

**COMPLAINT TO THE AUDITOR-GENERAL REGARDING MAJOR  
ONGOING BREACHES OF THE PUBLIC FINANCE MANAGEMENT ACT  
INVOLVING MANY MILLIONS OF RANDS AND OTHER MATERIAL  
IRREGULARITIES INCLUDING CRIMES COMMITTED IN A  
CORRUPTION COVER-UP BY PAST AND CURRENT HIGH OFFICERS  
OF LEGAL AID SOUTH AFRICA**

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I, Anthony Robin Brink, affirm:

1. I am an adult male, 60, an advocate of the High Court of South Africa, admitted to practice on 12 April 1983, and a former magistrate of the District- and Regional Courts, specialising in civil law. I reside at 36 Pearson Street, Eshowe, KwaZulu-Natal. My email address is anthonybrink.sa@gmail.com and my cellphone number is 083 779 4174.

**EXECUTIVE SUMMARY**

2. This complaint identifies major ongoing contraventions of the Public Finance Management Act 1 of 1999 ('PFMA'), some criminal, committed in a cover-up of top-level recruitment corruption at Legal Aid South Africa ('LASA') entailing unauthorised expenditure of around thirty million rands since 2010, hitherto undetected and unreported by LASA's external auditor PWC.

3. The complaint further identifies multiple instances of 'material irregularity' as defined by section 1 of the Public Audit Act 25 of 2004 ('PAA'), some criminal, committed by LASA's top officers prior to and in the course of the cover-up, in which the express wishes of both Parliament and the Justice Minister were defied, to the massive detriment of critical service delivery to the country's indigent.

4. Part Two and other parts of this complaint to follow will detail further material irregularities in the form of procedural and ethical corruption of staff

recruitment at LASA, and further ethical and criminal misconduct in covering it up.

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**The supporting documents referenced herein are accessible online in PDF at [illegal-aid.co.za/AG](http://illegal-aid.co.za/AG). For easy copying, reprinting, transmission by email, and reading on a portable device, copies of this complaint are available in PDF, MS Word, and HTML at the same site.**

## INTRODUCTION

5. The 'biggest law firm on the African continent', as its internet website bills it, LASA enjoys a sterling reputation as a model of good practice and probity in corporate governance, management and financial administration in South Africa, and it is officially lauded as the standard for emulation by other public entities. Then Deputy Minister of Justice and Constitutional Development Andries Nel enthused in 2011: 'The world would be a better place if it were run by Legal Aid'<sup>1</sup> and Minister of Justice and Correctional Services Ronald Lamola

<sup>1</sup> *Business Day*, 12 January 2011.

recently crooned in tune: ‘This is one of the best-run entities of government. We have had clean audits for the past 18 years. There is a well-established culture [of proper corporate governance at LASA]. ... So it is an institution of best practice, not only in SA but in the whole world’.<sup>2</sup>

6. The Auditor-General’s ‘clean audits for the past 18 years’ have generated the universal impression that LASA is ‘squeaky clean’<sup>3</sup> and have served to ‘beatify’ it and give it a ‘saintly status’.<sup>4</sup> In fact, as this complaint will demonstrate, LASA is profoundly corrupt. Under the stewardship of former Board chairperson Dunstan Mlambo JP and former CEO Vidhu Vedalankar (both of whom retired in 2019)<sup>5</sup> and with the active complicity of Chief Legal Executive Patrick Hundermark (now also a Board member), National Operations Executive Brian Nair (now also a Board member), and Human Resources Executive Amanda Clark, proper corporate governance and the rule of law at LASA seriously broke down, with criminal lawlessness becoming the norm.

7. Chief Operations Executive Jerry Makokoane (now also a Board member) and Chief Financial Officer Rebecca Hlabatau turned a blind eye to the corruption called to their attention, as did Board member Pieter du Rand,<sup>6</sup> then and still representing the Department of Justice and Correctional Services (‘the Department’) on the Board, thus betraying his fiduciary duty to LASA and his watching brief from the Department. Board Secretary Langa Lethiba failed to

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<sup>2</sup> News24, 1 August 2019.

<sup>3</sup> The phrase Chief Justice Mogoeng Mogoeng used ironically in paragraph 104 of *Public Protector v South African Reserve Bank* [2019] ZACC 29 (22 July 2019) in relation to the Reserve Bank as it operated during apartheid.

<sup>4</sup> Against which general danger Mogoeng CJ warned in a talk quoted by *The Mercury* on 18 July 2019: ‘We have got to make it our business not to beatify others at the expense of others, not to make others untouchable, and not to allow anybody, including me, to be awarded an undeserved saintly status.’

<sup>5</sup> Although Mlambo JP and Vedalankar have been succeeded by new chairperson Makume J and new CEO Kola, *brevitas causa* they’ll continue to be cited in this complaint as chairperson and CEO respectively.

<sup>6</sup> Thus all breaching section 15.1.5 of LASA’s Code of Conduct and Ethics (Bundle 2, page 780): ‘All employees must ... report any harmful activity they observe in the workplace’. The correspondence they disregarded will be put up with and treated in another part of this complaint to follow.

inform the Board of the illegalities brought to his attention, thereby preventing it from acting to remedy them.<sup>7</sup>

8. The wholesale corruption at LASA addressed in this complaint<sup>8</sup> had its beginning in non-executive<sup>9</sup> Board chairperson Mlambo JP's illegal intrusion into and interference with senior professional staff recruitment<sup>10</sup> – in so doing, lawlessly disregarding and flouting LASA's internal regulations precisely governing job candidate selection<sup>11</sup> and approval,<sup>12</sup> which give him zero role or say in such operations and decision-making<sup>13</sup> – and then in participating in an elaborate criminal cover-up of a particular case of ethical recruitment corruption<sup>14</sup> in which he was centrally involved, escalated to the Minister of Justice and Constitutional Development (now the Minister of Justice and Correctional Services, 'the Minister'), to the National Assembly, and to the courts,<sup>15</sup> in a classic instance of the multiplying dynamic of a disintegrating

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<sup>7</sup> See note 7 above.

<sup>8</sup> Given the egregious corruption and ethical turpitude at LASA reported in this complaint, uncovered by a limited investigation only of recruitment corruption and its cover-up, a comprehensive general forensic audit of LASA is likely to uncover much more.

<sup>9</sup> LASA's annual report 2010/11 explains: 'Legal Aid South Africa is governed by a Board of non-executive members commonly referred to as the Board of Directors. ... COMPOSITION OF THE BOARD AS AT 31ST MARCH 2010: JUDGE DUNSTAN MLAMBO ... Chairperson of the Board of Directors for Legal Aid South Africa since October 2002.' Bundle 2, page 756. LASA's annual report 2011/12 sets out the 'Role and Function of the Board of Directors': 'The Board ... is responsible for providing strategic direction and leadership, ensuring good corporate governance and ethics, determining policy, agreeing on performance criteria and delegating the detailed planning and implementation of policy to the Management Executive Committee.' Bundle 2, page 1053, section 2.2.3. As chairperson Mlambo JP explained in LASA's annual report 2010/11, the Board of non-executive directors plays an 'oversight role'. Bundle 2, page 1056.

<sup>10</sup> President Cyril Ramaphosa deplored this common evil at public entities in his State of the Nation Address on 16 February 2018: 'We have found ... that board members get involved in operational measures. ... We will remove board members from any role in [them].'

<sup>11</sup> Per LASA's Policies and Procedures on Recruitment, Induction, Probation and Relocation. Bundle 1, pages 228–34.

<sup>12</sup> Per LASA's Approval Framework. Bundle 1, pages 225–7.

<sup>13</sup> Besides approving the appointment of LASA's CEO, COO and NOE, in committee with the rest of the Board. Bundle, page 226, section 8.2.1.

<sup>14</sup> In favour of a professional colleague of his – to be canvassed in another part of this complaint to follow.

