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Government Notice

OFFICE OF THE PRIME MINISTER

No. 98

1990

PROMULGATION OF ACT OF THE NATIONAL ASSEMBLY

The following Act which has been passed by the National Assembly and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 29 of 1990: Legal Aid Act, 1990.

ACT

To provide for the granting of legal aid in civil and criminal matters to persons whose means are inadequate to enable them to engage practitioners to assist and represent them; and to provide for matters incidental thereto.

(Signed by the President on 12 December 1990)

BE IT ENACTED by the National Assembly of the Republic of Namibia, as follows:-

Definitions.

1. In this Act, unless the context otherwise indicates -

“Director” means the Director of Legal Aid appointed under section 3;

“legal aid” means the legal aid referred to in section 2;

“lower court” means any court established under the provisions of the Magistrates’ Court Act, 1944 (Act 32 of 1944);

“Minister” means the Minister of Justice;

“practitioner” means an attorney or advocate authorized under any law to practise as such and who is not employed in the public service;

“prescribe” or “prescribed” means prescribe or prescribed by regulation;

“this Act” includes the regulations made thereunder.

Extent of legal aid.

2. (1) Legal aid shall consist of -

- (a) the assistance of a practitioner, including assistance usually given in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and
- (b) representation in any court.

(2) Subject to the provisions of this Act -

- (a) the fact that assistance or representation is by way of legal aid, shall not affect the relationship between, or the rights of, practitioner and client or any privilege arising out of such relationship; and
- (b) the rights granted by this Act to a legally aided person shall not affect the rights or liabilities of any other parties to any proceedings or the principles on which the discretion of any court is normally exercised.

Appointment of Director of Legal Aid, legal aid counsel and legal aid assistants.

3. (1) Subject to the laws governing the public service, the Minister -

- (a) shall appoint a Director of Legal Aid who shall exercise such powers and perform such functions and duties as may be conferred or imposed upon the Director by this Act;
- (b) may appoint such other persons as legal aid counsel or legal aid assistants as are necessary to assist the Director in the administration of this Act.

(2) No person shall be appointed under subsection (1) -

- (a) as Director or legal aid counsel, unless he or she possesses a qualification in law, whether obtained within or outside Namibia; or
- (b) as legal aid assistant, unless he or she has received or is receiving tuition in law, whether within or outside Namibia,

which, in the opinion of the Minister renders him or her suitable for appointment in such capacity.

Act No. 29, 1990

LEGAL AID ACT, 1990

Performances of functions by Director and Legal Aid Counsel.

4. (1) Subject to the provisions of section 12, the Director shall, whenever he or she grants legal aid to a person under this Act, provide that person with such legal aid as may be required, unless the matter in question is allocated by the Director to a practitioner under section 6.

(2) Notwithstanding the provisions of any other law, the Director or any legal aid counsel, acting in accordance with the general or special directions of the Director, shall, for the purposes of providing legal aid to any person under subsection (1) in any matter -

(a) be entitled to perform all acts normally performed by an attorney in the discharge of his or her functions in a similar case, including any act which may in terms of any law be required to be performed only by an attorney;

(b) have the same right of audience before any court as an advocate.

Right of audience of legal aid assistant.

5. Every legal aid assistant shall, notwithstanding that he or she is not a practitioner, be entitled to appear for and represent any legally aided person in any civil or criminal proceedings before a magistrate's court.

Legal practitioners.

6. (1) The Director may allocate to any practitioner any matter in respect of which legal aid has been granted by the Director under this Act and such practitioner shall be entitled to the appropriate prescribed fees for his or her services.

(2) The Director may at any time dispense with the services of any practitioner to whom a matter has been allocated, except where legal aid has been granted in terms of section 12.

Legal aid committees.

7. (1) The Minister may in respect of any district or area determined by the Minister -

(a) establish a legal aid committee; or

(b) designate any officer in the Ministry of Justice,

for the purpose of assisting the Director, subject to the directions of the Director, in connection with applications for legal aid in the district or area concerned.

(2) A legal aid committee shall consist of so many members as the Minister may determine and who shall be appointed by the Minister.

(3) A member of a committee who is not an officer in the public service shall be paid such allowance as may be determined by the Minister after consultation with the Public Service Commission.

Legal aid in the High Court.

8. (1) Whenever any lower court commits an accused for trial before the High Court and such lower court is of the opinion that the accused has insufficient means to enable him or her to engage a practitioner to represent him or her, the court which commits such person shall recommend to the Director that legal aid be granted to such accused for the purposes of the trial.

(2) If an accused before the High Court is not legally represented and the Court is of the opinion that there is sufficient reason why the accused should be granted legal aid, the Court may issue a legal aid certificate.

Legal aid in lower courts.

