

**Speech by Hon Justice Edwin Molahehi**

**Deputy Chairperson of Legal Aid South Africa**

**27 October 2011**

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Greetings The Chief Justice Odoki

Hon Deputy Chief Justice Her Lady Bahegaine

Hon Minister of Justice Otafiire

Hon Attorney General Nyombi

Justices of the Supreme Court, Court of Appeal and the High Court,

Prof Kakooza and Hon Guests.

It is my greatest pleasure and we are humbled to have been invited to this conference. I come with greetings from our Chairperson Judge President Mlambo who over the years has worked with your delegations whenever they visited our country. Our CEO Mrs Vedelankar has also passed her regards and best wishes to the conference and the excellent work that you are doing.

The first visit we had from your country in 2006 was the beginning and a solid foundation for a strong and everlasting relationship between your country and ours and I must say that we are very proud of this relationship and stand firm in ensuring that nothing affects it negatively. We wish to congratulate you with the steps you have taken so far. I learned from last night that we need to have a serious discussion with you about how you successfully grew in such a short period of time in ensuring access to justice in your rural communities.

I humbly stand before you today to share with you the challenges and the success of Legal Aid South Africa. Accepting that the material conditions between your country and ours are not the same I have no doubt in my mind that the basic principles to guide us to access to justice for all are the same.

**Your voice. For justice.**

We share the same vision and values and therefore the mistake of one must assist the other in championing a better future for all in our beloved continent.

For the purposes of this conference I thought it would be useful to share with you our experience of providing legal aid to the indigent since the introduction of our Constitution in 1996.

Legal Aid South Africa derives its mandate to provide legal aid to those who cannot afford private lawyers from the provisions of the Legal Aid Act of 1969.

Legal aid South Africa is state funded organisation, which delivers legal aid services for the indigent for legal aid qualifies. A means test is used to determine whether the applicant. In terms of the governance structure, Legal Aid South Africa has Judge Mlambo as the head of the organisation and its CEO as Mrs Vedelankaar.

In the 1990's the organisation provided legal aid services through a model known as Judicare which in essence entailed the outsourcing of the legal aid services to private legal practitioners at a fee per matter they handled.

The major challenge with this model was accountability, transparency and more importantly the monitoring of the charges which lawyers made. The difficulties ranged from lawyers double booking themselves in a day to multiple charging for travelling to the same court on the same day. These challenges were so serious that they threatened the very existence of the organisation to the extent that at some point closure was considered a serious option. We will revert to other challenges later.

The dictates of the Constitution of 1996, brought with it an increase in the demand for legal aid services and thus called an increase in the budget allocation. The budget allocation increased from R66 million to R225 million in a period of about three years – that is between 1995 and 1998. It should be noted that this is in the context of a population of close to a million, the majority of whom are very poor and illiterate.

The biggest challenge facing the organisation at the time was weak management and poor governance structure. Because of these challenges at

one stage the organisation was faced with the contingency liability in the tune of between R600 million and 1billion.

Faced with these challenges and the Constitutional dictates the organisation had no option but to undertake an extensive transformation process. The transformation process wide ranging as it was, was not limited to addressing the management and governance issue only. It required a total change in the mind set upon which the organisation was originally conceived by the then apartheid government.

The underlying reason for the introduction of legal aid service in South Africa by the apartheid government was to counter the international outcry that followed the banning of political organisations in the 1960's. It may be important to mention that at its inception in 1971 the organisation operated on a budget of R50 000,00. It is also important to mention that there has always been other organisations such as the Legal Resources Centre Lawyers for Human Rights and others that provide quality legal aid to the indigent.

Prior to the crisis in governance and administration which I have referred to earlier the organisation had commenced a debate about the possibility of moving away from the judicare model as the sole mechanism for providing legal aid.

In 1997 with the view to consolidating the idea of moving away from the single model of service delivery the Minister of Justice appointed a committee to oversee the transformation process. By 1999 it was accepted that :

- The administrative structure of the organisation was not coping with the new challenges arising from the dictates of the democratic dispensation.
- The use of judicare was not costs effective
- The expenditure was growing faster than the budget.