<sup>15</sup> The Judicial Conduct Committee ('JCC') of the Judicial Service Commission (JSC) is currently seized with eight gross misconduct complaints made under section 14 of the Judicial Service Commission Act 9 of 1994 against Board chairperson Mlambo JP concerning *inter alia* (a) his active collusion in and connivance at CEO and information officer Vedalankar's (nominal, actually Hundermark's) persistent illegal and unconstitutional suppression of records duly requested under section 18 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') since 2010, and (b) his dishonest and deceptive false 'confidential' written report to the Minister and then to the Justice Portfolio Committee to successfully pervert their separately and

cover-up, starting with lies and eventually spiralling out into the commission of crimes. All this will be closely detailed with reference to supporting documents in this and other parts of this complaint to follow.<sup>16</sup>

9. Over the past decade, LASA's top officers have determinedly obstructed the investigation and exposure of their procedural, ethical and criminal corruption by scorning LASA's information transparency obligations imposed by section 32 of the Constitution, and by repeatedly falsely reporting<sup>17</sup> to evade being held to account for it;<sup>18</sup> and then, as this passive obstruction strategy was failing, by endeavouring to end the investigation with a multi-pronged attack to neutralise this investigator by moving to destroy him professionally, strangle him financially, and have him deprived of his essential basic civil rights guaranteed

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independently instituted enquiries (i) into the top-level recruitment corruption at LASA in question, in which report he advanced demonstrably objectively false reasons for the abortion of the Pietermaritzburg, Durban and Mthatha Senior Litigator recruitments (one false reason later retracted after being refuted and exposed, the other substituted with novel contradictory reasons); and (ii) into the said illegal and unconstitutional suppression of records exposing this corruption – later forced out of LASA through multiple pre-trial document discovery processes and multiple applications to court under section 78 of PAIA, the first five of them conceded by LASA at court. The complaints, Mlambo JP's response to them, and the complainant's invited comments on it can be accessed online at [illegal-aid.co.za/JSC](http://illegal-aid.co.za/JSC). Further complaints to the JCC against Mlambo JP will be lodged upon LASA's release, under court order, of other duly requested documents that Hundermark has illegally and unconstitutionally refused, initially in the name of his former immediate subordinate, Legal Executive Thembile Mtati, and others, but more recently, since Mtati's resignation, by Hundermark directly and personally.

<sup>16</sup> The submission of this complaint, commenced years ago, has long been delayed by Hundermark's determined concealment of incriminating records needed to complete it, followed by meritless, dilatory opposition to numerous necessary applications to court brought to compel their production, and by corruptly-motivated litigation he unsuccessfully brought to derail an application to compel full and proper compliance with his surrender treaty recording his total capitulation to the said first five applications – to be detailed in a another part of this complaint to follow, regarding irregular, fruitless and wasteful expenditure. Several further High Court applications to compel Hundermark's surrender of subsequently requested records are pending in the High Court. To avoid further delay, this complaint will be presented in separate parts, as and when the illegally and unconstitutionally withheld documents are disgorged by court order.

<sup>17</sup> Annually to the South African Human Rights Commission ('SAHRC') under section 32 of PAIA, for the misinformation of the SAHRC's annual section 84 reports to the National Assembly on public body compliance with PAIA, and in a special confidential report submitted to the Justice Portfolio Committee in June 2011. In this fraudulent manner, LASA has misinformed the National Assembly about its compliance or otherwise with PAIA requests, and has defeated its constitutional oversight function, thereby evading being held to account for hiding information illegally and unconstitutionally. All this is comprehensively dealt with in a 'Special Report' on LASA's chronic PAIA delinquency filed with the SAHRC in late 2016, and is further described in court papers in litigation subsequently launched under PAIA to compel LASA's delivery of duly requested records. The 'Special Report' and the said court papers are accessible online at [illegal-aid.co.za/PAIA](http://illegal-aid.co.za/PAIA).

<sup>18</sup> As then Board member Ela Gandhi put it appositely in *The Mercury* on 23 November 2011, 'It's only when people have something they are not proud of that they try to hide things.'

and entrenched by sections 32 and 34 of the Constitution, i.e. to access information held by the state and to approach the courts to compel its production when in a corruption cover-up it's illegally and unconstitutionally suppressed.<sup>19</sup>

10. Detailed and vouched in this complaint, the continuing pervasive, systemic corruption in LASA's top echelons has metastasized through virtually the entire governing- and national management structures, with audacious, confident, high-toned, practised lawyerly mendacity having become normal in engagement with their executive and oversight authorities, evincing a complete collapse of ethical standards among them. Indeed, detailed separately in a complaint currently pending before the Judicial Service Commission, LASA's most senior officers' brazen corruption and contempt for the law has reached such gross proportions that it has even polluted the judiciary.<sup>20</sup>

#### **PROVISIONS OF THE PFMA, THE PAA, AND THE CONSTITUTION GENERALLY RELEVANT TO THE COMPLAINT**

11. Section 3(1)(b) of the PFMA provides that the Act 'applies to ... public entities listed in Schedule ... 3',<sup>21</sup> including '49. Legal Aid Board' (now LASA); and section 2(1) of the Legal Aid South Africa Act 39 of 2014 accordingly describes LASA as 'a national public entity as provided for in the Public Finance Management Act'.

12. Section 2 of the PFMA states that 'The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.'

13. Under section 1 of the PFMA, "**executive authority**" ... (c) in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls' – *in casu*, the Minister.

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<sup>19</sup> All this will be detailed in another part of this complaint to follow.

<sup>20</sup> Supported by the hard written evidence of this discovered in a court file, the complaint to the JSC about it, the judge's response, and the complainant's invited comments on it, identifying the likely perpetrator on the probabilities, can all be accessed online at [illegal-aid.co.za/JSC](http://illegal-aid.co.za/JSC).

<sup>21</sup> Here, as elsewhere in this complaint, ellipsis in quotation is the complainant's.

14. Section 4 of the PAA, 'Constitutional functions', provides in subsection (3):

The Auditor-General may audit and report on the accounts, financial statements and financial management of–

(a) any public entity listed in the Public Finance Management Act[.]

15. Under section 1 of the PAA, 'Definitions',

**“material irregularity”** means any non-compliance with, or contravention of, legislation, fraud, ... or a breach of fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in ... the misuse ... of a public resource or substantial harm to a public sector institution or the general public[.]

16. Section 5(1A) of the PAA provides:

The Auditor-General may, as prescribed, refer any suspected material irregularity identified during an audit performed under this Act to a relevant public body for investigation, and the relevant public body must keep the Auditor-General informed of the progress and final outcome of the investigation.

17. Section 5(1B) provides:

The Auditor-General has the power to–

(a) take any appropriate remedial action[.]

18. Section 5(3) of the PAA provides:

The Auditor-General may, in the public interest, report on any matter within the functions of the Auditor-General and submit such a report to the relevant legislature and to any other organs of state with a direct interest in the matter.

19. Section 5A of the PAA requires:

The Auditor-General must, within a reasonable time after the issuing of an audit report in terms of section 20, follow up on whether the accounting officer or accounting authority has implemented the recommendations contained in the audit report relating to any material irregularity, within the time-frame stipulated in the audit report.

20. Section 11 of the PAA prescribes that 'Part 3: Accountability' 'applies to all audits of auditees which the Auditor-General – ... (b) opts to perform in terms of section 4(3).

21. Section 15 of the PAA provides:

When performing an audit under section 11, the Auditor-General or an authorised auditor has at all reasonable times full and unrestricted access to–

- (a) any document, book or written or electronic record or information of the auditee which or which reflects or may elucidate the business, financial results, financial position or performance of the auditee;
- (b) ... or
- (c) any staff member or representative of the auditee.

22. Section 20 of the PAA provides:

- (1) The Auditor-General must in respect of each audit referred to in section 11 prepare a report on the audit.
- (2) An audit report must reflect ... an opinion, conclusion or findings on–
  - (a) ...
  - (b) compliance with any applicable legislation relating to financial matters, financial management and other related matters; and
  - (c) reported performance of the auditee against its predetermined objectives.

(3) In addition, the Auditor-General may report on whether the auditee's resources were procured economically and utilised efficiently and effectively.

23. Section 216 of the Constitution, 'Treasury control', provides in subsection (2):

The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

The 'measures established in terms of subsection (1)' mentioned in subsection (2) are *inter alia* 'uniform treasury norms and standards.'

24. LASA's 'serious [and] persistent material breach' over the past decade of 'uniform treasury norms and standards', some criminal, will be particularised with reference to specific contraventions of the PFMA cited and quoted below. A multitude of unlawful material irregularities within the purview of section 1 of the PAA, some criminal, will likewise be detailed in this first part of the complaint and in other parts to follow.

### **LASA'S CREATION OF ITS SENIOR LITIGATOR POSTS, AND ITS REASON FOR DOING SO**

25. In November 2006, LASA CEO Vedalankar, NOE Nair and their Management Executive Committee colleagues submitted a 'Report to Board' in which they proposed 'Increasing Senior Litigation capacity' to remedy LASA's lack of:

professional staff that are senior enough to take on ... cases of a highly complex nature ... It is proposed that we build up such capacity at each province linked to a high court unit. Such senior litigators would be able to undertake more complex work as well as support and mentor our other High Court staff.<sup>22</sup>

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<sup>22</sup> Bundle 2, pages 990–1, paragraph 2.7.

