manner that displayed irritability and sarcasm towards him, had descended into the arena and transgressed the limitation within which judicial questioning should occur, this having been done in a manner which was grossly unfair to the appellant and which infringed the his right to fair trial.

In *Matroos v S*⁸⁶ the accused was unrepresented at the trial and the magistrate did not explain to him that he did not have to answer questions from the bench during plea stage, and put questions to the accused before he made an election as to whether he would elucidate his plea of not guilty. In the course of the trial, the magistrate questioned every State witness during evidence in chief and cross- examination. The magistrate discouraged the accused from putting certain questions and disallowed others. The question was whether or not the magistrate descended into the arena, and whether or not his conduct was not grossly irregular and thus resulting in the accused not receiving fair trial. The Supreme Court of Appeal held that the accused had not had a fair trial and that the irregularities vitiated the proceedings. Both conviction and sentence were set aside.⁸⁷

⁸⁵ At 273i - 274a.

⁸⁶ [2005] 2 All SA 404 (NC).

⁸⁷ Majiedt J said (at 410d-e): '... from the foregoing extract from the record it is abundantly clear that the magistrate had now assumed the role and function of the prosecutor. He merrily continued along this way throughout the trial. The poor unrepresented accused/appellant found himself at the mercy of the a presiding officer who proceeded to descend into the arena on the side of the prosecutor with great vigor and zeal from the outset and continued to do so throughout the trial. In these circumstances justice and fairness are but a mythical illusions, completely absent in these proceedings.'

7. Limitations

The right to be provided with legal representation at State expense may be limited either in terms of section 7(3) or 36 of the Constitution. The requirement of ‘substantial injustice’ is indicative of the fact that not all cases will qualify for legal representation at State expense. Where this requirement is not satisfied, legal aid at State expense will not be provided and this will conceivably be a limitation as envisaged in section 7(3) of the Constitution. Limitation in terms of section 36 of the Constitution is of academic importance only because even in the case of state of emergency, section 35 rights are non-derogable, with the exclusion of section 35(3)(d) rights. The latter section deals with the right to have the trial expedited and be completed without unreasonable delay. However the requirements⁸⁸ mentioned in section 36 must still be complied with.

8. International law.

Section 39 (1) (b) of the Constitution obliges a court, tribunal or forum to consider international law when interpreting a provision in the Bill of Rights. Sections 35 (2) (c) and 35 (3) (g) of the Constitution is a provision in the Bill of Rights and must be interpreted in the

⁸⁸ The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) the less restrictive means to achieve the purpose.

light of the above section. It is crucial to examine the relevant provisions in international law with due regard to the following instruments:

8.1. International Covenant on Civil and Political Rights.

Article 14 (3) (d) embodies in the right to fair trial, the right to defend oneself in person or through legal assistance of his own choosing, to be informed of the right and if he does not have legal assistance, to have one 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 sufficient means to pay for it.

8.2 Convention on the rights of the Child.

Article 40 (2) (b) (ii) guarantees a child accused of having infringed the penal law, right to be informed promptly and directly of charges against him/her and if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his/her defence

8.3 United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment of 1988.

Principle 17 (1) and (2) complement each other. In terms of 17 (1), a detained person shall be entitled to have legal counsel and to be informed of this right. In terms 17 (2) if the detainee

does not have a legal counsel of his own choice, he/she shall be entitled to have legal counsel assigned to him/her by a judicial or other authority in all cases where the interest of justice so require and without payment by him/her if he/she does not have sufficient means to pay.

8.4 United Nations Standard Minimum Rules for the Administration of Juvenile Justice of 1985.

In terms of Rule 15.1 juveniles have the right to be represented by a legal advisor throughout the proceedings or to apply for free legal aid where there is a provision for such aid in the country.

8.5 United Nations Rules for the Protection of Juvenile Deprived of Their Liberty.

Article 18 (a) provides that juveniles should have the right of legal counsel and be enabled to apply for free legal aid where such aid is available and to communicate regularly with their legal advisers.

A study of the above instruments shows that the provision of legal representation whether at State expense or not to detainees or accused is important. As afore said, a South African court or tribunal interpreting a provision in the Bill of Rights, is obliged to consider these instruments.

9. Conclusions.

Sections 35 (2) (c) and 35 (3) (g) of the Constitution of the Republic of South Africa Act of 1996 guarantee right to fair trial to accused of detainees who accused of having committed crimes and who appear before the court unrepresented. The State is obliged to provide legal representation and at State expense where substantial injustice would otherwise result.

In respect of cases not falling in the above category, the Legal Aid Board must provide legal representation free of charge should it be found that an accused or detainee complies with the means test.

The courts have interpreted the above provisions and have found that infringement of those provisions resulted in unfair trials. The provisioning of legal representation and measures adopted by the State to achieve the progressive realization of these rights are to be welcomed.

The question is whether the State is successful in providing legal representation to unrepresented accused or detainees where substantial injustice would otherwise result or whether the Legal Aid Board reaches out to every accused or detainee who require legal assistance. In practice every accused person appearing in court charged with an offence is provided with State aided legal representation.

The greatest challenge with regard to the State obligation to provide legal representation, whether at State expense or otherwise, is that a large number of accused persons or detainees

appearing in the courts perceive the Legal Aid Board as part of the criminal investigative organ. Many opt to conduct their own defence, despite eloquent and detailed explanations by presiding officers of the right to legal representation and at State expense where substantial injustice would otherwise result.

Despite these challenges many accused and detainees have benefited from the system.

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