

05 March 2014

For Immediate Release

Legal Aid SA on good course in the SCA appeal success

Legal Aid South Africa recorded a total of 30 criminal appeals heard in the Supreme Court of Appeal (SCA) of which 22 had a successful outcome.

“99% of the appeals were handled by our in-house practitioners consisting of Senior Litigators, High Court Unit Managers and High Court Unit attorneys with only one handled by a private attorney. The 30 appeals constituted 73% of all the appeals we took during quarter 1-3 with the remaining 27% (11 appeals) taken by private attorneys, of these 5 (45%) had a successful outcome”, says Legal Aid SA National Operations Executive, Brian Nair.

Below are some of the appeal cases handled by Legal Aid SA.

Appeal 1:

Legal Aid SA’s Mthatha Justice Centre acted in the matter of Mbaba v Mbaba in the SCA (474/2012) in the Supreme Court of Appeal of South Africa.

This case demonstrates how the application of old, authoritarian customary laws in most rural communities greatly affects the rights of women, placing them in a more vulnerable position.

Legal Aid SA only became involved after an appeal date had already been allocated and we had to work under pressure to get the respondent’s case ready for hearing.

The matter was about the locus standi of the appellant who claimed that she, and not the respondent was the customary wife of the deceased. The respondent was the one living with the deceased at the time of his death, but the appellant was the mother of the first born child of the deceased. In our heads of argument we referred the SCA to the (then unreported) Constitutional Court case of Modjadji Florah Mayelane v Mphephu Maria Ngwenyama and Another that confirmed in the finding that the Recognition Act does not nullify the second marriage if the first wife does not consent, although the Constitutional Court did overrule the SCA’s decision of whether the second marriage without consent was valid based

on the practice of that group and the development of the customary law. Consequently the SCA asked that further affidavits be filed on the customary law practice where the parties reside. The evidence obtained from the headman was not that in the area where the deceased married, polygamy is not practiced (but for one very old man) nor is it encouraged as they saw this practice against the best interest of women or children.

“We were successful in the appeal. Our success is however not necessary in winning the court case, but rather the fact that we were alerted that people’s lives are disrupted by the fact that the rural community is unaware of the changes in law brought about by Recognition of Customary Marriages Act 120 of 1998 and the development of the customary law in line with the Constitution,” says Legal Aid SA spokesperson, Mpho Phasha. An example is that previously a customary marriage could be dissolved informally, but since 2000, only a divorce court can dissolve a customary marriage.

Consequently after the court case, Legal Aid SA decided to bring these issues closer to the rural people. A workshop was arranged at Canzibe, which was attended by the Chief and his headman as well as members of the community (consisting mainly of women), who were unaware of the law. At this workshop we also touched on other issues, e.g. the right to marry civilly and without the payment of labola, the practice of ukuthwala where young girls are “married” against their will, the right of illegitimate children to maintenance and inheritance, the right of same sex persons to get married. Some of these issues raised a lot of emotion. At the end the Chief said that they were thankful for our workshop and undertook, where their practices were not in line with the constitution, to change.

“We hope to follow up on this workshop and roll it out to other areas, but will only be successful if we have the buy-in of the traditional leaders,” said Phasha. He adds that the case highlighted the dire need for information to be passed onto rural communities. “We will continue to explore ways to get information to communities.

Appeal 2:

Advocate Mornay Calitz, Senior Litigator from Legal Aid SA represented the appellant, David Sithole in his Appeal to the Supreme Court of Appeal in Bloemfontein during March 2013. (Sithole v The State 604/12 [2013] ZASCA 55). The appellant was convicted in the regional court during 2002 on a charge of robbery with aggravating circumstances. He was sentenced to 15 years’ imprisonment after the regional magistrate found no substantial and compelling circumstances. His appeal against both the conviction and sentence to the North Gauteng High Court failed in 2006. Leave to appeal to the SCA was granted

during September 2011. The appeal was mainly about whether the appellant was properly convicted of the charge against him. The SCA also addressed the issue of whether he had a substantively fair trial.

The facts were that the complainant was on her way to visit a cousin, when she was approached by two men, one armed with a firearm. They robbed her of her cellphone. Two people claimed that they saw the incident and claimed that they knew the robber who used the firearm. They told the complainant that he used to exercise at the nearby gymnasium. The complainant's version was that she saw the appellant walking past her to the gymnasium and she identified him and he was later arrested. The appellant's version was an alibi. He denied that he was involved in the robbery incident and said that he was at work on that day. The trial court found that the state had proved the appellant's guilt beyond a reasonable doubt and therefore rejected his version.

On appeal, the state contended in its heads of argument that the appellant had been wrongly convicted and that he had not received a fair trial. The state confirmed this at the hearing as the state's case against the appellant rested on the evidence of the identification of a single witness. The court held that the magistrate accordingly erred. As far as the appellant's version was concerned, it appears that the magistrate gave it only cursory and superficial consideration. The magistrate did not follow the rules of assessing the appellant's evidence in the context of all the evidence to determine whether his defence was reasonably possibly true. The SCA held that a court cannot simply reject an accused's version because it finds the prosecution witnesses to be credible. The SCA highlighted a few irregularities that occurred during the trial. These were that the magistrate failed to inform the appellant of his constitutional right to choose and be represented by a legal practitioner; the magistrate failed to assist the unrepresented appellant during the trial, the magistrate was biased against the appellant by making statements before the state had closed its case. In light of all of the above the appeal was upheld and the conviction and sentence set aside.

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Issued by the Communications Department of Legal Aid South Africa. For more information, please contact the National Spokesperson, Mpho Phasha on 011 877 2081. Visit our website at www.legal-aid.co.za or call the Legal Aid Advice Line on 0800 110 110.