26. Nine such Senior Litigator posts were proposed,<sup>23</sup> for which the motivation recorded there was 'Funding available'.<sup>24</sup>

27. On 24 November 2006, the Board approved the proposal,<sup>25</sup> and the posts were duly created and subsequently advertised.<sup>26</sup>

28. In view of their high population densities and corresponding greater need for them, KwaZulu-Natal and Gauteng were allocated two Senior Litigator posts each.<sup>27</sup> Particularly relevant to the KwaZulu-Natal posts, NOE Nair has pointed out that it's in the 'rural areas' that the 'demand [for] civil legal aid ... was bigger';<sup>28</sup> and chairperson Mlambo JP has 'agreed that there was still much to be done in reaching the rural poor'.<sup>29</sup>

29. At grade LP10<sup>30</sup> (formerly 'level 13'),<sup>31</sup> Senior Litigators are the most 'Senior Professional staff'<sup>32</sup> in LASA's legal professional staff establishment;<sup>33</sup> and LASA classifies a Senior Litigator post as a 'critical position'<sup>34</sup> accordingly.

30. Section 53 of the PFMA provides:

- (1) The accounting authority for a public entity listed in Schedule 3 which is not a government business enterprise must submit to the executive authority responsible for that public entity, at least six months before

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<sup>23</sup> Bundle 2, page 992, item 7.

<sup>24</sup> *Ibid*: page 992, item 7. 'Funding available' noted in the right margin; page 989, second paragraph; and pages 704–6.

<sup>25</sup> Bundle 2, page 702. In paragraph 4.1 of its answer to a pre-trial conference agenda listing facts for formal admission in case LC D529/11, LASA confirmed in October 2011 that 'the Senior Litigator positions were created by Management and approved by the Board'. (More accurately, they were 'proposed' by management. Bundle 2, page 990, paragraph 2.7.)

<sup>26</sup> Bundle 1, page 537.

<sup>27</sup> Bundle 2, page 690.

<sup>28</sup> Bundle 1, page 433, penultimate paragraph.

<sup>29</sup> Bundle 1, page 441, thirteenth paragraph.

<sup>30</sup> Bundle 2, page 1021, paragraph 16.

<sup>31</sup> Bundle 2, page 690.

<sup>32</sup> Bundle 2, page 1036, section 8.2.2 (b).

<sup>33</sup> Bundle 2, page 733: 'through positions such as senior litigator' for 'employees to advance into'.

<sup>34</sup> Bundle 1, page 253. Paragraph 2.2.b of this 'Report to Board' distinguished between 'critical positions' and LASA's many public defender posts serving the lower criminal 'District Courts and Regional Courts.' Paragraph 48.9 of LASA's original response (plea) to the original statement of claim in case LC D529/11 referred in to 'the critical position of High Court [senior] litigator'. In paragraph 43.1 of its answer to the facts listed for admission in the pre-trial conference agenda, LASA 'Agreed' the proposition that 'The Pietermaritzburg Senior Litigator post is "a critical position"'.

the start of the financial year of the department designated in terms of subsection (2) ..., a budget of estimated revenue and expenditure for that financial year, for approval by the executive authority.

- (2) The budget must be submitted to the executive authority through the accounting officer for a department designated by the executive authority, who may make recommendations to the executive authority with regard to the approval or amendment of the budget.

31. In due compliance with section 53(1) of the PFMA, LASA specifically budgets for salaries for all nine of its Senior Litigator posts,<sup>35</sup> and provision in LASA's budgets for the employment of nine Senior Litigators has from inception to date been (i) annually approved by the Minister on the advice of the Department's accounting officer, (ii) voted by the National Assembly, and (iii) received by LASA from the Treasury via the Department's Third Party Funds Directorate.<sup>36</sup>

32. In short, LASA's nine Senior Litigator posts have always been and remain funded; which is to say in plain terms that LASA has always had and still has the money to employ nine Senior Litigators at seats of the High Court around the country.

**THE JUSTICE PORTFOLIO COMMITTEE'S REPEATEDLY EXPRESSED CONCERN ABOUT INADEQUATE LEGAL EXPERTISE AVAILABLE TO THE PUBLIC AT LASA; LASA'S REPEATED CONCESSION OF THE**

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<sup>35</sup> Bundle 3, pages 1073–92: These documents are LASA's consolidated budget applications and its specific budget applications for Senior Litigator salaries over the period February 2010 to October 2013. Duly requested under PAIA, other such budget applications for other years have been illegally and unconstitutionally suppressed by Hundermark to obstruct this corruption investigation, and litigation is pending in the Pietermaritzburg High Court to compel their production (case 5239/18P). Meanwhile the Auditor-General has 'full and unrestricted access to' these further financial records under section 15 of the PAA.

<sup>36</sup> Bundle 3, page 1093. These employment statistics show LASA's employment of six Senior Litigators as at March 2012. (The falsity of the 'frozen' entry for the Durban, Pietermaritzburg and Kimberley Senior Litigator posts is discussed below.) Hundermark is also hiding payment vouchers reflecting the Department's transfer to LASA of its baseline budgets, and High Court litigation is pending to compel their production (case 5239/18P). As said, under section 15 of the PAA the Auditor-General can readily access these records to confirm that all nine of LASA's Senior Litigator posts have always been and still are funded by the Treasury via the Department's Third Party Funds directorate .

**PROBLEM; AND THE JUSTICE PORTFOLIO'S SPECIFIC CONCERN THAT LASA EMPLOY SENIOR LITIGATORS TO REMEDY IT**

33. Six months after the Board resolved to create its new Senior Litigator posts, but before they were advertised, LASA's parliamentary oversight authority at the time, the National Assembly's Select Committee on Safety and Security,<sup>37</sup> pertinently enquired at its meeting with Board chairperson Mlambo JP and CEO Vedalankar on 30 May 2007 'if the LAB [the Legal Aid Board, now LASA] employed senior litigators', in view of a 'complaint' about 'service delivery to the effect that LAB lawyers were inexperienced,' and 'the issue of lawyers being seen as apprentice lawyers'. Mlambo JP responded by admitting, 'The LAB was aware of constant criticism that they employed inexperienced lawyers to do the work.'<sup>38</sup>

34. Again the Justice Portfolio Committee raised its concern about the quality of legal expertise available at LASA when on 5 August 2009 it 'asked if the Board [i.e. LASA] was working on improving public perceptions about itself.'<sup>39</sup> Mlambo JP responded by again conceding that LASA bore 'a legacy' of 'bad public perceptions'.<sup>40</sup> (Mentioned in paragraph 27 above, LASA resolved to create nine new Senior Litigator posts three months later.)

35. Again at its meeting with LASA on 11 October 2010,<sup>41</sup> 'The Committee wanted to know about the experience levels of Legal Aid South Africa practitioners as well as their ability to compete with lawyers from ... private practice'.<sup>42</sup>

36. Again on 3 November 2010, the 'Chairperson [of the Portfolio Committee] remarked that public perceptions of Legal Aid SA were important.' Then Legal Development Executive, now CLE Hundermark repeated Mlambo JP's

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<sup>37</sup> This Select Committee was the precursor of the Portfolio Committee on Justice and Constitutional Development, now named the Portfolio Committee on Justice and Correctional Services.

<sup>38</sup> Bundle 2, page 816.

<sup>39</sup> Bundle 2, page 1048, penultimate paragraph.

<sup>40</sup> Bundle 2, page 1049, first paragraph.

<sup>41</sup> Reported on 12 October 2010.

<sup>42</sup> Bundle 2, pages 960 and 962.

concession that there were still ‘remnants’ of ‘the perception’ of poor legal service delivery by LASA.<sup>43</sup>

37. Again in its pleadings in the Durban Labour Court in 2013, LASA conceded that its ‘public image ... has, for the most part, been negative due to a perception of incompetence and lack of vital court skills.’<sup>44</sup>

38. Again in its Strategic Plan 2012–17, LASA identified among its ‘strategic risks’ the ‘Quality of legal services offered by Legal Aid SA’ and the ‘Attraction and retention of expertise and specialist skills’.<sup>45</sup>

39. Again in its current Strategic Plan 2015–20, LASA confessed this real problem – as well as other serious problems germane to this complaint – now in the most direct and frank terms to date:

The organisation has assessed the strategic risks that have to be mitigated during the strategic plan period and these are as follows: ...

Lack of capacity to deliver on the demand for legal services. ... Poor quality of the legal services provided by the Justice Centres ... Unethical, corrupt or fraudulent practices or acts. ... Lack of engagement with the organisational values and culture by employees.<sup>46</sup>

40. ‘Lack of capacity to deliver on the demand for legal services’ and ‘Poor quality of the legal services provided by the Justice Centres’ as a result of ‘Unethical, corrupt or fraudulent practices or acts’ by LASA’s top officers named in paragraph 6 above, and their ‘Lack of engagement with the organisational values’ of LASA – ethical, legal, and constitutional – prescribed by LASA’s Code of Conduct and Ethics<sup>47</sup> – a lack displayed also by the officers named in paragraph 7 – is precisely the subject of this complaint.