9. (1) Whenever -

(a) in a trial before a lower court an accused who is not legally represented, is charged -

(i) with an offence specified under subsection (2); or

(ii) with an offence which is not so specified and the lower court considers that, having regard to all the circumstances of the case, it is in the interest of justice that the accused should be represented;

(b) at a preparatory examination held by a lower court under the Criminal Procedure Act, 1977 (Act 51 of 1977), the court considers that, having regard to all the circumstances of the case, it is in the interest of justice that the accused should be represented at the preparatory examination,

the court shall, if, in its opinion after inquiry, the accused has insufficient means to enable him or her to engage a practitioner to represent him or her, recommend to the Director that legal aid be granted to the accused for the purposes of such trial or preparatory examination.

(2) The Minister may by notice in the *Gazette* specify any offence for the purposes of subsection 1.

Powers and duties of Director in criminal cases.

10. (1) The Director -

- (a) shall grant legal aid to any person in respect of whom a legal aid certificate has been issued under section 8(2);
- (b) may grant legal aid to any person in respect of whom a recommendation has been made by a court under section 8(1) or 9(1).

(3) Any person charged with an offence may apply to the Director for legal aid and if the Director is of the opinion that -

- (a) having regard to all the circumstances of the case, it is in the interest of justice that such person should be legally represented; and
- (b) such person has insufficient means to enable him or her to engage a practitioner to represent him or her,

the Director may grant legal aid to such person.

Legal aid in civil matters.

11. (1) Any person who wishes to procure legal aid for the purpose of any civil proceedings may apply therefor to the Director.

(2) Where application has been made for legal aid in terms of subsection (1), the Director may, if in his or her opinion -

- (a) the applicant has reasonable grounds for instituting or defending, or otherwise becoming a party to, the proceedings;
- (b) it is in the interest of justice that the applicant should be legally represented; and
- (c) the applicant has insufficient means to enable him or her to engage a practitioner to represent him or her,

grant, on such terms and conditions as the Director may determine, legal aid to the applicant for the purposes of such civil proceedings or in relation to any aspect or part of such proceedings.

Legal aid in civil proceedings where the State is a party.

12. (1) A court may at any time issue a special aid certificate to any person who is a party in any civil proceedings, whether at first instance or at appeal, in which the State is a party if the court is of the opinion that -

- (a) it is in the interest of justice that such person should be represented by a practitioner other than the Director; and
- (b) such person has insufficient means to enable him or her to engage a practitioner to represent him or her.

(2) The power conferred by subsection (1) may be exercised by a court whether or not legal aid has been applied for or granted under any other provision of this Act.

(3) The court may, when it issues a special aid certificate under this section, designate one or more practitioners with his or her or their consent, and the Director shall thereupon allocate the representation of the person concerned to the practitioner or practitioners so designated.

(4) Where a special aid certificate has been issued under this section, the court may order the legally aided person to contribute to the costs of the legal aid afforded to him or her to such extent as the court may deem just and reasonable having regard to that person's means.

Legal aid in appeals.

13. (1) Any person -

- (a) convicted of an offence who intends to appeal against his or her conviction or any resultant sentence or order;
- (b) who intends to appeal against any final judgment, rule or order of a court in any civil proceedings;

- (c) who becomes a respondent in an appeal in any criminal or civil proceedings,

and who wishes to procure legal aid for the purposes of such an appeal, may apply therefor to the Director.

(2) Where application has been made for legal aid in terms of subsection (1), the Director may, if in his or her opinion -

- (a) the applicant has reasonable grounds for noting or opposing the appeal;
- (b) it is in the interest of justice that the applicant should be represented in the appeal; and
- (c) the applicant has insufficient means to enable him or her to engage a practitioner to represent him or her,

grant legal aid to the applicant for the purposes of such appeal.

Courts may direct the grant of legal aid for appeals.

14. Where, in any appeal before the High Court or the Supreme Court, any party to the appeal is not legally represented and the Court is of the opinion that a legal question of public importance is likely to arise in the appeal, the Court may issue a legal aid certificate and the Director shall thereupon grant legal aid to that party for the purposes of the appeal.

Contributions towards legal aid.

15. (1) The Director may, in granting legal aid to any person under this Act, subject to such conditions as may be prescribed, require that person to contribute to the costs of such legal aid to such extent as the Director may deem to be just and reasonable having regard to that person's means.

(2) Any amount remaining unpaid in respect of a contribution required to be made under subsection (1) shall, for the purposes of any proceedings for recovery, be deemed to be a debt due to the Government.

Ascertainment of means.

16. (1) In ascertaining the means of any person for the purposes of this Act, that person's income and the value of his or her movable and immovable property, but excluding the value of -

- (a) any dwelling-house owned and occupied by him or her;
- (b) any household furniture owned by him or her;
- (c) any tools or implements used by him or her for the purpose of his or her trade,

shall be taken into account.

(2) In assessing a person's means, such of his or her commitments as may be prescribed shall be deducted from the resources which would otherwise be his or her means.

Costs awarded to legally-aided persons.