The real transformation of the organisation began with the appointment of Hon Judge Navsa of the Supreme Court of Appeal as the chairperson of the

organisation. The current Chairperson was one of the members of the board appointed to look into transforming the organisation into a viable entity. If I may pause and say that an interesting aspect of that board was that it consisted mainly of lawyers and judges who had a very strong background in human rights work and in particular had been involved with organisations which were involved in legal aid services.

In getting down to do its job that board identified the following challenges:

- Lack of skills among the staff
- Over centralisation of administrative functions which led to problems regarding logistics and allocation of resources
- The increase in the demand for legal aid services
- The need to provide legal aid to people who were to appear before the Truth and Reconciliation Commission
- The appointment of the Legal aid to provide legal assistance to people who had lost their rights to land.
- The scope of the work of the organisation was extended by the decision of the Constitutional Court in the case of Sv Makwanyana in 1995 where the Court held that the death penalty was unconstitutional.
- the administrative structures of the Legal Aid Board were inadequate to cope with the volume of work;
- the cost of legal aid was being inflated by Judicare practitioners;
- and the cost of legal aid was growing faster than the budget.

The key challenge was in fact the Constitution which moved away from the welfare and discretionary legal aid provision to the right to legal aid. In this regard section 35(2) (B) of the Constitution reads as follows:

**“Everyone who is detained, including every sentenced prisoner, has the right... to choose, and to consult with, a legal practitioner”.**

By 1999, the Legal Aid South Africa was taking on approximately 200 000 matters per year. In addition, it had a backlog of almost 25 000 Judicare accounts to pay, and an unknown number of accounts still to come.

In a number of instances there was clear abuse of the system by unscrupulous judicare practitioners who double charged for both the work they may have performed including some attorneys claiming multiple trips to the same court for trials on the same day.

With all the above problems there is no doubt that some of you should be asking yourselves why should Legal Aid South Africa be regarded as a leader and champion in the provision of legal aid in our country and probably in the continent. Put differently the question may be what strategies and tactics did we adopt to turn around our challenges into success.

With the commitment of our government to ensuring compliance with its constitutional obligation parliament granted the Legal Aid South Africa an emergency appropriation of R107 million, to address the above problems.

Having received the funding the next question was to ensure that the objective of turning the organisation around was achieved. At this stage an effective and efficient board was already in place. It consisted as I stated earlier of professional from the various stakeholders who were not only committed to the constitutional values of the country but shared in the vision of ensuring that the indigent people received legal aid. I need to pause here and indicate that whilst the board was constituted by people of high standard and ethics they were mainly lawyers and judges. That has since changed in that the board as currently constituted consist of a diverse group of stakeholders in our society. Broadly speaking the representation ranges from NG's, the state represented by the department of justice and legal profession.

Turning to the issue of funding the one challenge that arose from the funding was the obvious question of how to spend it in a manner that ensures that the

objective it was meant for is achieved. The first task of tackling this challenge was to ensure that the human resources capacity was addressed. The issue of human resources came to the fore towards the end of 1999, when all judicare practitioners providing services on behalf of the Legal Aid South Africa in one of the towns withdrew from their matters with the view of putting pressure on Legal Aid South Africa to operate on their terms. This was indeed an unfortunate situation which at some level had a negative impact on the operation of the organisation and great concern to magistrates and judges.

The significance of that experience was that it became clear that the single model of service delivery posed a risk to the organisation and that there was indeed a need to investigate other models of service delivery. It was very clear from this experience that the use of judicare model as the only model to rely on the organisation ran the risk of the possibility of failing in delivering on its constitutional mandate.

It was for this reason that the mixed model of service delivery was introduced, relying on both judicare and in-house lawyer models. The in-house lawyer model delivers over 90% of the services for the organisation. The in-house lawyer model in essence means that the organisation employs its lawyers who on a full time basis perform the function of delivering legal aid services to clients.