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<sup>43</sup> Bundle 2, page 1003.

<sup>44</sup> Paragraph 9 of LASA’s original response to the original statement of claim in LC D529/11.

<sup>45</sup> Bundle 3, page 1108.

<sup>46</sup> Bundle 3, page 1110.

<sup>47</sup> Bundle 2, pages 770–80.

**THE JUSTICE PORTFOLIO COMMITTEE'S REPEATEDLY EXPRESSED CONCERN THAT VACANT POSTS IN THE JUSTICE CLUSTER BE FILLED, ESPECIALLY CRITICAL POSTS**

41. On 4 May 2010, the Justice Portfolio Committee raised the fact that it:

has several times previously expressed its concern about the negative consequences that vacancies can have for the delivery of justice services. Also, the committee believes that although the use of savings from vacant posts to fund other projects (such as the implementation of the OSD) may be understandable, the practice is potentially risky as it may discourage the filling of posts. ... The Committee recommends that all critical posts be filled as soon as possible, especially given the fact that the Department has the budget for the posts. It intends to continue to monitor progress closely.<sup>48</sup>

**THE JUSTICE MINISTER'S SPECIFIC CONCERN STATED TO LASA'S CHAIRPERSON THAT LASA SHOULD FILL ITS VACANT POSTS AND NOT FREEZE ANY, AND THAT IT SHOULD MAINTAIN ITS DELIVERY OF LEGAL SERVICES AS PLANNED**

42. On 16 July 2010, COO Makokoane<sup>49</sup> submitted a 'Report to Board'<sup>50</sup> recording that:

the Executive Authority [i.e. the Minister] has ... in a meeting with the Legal Aid SA Board Chairperson expressed his wish to have Legal Aid SA service delivery maintained and that DoJ should make funds available to cover the OSD shortfall through the mid-year budget adjustments in September/October 2010.<sup>51</sup>

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<sup>48</sup> Bundle 2, page 820.

<sup>49</sup> LASA volunteered that it was 'a report by the COO to the Board' in paragraph 17 of its original response to the original statement of claim in case LC D529/11.

<sup>50</sup> Bundle 1, pages 253, paragraph 2.2.(a); and page 254, paragraph 4.II.

<sup>51</sup> Bundle 1, page 252, paragraph 1.2.

43. COO Makokoane was referring to the fact that funding for salary increases for legal staff under Phase 1 of the Occupational Special Dispensation (OSD) scheme hadn't been included in LASA's baseline budget for 2010/11, as LASA learned in March 2010;<sup>52</sup> but as undertaken by the Minister to chairperson Mlambo JP, provision for this additional funding was indeed made<sup>53</sup> in the national mid-term budget in October 2010<sup>54</sup> and it was paid to LASA on 15 December 2010.<sup>55</sup>

44. Addressing the Justice Portfolio Committee on 11 October 2010 and informing it that the OSD funding issue had just been resolved with the Minister's assistance by including provision for it in the national mid-term budget, CEO Vedalankar reported the Minister's wishes, originally stated to Mlambo JP, that he 'didn't want' LASA to 'freeze ... posts' and that he'd 'said that we needed to continue with the business'<sup>56</sup> of providing legal services to the country's indigent in accordance with LASA's Strategic Plan 2009–12 by filling LASA's budgeted and funded vacant legal posts.

### **THE EMPLOYMENT OF SENIOR LITIGATORS AS A KEY COMPONENT OF LASA'S STRATEGIC PLAN 2009–12**

45. As LASA explains in various documents, the Board 'is responsible for providing strategic direction ... and delegating the detailed planning and implementation of policy to the Management Executive Committee.'<sup>57</sup> This 'strategic direction' and 'policy' is set out in the Board's Strategic Plan for LASA's future operations; and LASA's annual Business Plan ('also referred to as ...the Annual Performance Plan'),<sup>58</sup> based on the Strategic Plan,<sup>59</sup> sets out the

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<sup>52</sup> Bundle 1, page 236, paragraph 6.

<sup>53</sup> Bundle 2, page 849, last paragraph.

<sup>54</sup> Bundle 2, page 847.

<sup>55</sup> Bundle 2, page 713.

<sup>56</sup> Bundle 1, page 184.

<sup>57</sup> Bundle 2, page 1053.

<sup>58</sup> Bundle 1, page 435, last paragraph.

<sup>59</sup> Bundle 2, page 452, second point.

‘detailed planning and implementation of policy [by] the Management Executive Committee.’<sup>60</sup>

46. The National Treasury states in its ‘Framework for Strategic Plans and Annual Performance Plans’:

Strategic Plans identify strategically important outcomes-orientated goals and objectives against which public institutions’ medium-term results can be measured and evaluated by Parliament ... and the public.<sup>61</sup>

47. LASA states consistently: The ‘Strategic Plan sets a clear Vision and Mission as well as Outcomes and Strategies that the organisation aims to achieve.’ It’s ‘key to Legal Aid South Africa’s operations’ and ‘complies with National Treasury Regulations’, requiring it to ‘outline how it will use its resources optimally to achieve its vision and outcomes.’<sup>62</sup>

48. Section 3.2.1.a of the Charter of LASA’s Board Executive Committee stipulates that ‘approval of the strategy, business plans and annual budgets and any subsequent changes in strategic direction or material deviations in business plans’ at LASA are ‘reserved for Board decision’.<sup>63</sup>

49. Chaired by NOE Nair,<sup>64</sup> LASA’s Legal Services Technical Committee has (per the Legal Aid Guide) the ‘collective responsibility’ for ‘managing the legal services delivery programme’ and ‘the execution of all Board strategy, policies, programmes and plans relating to the legal services delivery programme of the Legal Aid South Africa’.<sup>65</sup>

50. In CEO Vedalankar’s parliamentary presentation titled ‘Briefing of Justice Portfolio Committee 5 August 2009’,<sup>66</sup> a couple of months before she and her fellow management executives proposed that LASA’s Board approve the creation of the new Senior Litigator posts, she mentioned among LASA’s ‘Legal Delivery

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<sup>60</sup> Bundle 2, page 1053.

<sup>61</sup> Bundle 3, page 1113.

<sup>62</sup> Bundle 3, page 1107.

<sup>63</sup> Bundle 3, page 1101.

<sup>64</sup> Bundle 2, page 767, section 2.3.

<sup>65</sup> Bundle 2, page 767–8.

<sup>66</sup> Bundle 1, page 427.

Challenges' its 'Limited capacity to render civil legal aid services'<sup>67</sup> – hence the organisation's resolution in its 'Way Forward' to 'Increase Legal Aid SA's capacity to render civil legal aid services.'<sup>68</sup>

51. LASA elaborated more specifically its lack of capacity to undertake complex, high-level litigation in its draft 'Strategic Plan 2009–2012', issued about a year earlier on 5 September 2008,<sup>69</sup> namely its 'Lack of specialised legal skills' and 'Lack of capacity to provide impact litigation'<sup>70</sup> – which is why the Strategic Plan 2009–12 stated that 'the Legal Aid Board should capacitate for specialised skills'.<sup>71</sup>

52. Accordingly, the objects of LASA's Strategic Plan 2009–2012 in this regard were:

- 'To develop a full appreciation of the civil justice needs of the poor and provide more civil representation';<sup>72</sup>
- 'To undertake targeted impact litigation';<sup>73</sup>
- 'To improve access to justice through impact litigation';<sup>74</sup>
- To 'recruit specialist skills';<sup>75</sup>
- To effect 'increased capacity of LAB ie more legal specialists';<sup>76</sup> and,
- To 'capacitate civil units ie more staff and more supervision'.<sup>77</sup>

53. In September 2009,<sup>78</sup> LASA's Strategic Plan 2009–2012 was presented to the Minister, being LASA's 'executive authority' under section 1 of the PFMA; and on 13 April 2010<sup>79</sup> to the Justice Portfolio Committee, LASA's oversight authority under section 55(2)(b)(ii) of the Constitution.

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<sup>67</sup> Bundle 1, page 426, penultimate paragraph.

<sup>68</sup> Bundle 1, page 429.

<sup>69</sup> Bundle 1, page 444.

<sup>70</sup> Bundle 1, page 445, sections III and IV.

<sup>71</sup> Bundle 1, page 445, section XIV.

<sup>72</sup> Bundle 1, page 446, 'Client & Community'.

<sup>73</sup> *Ibid.*

<sup>74</sup> Bundle 1, page 447, Programme P5.

<sup>75</sup> Bundle 1, page 450, Programme P23.