17. (1) Where a court awards costs to a legally aided person in any proceedings, such costs shall be the costs which would have been payable if the services performed under legal aid had been performed by a practitioner on the instruction of a client without benefit of legal aid, and such costs shall be taxed accordingly.

(2) Notwithstanding that costs referred to in subsection (1) have been awarded to the legally aided person, such costs shall be payable to the Director.

(3) For the purpose of the recovery of any costs payable to the Director in terms of subsection (2), the Director may take all such steps and pursue all such remedies as could have been taken or pursued by the legally aided person to whom costs were awarded and the costs of taking such steps or pursuing such remedies may be recovered by the Director.

(4) Costs paid to the Director in terms of this section shall be paid into the State Revenue Fund.

(5) Where costs awarded by a court have been paid to the Director in terms of subsection (2), the Director may refund to the legally aided person the amount, or such portion thereof as the Director considers just and equitable, which such person contributed in terms of section 15.

State not liable for costs.

18. (1) No order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings.

Parties to submit to arbitration in certain cases.

19. Where in any proceedings or contemplated proceedings all the parties thereto apply for legal aid in terms of this Act, and the Director is of the opinion that the dispute is of a nature which could properly be the subject of arbitration, the Director may, as a condition of the granting of legal aid, require the parties to submit the dispute to arbitration and may make such arrangements for the purpose of such arbitration proceedings as the Director may deem fit.

Termination of legal aid.

20. The Director may at any time for any reason which the Director considers sufficient, terminate any legal aid granted under this Act for the purposes of any civil proceedings: Provided that, in the case of legal aid granted under section 12, the Director shall do so only with the leave of the court.

Legal aid to persons acting in representative capacity.

21. Where application is made for legal aid by a person acting in a representative capacity for the benefit of a deceased estate or a trust or any person who is subject to a legal incapacity and such representative is capable of instituting or defending proceedings in such capacity, the Director may, grant legal aid to such estate, trust or legally incapacitated person if, in his or her opinion -

- (a) the representative concerned has reasonable grounds for instituting or defending the proceedings; and
- (b) the means of the estate, trust or legally incapacitated person are insufficient to enable the representative concerned to engage the services of a practitioner.

Legal aid for purposes of proceedings before a tribunal.

22. (1) Notwithstanding anything to the contrary contained in this Act, legal aid may be granted to any person for the purposes of any proceedings held before a board, council, body or any other authority in terms of any law, if such person may, in terms of the law concerned, be legally represented at such proceedings.

(2) The provisions of section 11 shall *mutatis mutandis* apply in respect of legal aid contemplated in subsection (1).

Person may refuse or dis-
pense with legal aid.

23. (1) Notwithstanding anything to the contrary contained in this Act any accused person to whom legal aid has been granted under any provision of this Act may before the commencement of, or at any time during, the trial in respect of which the legal aid was granted, refuse to make use or further use of the legal aid granted or available to him and may conduct his or her case either personally or by a practitioner of his or her choice and at his or her own expense.

(2) If legal aid is refused or terminated in terms of subsection (1), the Director may -

- (a) where the legal aid was granted for the purpose of any civil proceedings, recover from the person concerned the taxed costs, according to the tariff of fees prescribed by the rules of the court concerned, in respect of the legal aid granted before the cancellation thereof, or such part of such costs as the Director may deem just and reasonable to recover in the circumstances;
- (b) where the legal aid was granted for the purpose of any criminal proceedings, retain the amount which the person concerned was required to contribute in terms of section 15 or recover such amount as may remain unpaid in respect of such contribution.

Regulations.

24. The Minister may make regulations in relation to -

- (a) the composition, powers and functions of legal aid committees and the practice and procedure to be observed by such committees;
- (b) the form of any application certificate, or other document which may be required for the purposes of this Act;
- (c) the manner in which the means of any person who may be eligible for legal aid in terms of this Act, shall be computed;
- (d) the manner of payment and recovery of any contribution required under section 15 to be made by a person to whom legal aid is granted;

- (e) reports and information required by the Director for the purposes of this Act to be supplied by any person; and
- (f) generally all other matters which are by this Act required or permitted to be prescribed, or which are necessary or expedient to be prescribed in order to achieve the purposes of this Act.

Restriction of liability.

25. No person, including the State, shall be liable in respect of anything done in good faith in the exercise of a power or the performance of a duty conferred or imposed by or under this Act.

Repeal of Act 22 of 1969, and saving.

26. (1) The Legal Aid Act, 1969 (Act 22 of 1969), is hereby repealed.

(2) Any legal aid granted in terms of the Act repealed by subsection (1) for the purpose of any proceedings which have not been concluded at the commencement of this Act, shall continue to be of force and effect and the provisions of that Act shall, notwithstanding the repeal thereof, apply in respect thereof as if this Act had not been passed.

Short title.

27. This Act shall be called the Legal Aid Act, 1990, and shall come into operation on a date to be fixed by the President by proclamation in the *Gazette*.