In addition to restructuring the service delivery model the organisation focused on technical aspects of the business and operational requirements. This entailed inter alia getting all financial controls in place and functioning efficiently and effectively.

The next phase in the process of transformation entailed developing a vision and mission for the organisation. In considering the mission and vision both the big picture and the details of delivery, within a strong governance framework played a critical role. The main challenge in this regard was meeting the legal obligation of delivering very broad and at times complex legal services.

The second challenge was that of retaining highly qualified professional lawyer and administrators who were disgruntled by the manner in the organisation was run.

The outcome of the deliberations about the above issues resulted in a coherent three-year Strategic Plan 2003, which clarified the organisation's role as being to deliver on the constitutional mandate of providing legal services to ensure access to justice for those who qualified.

The strategic Plan 2003 has since turned the organisation onto a role model for legal aid and public service delivery vehicle. It is the strategic Plan 2003 that increased recognition by government and public of the importance and value adding role plaid by Legal Aid South Africa.

Although the organisation has met its targets and made great strides in extending access and improving quality, these two areas remain priorities.

Every advances in delivery the service at the highest level raises expectation and exposes more work to be done and opportunities for improvement. In addition to extending its footprint to the rural areas that are difficult to serve and where crime levels are high, the Legal Aid South Africa needs to take its part in educating and assisting South Africans with respect to legal issues.

The Legal Aid South Africa also faces the broader challenges of extending access beyond its current mandate, convincing government to provide the funding for it to do so, and in the process working closely with stakeholders to instil confidence in the legal system.

The other method of delivering legal aid in South Africa is pro bono. Whilst in general it has been accepted that pro bono will go a long way to assist in complementing the efforts of Legal Aid South Africa, there is yet to be consensus as to whether private lawyers should be compelled to participate in pro bono. In the Labour Court an interesting pro bono model was recently introduced. The model was conceptualise by the Judge President of the Labour Court, Judge Mlambo. In terms of the model the South African Labour Lawyers Association (SASLAW) has agreed to provide pro bono on a

permanent basis for clients seeking legal aid at the Labour Court. In this respect the Labour Court has availed an office space at the Court for the running of the pro bono programme. The lawyers that specialises in labour law are booked on a daily basis to be at the Labour Court to consult and assist lay persons who wish to litigate in the Labour Court. The model is also based on lawyers volunteering their services and this seems to me to be the basis of its success.

The Legal Aid South Africa has also concluded a corporation agreement with SASLAW to participate jointly in the pro bono services at the Labour Court.

This last point I wish to touch on is the is the issue of legal aid in civil matters. The debate concerning the provision of civil legal aid funded by governments, is a worldwide phenomenon.

In South Africa the debate that has persisted since 2000 has now been put to rest. The best proposition as to why the organisation had the duty to provide civil legal aid was put by our CEO during the course of that debate when she said:

“Anybody who is involved in justice and human rights and wants to promote access to justice will look at the entire bill of rights and say that we must do more”.

The interpretation that the Legal Aid Act and the Constitution requires Legal Aid South to provide civil legal aid has now been accepted by all the stakeholders. Whist the statistics of civil legal aid were not high in the past financial year there are clear indication that some significant progress will be made in the coming year in as far as delivery of civil legal aid is concerned.

The highlights of our success recently has been both having achieved a ten in succession of a clean audit record which was presented recently at our parliament and the establishment of a national call centre which provides legal advice to clients through a free telephone services. This service involves referring clients to various appropriate dispute bodies.

In conclusion

I must add that although we are proud of what we have achieved especially from where we started out – we will be the first one to tell you that we have not achieved everything. That the road is still a long one ahead of us but with more and more countries especially on this Great continent realising that Legal Aid for its citizens is essential the journey will be easier.

Seeing the work the people of Uganda have done in designing a system for legal aid gives us strength and hope. We are inspired by your resolute stand you have taken and wish you the best of luck.

**Thank you**

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