<sup>76</sup> Bundle 1, page 450, Programme P24.

<sup>77</sup> *Ibid.*

<sup>78</sup> Bundle 1, page 452.

<sup>79</sup> Bundle 1, page 431; and bundle 2, page 821.

54. The Strategic Plan 2009–12 doesn't mention Senior Litigator posts by name, but LASA has expressly acknowledged that the engagement of Senior Litigators was integral to the plan to develop and increase LASA's capacity to deliver expert litigation services to indigent litigants by creating a pool of specialist professionals to attend to complex matters in specialist and High Courts, including the Supreme Court of Appeal and the Constitutional Court.<sup>80</sup>

55. LASA's current Strategic Plan 2015–20 puts a point on it:

To give content to the Constitution through impact litigation – which is able to address Constitutional rights and socio-economic rights and develop jurisprudence on social justice matters.<sup>81</sup>

56. LASA's several advertisements for Senior Litigators in the period 2007–2010 precisely envisaged their conduct of such 'specialised, complex or impact'<sup>82</sup> litigation, and stated LASA's aim to 'Develop the litigation expertise within the LAB by providing individual mentoring and coaching to legal staff, that is, to 'provide support for practitioners in more complex matters',<sup>83</sup> as LASA's annual report for 2009/10 puts it, and, as announced in a press release in March 2012, for 'protecting the rights of women and children' in accordance with LASA's, 'vision as an organisation ... for the implementation of a child-centred justice strategy that ensures the best interests of the child in all legal matters. ... In very complex matters, our Senior Litigators provide support and advice to practitioners that need it.'<sup>84</sup>

57. In their Foreword to LASA's current Strategic Plan 2015–20, Mlambo JP and Vedalankar likewise emphasised 'Priority to civil legal aid assistance in Constitutional rights related matters'<sup>85</sup> – exactly the province of 'professional staff that are senior enough to take on ... cases of a highly complex nature',

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<sup>80</sup> Bundle 2, page 898, section 3; and paragraphs 2.2–3 of LASA's response to paragraph 3.2 of first amended statement of claim in case LC D529/11.

<sup>81</sup> Bundle 3, page 1111, section S4, P4.

<sup>82</sup> Bundle 1, pages 43, 45, 46, and 537; and Bundle 2, page 732.

<sup>83</sup> Bundle 1, page 142, paragraph 153.

<sup>84</sup> Bundle 2, pages 825–6.

<sup>85</sup> Bundle 3, page 1109.

namely 'senior litigators ... able to undertake more complex work'<sup>86</sup> as Vedalankar and her executive management colleagues envisaged in their motivation for the creation of the nine Senior Litigation posts, approved by Mlambo JP and the rest of the Board.

58. Quoted below, LASA would repeatedly vaunt the employment of Senior Litigators as a key achievement in its 'Report on Completion of Strategic Plan 2009–2012', both in the Board's 'Annual Performance Report 2011–12' and in Vedalankar's CEO report for that year.

**THE CONCEALED ILLEGAL ABORTION OF LASA'S STRATEGIC PLAN 2009–12 IN REGARD TO THE EMPLOYMENT OF SENIOR LITIGATORS BEFORE IT WAS COMPLETED, UNLAWFULLY LEAVING A THIRD OF THESE CRITICAL BUDGETED AND FUNDED POSTS VACANT, IN CONTRAVENTION OF THE PFMA, AS THE CONSTITUTIONAL COURT HAS NOTED**

59. In October 2007, four months after Parliament enquired whether LASA 'employed senior litigators',<sup>87</sup> LASA advertised to recruit applicants for appointment to its nine newly created Senior Litigator posts,<sup>88</sup> after which the candidates selected for the Johannesburg, Pretoria, Cape Town and Port Elizabeth posts were approved on 8 December 2008<sup>89</sup> and appointed.<sup>90</sup> The Bloemfontein and Mahikeng posts were filled later on.<sup>91</sup> No appointments were

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<sup>86</sup> Bundle 2, pages 990–1, paragraph 2.7.

<sup>87</sup> Bundle 2, page 816.

<sup>88</sup> Bundle 1, page 537.

<sup>89</sup> Bundle 3, pages 1094 and 1097. Material irregularities in the approval process will be canvassed in another part of this complaint to follow.

<sup>90</sup> Bundle 3, page 1093.

<sup>91</sup> Bundle 3, pages 1073 and especially 1076 compared with pages 1077 and especially 1080. These two budget applications show five Senior Litigator posts were vacant in February 2010, and that the vacancies dropped to three in February 2012, which means two of them were filled after February 2010 (at Bloemfontein and Mahikeng). To obstruct the complainant's investigation and determination of the date(s) on which these latter two appointments were made (sometime after February 2010, well after the irregular abortion of the Pietermaritzburg and Durban recruitments in November 2009; see paragraphs 67 and 68), Hundermark is hiding the records of 'All six Senior Litigator appointments'. These were duly requested on 1 August 2016 under section 18 of PAIA, and after they were illegally and unconstitutionally refused in September, were sued for, along with other documents, two weeks later in October 2016 under section 78 of PAIA (case 11187/16P). The case was eventually argued in the Pietermaritzburg High Court on 30 August 2019, nearly three years later, after being repeatedly held up by

made to the Pietermaritzburg, Durban and Kimberley posts pursuant to the initial advertisement and recruitment process, and LASA readvertised the three posts in 2009.<sup>92</sup>

60. The re-advertisement of the Kimberley post in May 2009<sup>93</sup> failed to attract a suitable applicant,<sup>94</sup> and on 24 March 2010, LASA's Legal Services Technical Committee accepted that the vacant post was 'redundant'<sup>95</sup> since there'd 'never been a demand for' it<sup>96</sup> and resolved to abolish it and transfer its budget to a second Senior Litigator post to be created for the Eastern Cape at Mthatha,<sup>97</sup> on the basis cogently argued by the Regional Operations Executive for the region<sup>98</sup> that 'We currently have one Senior Litigator who is stationed at Port Elizabeth. It is a huge challenge for this one person to provide support to the whole Region' with its 'four High Court seats [at] Port Elizabeth, Grahamstown, Bhisho and Mthatha',<sup>99</sup> the latter three many kilometres distant from Port Elizabeth.

61. The two vacant Pietermaritzburg and Durban posts in KwaZulu-Natal were simultaneously readvertised in June 2009<sup>100</sup> and again two months later in August.<sup>101</sup>

62. Just as they'd done before the original advertisement of the nine Senior Litigator posts in 2007, LASA's responsible management executives duly 'determined [that] a "real" need exists for the position[s] to be filled before [the] process of recruitment [was] initiated'<sup>102</sup> before readvertising the Pietermaritzburg and Durban posts in 2009, in due compliance with their obligation to do so under section 3.1 of Chapter 2 on 'Recruitment' in the Senior

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various dilatory tactics, and reserved judgment is pending. Once they've been disgorged by order of court, the withheld documents will be used in support of further parts of this complaint to follow, concerning several instances of 'material irregularity' as defined by section 1 of the PFMA, including 'fraud'.

<sup>92</sup> Bundle 1, pages 43, 45, and 537; and Bundle 2, page 732.

<sup>93</sup> Bundle 2, page 732.

<sup>94</sup> Bundle 2, page 736, 'Background', second paragraph.

<sup>95</sup> Bundle 2, page 738, paragraph 1.

<sup>96</sup> Bundle 2, page 736, 'Background', first paragraph.

<sup>97</sup> Bundle 2, page 709, paragraph 4.1.7.

<sup>98</sup> Bundle 2, page 738, header; and page 740, final entry.

<sup>99</sup> Bundle 1, page 739, paragraph 2.2.

<sup>100</sup> Bundle 1, pages 43–44.

<sup>101</sup> Bundle 1, page 45.

<sup>102</sup> Bundle 2, page 789.

Management Services Public Service Handbook<sup>103</sup> ('SMS Handbook') issued by the Department of Public Service and Administration. LASA's own 'Policies and Procedures on Recruitment, Induction, Probation and Relocation'<sup>104</sup> ('Recruitment code') states its conformity with the SMS Handbook: 'This policy and procedure aims at ensuring that appropriate recruitment procedures are followed, in line with statutory legislation and business practices.<sup>105</sup> ... [It] provides the Legal Aid Board with clear guidelines to be followed when a vacancy exists.'<sup>106</sup>

63. Section 3.3 of the SMS Handbook requires that such responsible management executives ensure that 'the position is budgeted for'<sup>107</sup> and Note 17 of LASA's Approval Framework applicable at the time mandated consistently: 'It is the responsibility of the line function Executive to ensure that such [appointment] is provided for in the budget and MTEF and that a vacancy exists in respect of the post concerned.'<sup>108</sup>

64. The 'line function Executive'<sup>109</sup> in regard to Senior Litigator posts is NOE Nair, and before the recruitment processes for the Pietermaritzburg and Durban Senior Litigator were recommenced in 2009, he would have duly confirmed that the two posts had been budgeted for – as indeed LASA's recruitment/vacancy/budget statistics for November 2009<sup>110</sup> show they were.

65. Four of the candidates attracted by the re-advertisement of the Pietermaritzburg and Durban Senior Litigator posts in 2009 were shortlisted;<sup>111</sup> and on 12 November 2009<sup>112</sup> they were duly interviewed by a duly constituted selection panel of LASA's most senior lawyers in the region,<sup>113</sup> following which

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<sup>103</sup> Bundle 2, pages 787–801.

<sup>104</sup> Bundle 2, page 717.

<sup>105</sup> Bundle 1, page 228, section 1.1.2.

<sup>106</sup> Bundle 1, page 228, section 1.1.3.

<sup>107</sup> Ibid.

<sup>108</sup> Bundle 2, page 1040.

<sup>109</sup> Bundle 1, page 19.

<sup>110</sup> Bundle 2, pages 1028 and 1029: 'Vacant' and 'Budget' columns.

<sup>111</sup> Bundle 1, page 245.

<sup>112</sup> Bundle 1, page 244. The date of the interviews is incorrectly recorded on the recommendation report as 6 November 2009; in fact they were held on the 12th.

<sup>113</sup> Bundle 1, page 248.

two suitably qualified and experienced candidates were duly and unanimously selected and recommended by the panel, one for each of the Pietermaritzburg and Durban posts<sup>114</sup> for which they'd respectively applied.<sup>115</sup>

66. In sum, the selection and recommendation process was conducted impeccably properly in compliance with LASA's Recruitment code and with similar official codes of recruitment practice in the public sector observed by LASA.<sup>116</sup>

67. The two candidates duly recommended for the Pietermaritzburg and Durban posts were not appointed, however, and the approval process to finalize their recruitments governed by the Approval Framework<sup>117</sup> was silently aborted by national-level officers of LASA,<sup>118</sup> no reason initially given.<sup>119</sup>

68. In a confirmatory affidavit put up in legal proceedings for the true information of the trial judge, NOE Nair corroborated<sup>120</sup> then Corporate Services

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<sup>114</sup> Bundle 1, page 247, paragraph 6.

<sup>115</sup> Bundle 2, page 827.

<sup>116</sup> The irregular manner in which the selection panel framed its recommendations of the two candidates after duly selecting them will be discussed in another part of this complaint to follow, as will the many unlawful irregularities committed by LASA's national executives in the matter, *inter alia* by unlawfully gerrymandering the qualifying criteria for the posts in a failed attempt to bias the process in favour of one of the applicants, Ngcamu AJ (as he used to be), a long-time judicial colleague of LASA chairperson Mlambo JP, who was then head of the Labour- and Labour Appeal Courts, and who'd repeatedly got him appointed as an acting judge of the Labour Court over a period of about six years prior to the interviews. To be discussed in another part of this complaint to follow, this long suppressed, determinedly concealed, critically relevant information was finally forced out of LASA through PAIA litigation in April 2016, years after the trial of and judgment in the misconceived, correctly dismissed labour action mentioned above (LC D529/11), which had been wrongly founded on unfair discrimination.

<sup>117</sup> Bundle 2, page 1036. Under section 8.2.2.b of the Approval Framework, the NOE (Nair) has 'Final approval' authority, provided that the CEO (then Vedalankar) 'Must agree' with the appointment.

<sup>118</sup> To be identified in light of relevant documents in another part of this complaint to follow.

<sup>119</sup> Bundle 1, page 19. This is a letter by NOE Nair on 3 August 2011, under pressure of the complainant's enquiry more than seven months after the silent abortion of the Pietermaritzburg and Durban Senior Litigator recruitments, alleging that 'the recruitment process to finalise the appointments for all vacant Senior Litigator posts were [*sic*] put on hold due to various reasons. I can now confirm we will not be proceeding with the filling of any of these posts.' The mendacity of Nair's first allegation will be exposed in another part of this complaint to follow. The mendacity of his second allegation is exposed in paragraph 88 below; in sum, Nair, Vedalankar and Clark have all admitted on oath that no record whatsoever exists to show that LASA duly took any such decision not to fill the posts. Discussed in paragraphs 83–5 below, such a decision would anyway have been *ipso facto* unlawful under the PFMA, as the Constitutional Court confirmed in the *Zungu* case.

<sup>120</sup> Annexure 'DM15' to Mtati's answering affidavit in the application to subpoena Mlambo JP for cross-examination at the trial of case LC D529/11. (LASA neglected to annex this confirmatory affidavit to the answering affidavit provided to the complainant, and only furnished it after the

Executive Thembile Mtati's truthful evidence on affidavit, given *qua* attorney on Mlambo JP's instructions, that the Pietermaritzburg and Durban 'recruitment ... was aborted immediately after the first round of interviews.'<sup>121</sup> In other words (LASA's words), it was 'immediately after the first round of interviews' that 'the decision to abort the recruitment of the Senior Litigator, Pietermaritzburg'<sup>122</sup> was taken, and with it the recruitment process for the Durban Senior Litigator post – off the record, without authority, and therefore unlawfully, as discussed below.

69. Many months later, under persistent, rising pressure to account – ultimately to the Minister and to the chairperson of the Portfolio Committee, both of whom had separately and independently instituted enquiries into the matter, and after that to several courts – LASA's top officers advanced a shambles of manifestly untruthful, shifting, vacillating, radically contradictory, mutually exclusive and destructive excuses, all objectively demonstrably false, for not completing the Pietermaritzburg and Durban Senior Litigator recruitments, and several months later for cancelling the transfer of the Mahikeng Senior Litigator to the new Mthatha Senior Litigator post, for which he'd been selected and recommended in May 2010. Another part of this complaint to follow will quote and refute, in light of LASA's own records, the profusion of chaotically inconsistent changing lies told by LASA's top officers to falsely justify the off-the-record, unauthorized, unlawful abortion of the Pietermaritzburg, Durban and Mthatha Senior Litigator recruitments, and to cover ethical recruitment corruption (jobs for pals) in the case of the Pietermaritzburg post – starting with 'there was a funding shortage at the time that [the complainant] had applied for the Senior Litigator post',<sup>123</sup> i.e. on 2 October 2009,<sup>124</sup> which is to say 'there was no ... funding ... to

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trial. So if it's not in the court file LASA will have a copy, otherwise the complainant can make his copy available.

<sup>121</sup> Paragraph 13.4 of Mtati's answering affidavit in the application to subpoena Mlambo JP in LC D529/11.

<sup>122</sup> Paragraph 28 of LASA's original response to the original statement of claim in LC D529/11.

<sup>123</sup> Paragraph 48.3.1 of LASA's original response in LC D529/11.

<sup>124</sup> Bundle 2, page 827.

fill the vacant posts'<sup>125</sup> – which blatant lie was afterwards substituted with other completely different contradictory blatant lies.

70. The result of the illegal abortion of the three substantially complete recruitment operations for the Pietermaritzburg, Durban and Mthatha Senior Litigator posts, and the unlawful deliberate failure to complete LASA's Strategic Plan 2009–12 regarding the employment of Senior Litigators, is that these then and still budgeted and funded top critical specialist legal professional posts have unlawfully deliberately been left vacant for a decade since the due selection and recommendation of suitable candidates for the Pietermaritzburg and Durban posts in November 2009, and the irregular selection and recommendation of a suitable candidate for internal lateral transfer<sup>126</sup> and appointment<sup>127</sup> to the Mthatha post on 24 May 2010.<sup>128</sup>

71. LASA isn't a government department in the 'public service' according to the definition in sections 1 and 8 of the Public Service Act 103 of 1994, so neither the Public Service Regulations nor the SMS Handbook's 'Recruitment'<sup>129</sup> chapter applies directly to LASA as a public entity listed in Schedule 3 of the PFMA, but as quoted in paragraph 62 above, LASA's Recruitment code states that LASA's recruitment operations must be conducted in accordance with such regulations.

72. Official 'business practices'<sup>130</sup> for public sector recruitment prescribed by the Public Service Regulations, both in Part IV, section C.1A.2, of the former Regulations applicable in 2009 and 2010, and in section 65(7) of the new Regulations promulgated in 2016, with which LASA's Recruitment code is 'in line',<sup>131</sup> are: 'A funded vacant post ... shall be advertised within six months after becoming vacant and be filled within 12 months after becoming vacant.'<sup>132</sup>

Indeed, LASA has acknowledged that 'the recruitment process for the senior

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<sup>125</sup> Paragraph 49.6 of LASA's original response in LC D529/11.

<sup>126</sup> Paragraph 99.5 of Mtati's answering affidavit in the application to subpoena Mlambo JP in LC D529/11.

<sup>127</sup> Paragraph 92.1 of LASA's answer to pre-trial conference agenda in LC D529/11.

<sup>128</sup> Bundle 2, pages 994 and 996. The several material irregularities in the Mthatha recruitment will be addressed in another part of this complaint to follow.

<sup>129</sup> Bundle 2, pages 787–801.

<sup>130</sup> In the language of section 1.1.2 of LASA's Recruitment code. Bundle 1, page 228.

<sup>131</sup> Bundle 1, page 228, section 1.1.2.

<sup>132</sup> Bundle 3, pages 1115 and 1117.

litigator positions' was required to 'be completed within a reasonable time'<sup>133</sup> – in default of which, section C.1A.3 of the Regulations, applicable at the material time, required that 'the reasons for the non-compliance shall be recorded in writing.'<sup>134</sup> In breach of the Regulations, the Pietermaritzburg, Durban and Mthatha Senior Litigator posts were deliberately not filled 'within 12 months after becoming vacant' or at all, and no 'reasons for the non-compliance' were 'recorded in writing'.<sup>135</sup>

73. In unlawful contravention of official 'business practices' prescribed for the conduct of recruitment operations in the public sector – which LASA's Recruitment code, approved by the Board,<sup>136</sup> requires LASA's management executives to observe – three budgeted and funded Senior Litigator posts at LASA have been vacant since their creation in November 2006,<sup>137</sup> for over thirteen years now.

74. Very much more serious than unlawfully failing to comply with codified recruitment practice in the public service, and irrespective of the mess of contradictory lying excuses later forged and uttered by CLE Hundermark, CEO Vedalankar, NOE Nair and chairperson Mlambo JP under pressure to explain

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<sup>133</sup> Bundle 1, page 381, paragraph 15.

<sup>134</sup> Bundle 3, page 1115.

<sup>135</sup> In November 2011, two years after the abortion of the Pietermaritzburg and Durban Senior Litigator recruitment processes 'immediately' after the candidate recommendations were made in November 2009, followed by the abortion of the Mthatha recruitment several months later as CEO Vedalankar and NOE Nair came under pressure to finalise the Pietermaritzburg appointment – even as the Bloemfontein and Mahikeng Senior Litigator recruitments proceeded and were finalised with appointments made – NOE Nair made a 'Report to Board' (Bundle 2, page 869) alleging absolutely falsely that the three Senior Litigator posts at Pietermaritzburg, Durban and Mthatha 'have remained vacant due to recruitment challenges.' Nair compounded his lie to the Board by making up a second quite different, also absolutely false reason, unsupported by any records: 'We have since decided not to fill the remaining positions until we are satisfied that our objectives determined for this position [*sic*] is [*sic*] being achieved by the current incumbents.' Nair's lying spree continued with a third outright fabrication in which he absolutely falsely and slanderously alleged, contradicted by LASA's professional quality assessment reports, that LASA's incumbent six Senior Litigators were incompetent and underperforming and needed urgent professional auditing 'by a retired judge', which blatant lie he told about them Nair later retracted under oath in court. The several different lies Nair told the Board to justify not filling the Pietermaritzburg, Durban and Mthatha Senior Litigator posts, and his 'operational reasons' perjury in a subsequent affidavit, will be addressed and refuted with reference to material documents in another part of this complaint to follow.

<sup>136</sup> Bundle 1, page 228, footnote.

<sup>137</sup> As mentioned in paragraph 60 above, the original Kimberley Senior Litigator post was abolished and a new post created at Mthatha, with the budget for the former transferred to the latter.

why the selected and recommended candidates for the critical Pietermaritzburg, Durban and Mthatha Senior Litigator posts weren't appointed, LASA's deliberate failure to fill these budgeted and funded critical posts, and its failure to duly apply the salary revenue it budgets for the posts and receives for them from the Treasury via the Department, has unlawfully contravened and continues to unlawfully contravene the PFMA.

**CRIMINAL AND OTHER CAPITAL CONTRAVENTIONS OF SECTIONS 53(3), 53(4), 55(1)(a) & 55(2)(a) OF THE PFMA, READ WITH SECTION 86 'OFFENCES AND PENALTIES'; AND CRIMINAL CONTRAVENTIONS OF SECTION 17(2) OF THE POWERS, PRIVILEGES AND IMMUNITIES OF PARLIAMENT AND PROVINCIAL LEGISLATURES ACT 4 OF 2004 IN FALSELY REPORTING TO MISLEAD THE JUSTICE PORTFOLIO COMMITTEE**

75. Section 1 of the PFMA defines '**unauthorised expenditure**' *inter alia* as 'expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division'.

76. Presenting the then recently enacted PFMA to the Finance Portfolio Committee of the National Assembly on 19 March 2001, the Treasury explained the gravity of 'underexpenditure' as a form of unlawful 'unauthorised expenditure':

[T]he definition of unauthorised expenditure is ... also not spending according to the programme description of the specific department. ... The Minister [of a Department; or, in the case of a public entity, its Board as accounting authority]<sup>138</sup> must ensure budget is spent in accordance with the original budget plan. ... [N]o one is allowed to have unauthorised

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<sup>138</sup> Quoted in paragraph 79 below, section 1 of the PFMA identifies the Board as LASA's 'accounting authority', and LASA stated accordingly in its annual report 2011/12: 'The Board is the accounting authority of Legal Aid South Africa under the Public Finance Management Act 1 of 1999 (as amended).' Bundle 2, page 1053, paragraph 2.2.3.

expenditure. ... National Treasury ... will ... follow up should there be any indication of ... underexpenditure.<sup>139</sup>

77. When a member of the Portfolio Committee deplored that ‘there are a few departments that repeatedly engage in underspending. This results in poor delivery’, and he ‘asked how the Act addresses this situation for the people on the ground who are suffering’, the Treasury representative responded: ‘The Minister must ensure that the budget is spent in accordance with the original budget plan. ... Should there be any underexpenditure, the Minister must report to the Cabinet.’<sup>140</sup>

78. LASA isn’t a department of state, but the point is the same: ‘underexpenditure’ by a public entity like LASA and the failure of its Board to ‘ensure that budget is spent in accordance with the original budget plan’ is extraordinarily serious; indeed, shown below, it constitutes financial misconduct and a breach the PFMA. Aggravating this particular case, it ‘results in poor delivery’ and ‘people on the ground who are suffering’, namely the indigent in KwaZulu-Natal completely deprived, and in the Eastern Cape substantially deprived, of access to complex constitutional and other specialist litigation services pertinently envisaged by LASA’s Strategic Plan 2009–12 and the two plans following it. The effect of this unlawful underexpenditure, as a result of corruption in LASA’s top governing and executive ranks, is that these ‘people on the ground ... are suffering’ from ‘poor delivery’ of expert legal services, despite financial provision for them in LASA’s annual budgets, met by the Treasury. Causing substantial harm to ... the general public’ (per the definition of ‘material irregularity’ in section 1 of the PAA), LASA’s corrupt and complicit officers named paragraphs 6 and 7 of this complaint have effectively denied any hope of ‘social justice’<sup>141</sup> to these ‘people on the ground who are suffering’ when their

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<sup>139</sup> Bundle 3, page 1119. The transcript of the meeting doesn’t identify which Portfolio Committee the Treasury representative addressed, but it looks certain to have been the Finance Committee.

<sup>140</sup> *Ibid.*

<sup>141</sup> Quoted in paragraph 55 above, LASA’s Strategic Plan 2015–20 aims ‘To give content to the Constitution through impact litigation – which is able to address Constitutional rights and socio-economic rights and develop jurisprudence on social justice matters.’

'Constitutional rights and socio-economic rights'<sup>142</sup> are violated, inasmuch as their state-funded access to the courts, which they can't themselves afford, has been practically blocked in furtherance of a cynical corruption cover-up.

79. Under section 1 of the PFMA, “**accounting authority**” means a body or person mentioned in section 49’, which section provides:

(1) Every public entity must have an authority which must be accountable for the purposes of this Act.

(2) If the public entity–

(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity[.]

80. Section 56(1)(a) of the PFMA provides: ‘The accounting authority for a public entity may ... in writing delegate any of the powers entrusted or delegated to the accounting authority in terms of this Act, to an official in that public entity’; and accordingly on 24 November 2007 the Board as LASA’s accounting authority duly ‘delegate[d] to the Chief Executive Officer all the powers entrusted or delegated to the accounting authority in terms of the Act’.<sup>143</sup>

81. Section 56(2)(c) of the PFMA provides that the delegation ‘does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.’ That is, the Board remains ultimately responsible for ensuring that the funds LASA receives from the Treasury are spent as budgeted, recommended, and approved.

82. Section 53 of the PFMA prescribes:

...

(3) A public entity which must submit a budget in terms of subsection (1), may not budget for a deficit and may not accumulate surpluses unless the prior written approval of the National Treasury has been obtained.

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<sup>142</sup> *Ibid.*

<sup>143</sup> Bundle 2, page 1040, Note 30.

- (4) The accounting authority for such a public entity is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget.

83. In contravention of section 53(3), LASA has been engaging in unauthorised expenditure in the form of underexpenditure, and in this manner accumulating millions of rands in unauthorised surplus over the past decade, by budgeting for nine Senior Litigator posts but only filling six of them with the salary budget received for them, and deliberately not filling its remaining three vacant Senior Litigator posts – following an unrecorded, unauthorised, backroom decision taken illegally (discussed below).

84. The Constitutional Court has unanimously affirmed in *Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1 (22 January 2018) that deliberately not filling a budgeted and funded post in the public sector, and not spending the salary budget received for it on employing a suitable officer to fill it, contravenes the PFMA. Indeed, our apex court noted that this trite principle was beyond issue and common cause between the parties:

[8] ... The Premier submitted that, had the position ... been left vacant, he would have been in breach of the provisions of the Public Finance Management Act (PFMA) which preclude him from leaving the position ... vacant. ...

[9] ... The Labour Court further stated that the defence by the Premier that he was bound by the PFMA was not challenged by the applicant. ...

85. CEO Vedalankar's contravention of section 53(3) of the PFMA in not applying LASA's Senior Litigator budget to the employment of suitably qualified and experienced trial lawyers in its Pietermaritzburg, Durban and Mthatha Senior Litigator posts amounts to financial misconduct – for which Mlambo JP and the Board are ultimately responsible – in that section 83 of the PFMA provides:

- (1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently–
  - (a) fails to comply with a requirement of section ... 53 ... or 55; or
  - (b) ...
- (2) If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.
- (3) An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.
- (4) Financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) or (3) despite any other legislation.

86. Section 55(1)(a) of the PFMA prescribes:

The accounting authority for a public entity ... must keep full and proper records of the financial affairs of the public entity.

87. Consistently with this provision, section 12 of LASA's Code of Conduct and Ethics requires:

Accurate and reliable records of many kinds are necessary to meet the LEGAL AID BOARD's legal and financial obligations and to manage the affairs of the LEGAL AID BOARD. The LEGAL AID BOARD's books and records should reflect all business transactions ... and the employees responsible for accounting and record-keeping functions are expected to be diligent in enforcing proper practices.<sup>144</sup>

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<sup>144</sup> Bundle 2, page 778, paragraph 12.

88. NOE Nair has repeatedly conceded,<sup>145</sup> and CEO Vedalankar<sup>146</sup> and HRE Clark<sup>147</sup> have likewise confirmed – all under oath – that no record whatsoever exists of any decision taken by any competent authority at LASA,<sup>148</sup> or indeed by anyone at all,<sup>149</sup> to abort LASA’s substantially completed recruitment processes for its critical Senior Litigator posts at Pietermaritzburg, Durban and later on at Mthatha, for which suitable candidates had been selected and recommended, and to ‘freeze’<sup>150</sup> the posts, for any reason.<sup>151</sup>

89. In sum, for ten years three budgeted and funded critical specialist legal professional posts have unlawfully deliberately been kept vacant without any record of any decision of this extraordinarily important financial and operational decision involving many millions of rands and hugely affecting critical service delivery.<sup>152</sup> Besides contravening section 12 of LASA’s Code of Conduct and

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<sup>145</sup> Bundle 1, page 381, paragraphs 14, 15 and 16; page 382, paragraph 22; page 383, paragraph 29; page 385, paragraph 35.

<sup>146</sup> Bundle 1, pages 390–1.

<sup>147</sup> Bundle 1, pages 392–3.

<sup>148</sup> Annexure W to the Legal Aid Guide, titled ‘Legal Services Technical Committee Terms of Reference’, explains: ‘The Board delegates authority to the CEO, the Management Exco [Management Executive Committee], LSTC [‘Legal Services Technical Committee’], other committees and officials through its Approval Framework.’ Bundle 2, page 767, section 3.2.3. Section 5 of the Guide specifies the ‘Responsibilities of LSTC’: ‘The LSTC shall have collective responsibility for: ... 5.3. the execution of Board strategy, policies, programmes and plans relating to the legal services delivery programme of the Legal Aid South Africa.’ Bundle 2, pages 775–6. To be addressed in another part of this complaint to follow, a variety of false, contradictory claims have been made about who took the decision to abort the recruitments and to freeze the posts, and who was consulted about it. (About which no records exist.)

<sup>149</sup> To be discussed in another part of this complaint to follow, Vedalankar claimed (Hundermark almost certainly ghost-writing for her) that she and Nair decided this ‘in July [2010]’ – untruthfully and anyway *ultra vires* their powers and therefore illegally. *First*, as mentioned just above, the Legal Services Technical Committee is LASA’s decision-making authority in regard to the implementation of Board policy to hire Senior Litigators – as illustrated by its abolition on 24 March 2010 of the Kimberley Senior Litigator post and its creation of the Mthatha one. *Second*, contradicting and refuting her (Hundermark’s) claim that she was party to the original unrecorded, unauthorised decision to abort the Pietermaritzburg and Durban Senior Litigator recruitments, Vedalankar’s email records show that by late July 2010 she wasn’t even aware of the decision, not until October 2010, nearly a year later, when she wrote to the complainant (Hundermark almost certainly ghost-writing) alleging that she and Nair had taken this decision.

<sup>150</sup> *Ipsa facto* illegal under the PFMA, as the Constitutional Court confirmed in *Zungu*.

<sup>151</sup> To be quoted and discussed in another part of this complaint to follow, the several untruthful, mutually contradictory and objectively contradicted, totally different reasons fabricated and advanced – including on affidavit, to the Minister, to the Portfolio Committee, and to the courts – have zigzagged wildly over time, ultimately criminally.

<sup>152</sup> Until the selection and recommendation of suitable candidates for appointment to the Pietermaritzburg and Durban Senior Litigator posts in November 2009, when the recruitment process was quietly halted, LASA had repeatedly tried filling the posts, as required by the PFMA and the Public Service Regulations, and had advertised them repeatedly: first in 2007 and twice

Ethics, this gross irregularity in not making and keeping a record of the decision to abort the recruitments and ‘freeze’ the posts (for wildly disparate reasons given much later under pressure to account) contravenes section 55(1)(a) of the PFMA and constitutes criminal financial misconduct under section 86(2):

An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section ... 55.

90. The unauthorised, off-the-record decision to abort the Pietermaritzburg, Durban and Mthatha Senior Litigator recruitments after the selection and recommendation of suitable candidates for appointment to the posts, and the indefinite and practically permanent ‘freezing’ of the top professional posts – for a decade now – was a major change to LASA’s Strategic and Business Plans. Section 1.1 of the Approval Framework required the Board’s ‘Final approval’<sup>153</sup> for any change to LASA’s ‘Strategic Plan’, and section 1.2 required that the Board ‘Must be consulted (before)’<sup>154</sup> executive management changed the ‘Business Plan’. But as NOE Nair confirmed on affidavit in April 2011: ‘The Board was ... not informed of the decision’.<sup>155</sup> That is, the unrecorded decision was taken without necessary authority under the Approval Framework<sup>156</sup> (an internal regulation, a form of subordinate legislation) and was consequently illegal for that reason as well – and hence a ‘material illegality’ as defined by section 1 of the PAA and accordingly of concern to the Auditor-General.

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again in 2009 (Bundle 1, page 537, and pages 43 and 45). Created in March 2010 (Bundle 2, page 709, paragraph 4.1.7; and Bundle 3, page 1120), the Mthatha Senior Litigator post was advertised the following month in April (Bundle 3, page 1111: ‘Closing date – 07 May 2010’), and after the short-listing of applicants in May (Bundle 3, pages 1122–3), interviews were held and a selection and recommendation made on 24 May (Bundle 3, page 1122; and Bundle 2, pages 994–7).

<sup>153</sup> Bundle 2, page 1034.

<sup>154</sup> Ibid.

<sup>155</sup> Bundle 1, page 385, paragraph 36.

<sup>156</sup> In November 2011, two years after the illegal, concealed abortion of the Pietermaritzburg and Durban Senior Litigator recruitments in November 2009, NOE Nair mentioned incidentally in a ‘Report to Board’ that the posts hadn’t been filled – not because of lack of budget for them, as originally falsely alleged, but for other equally false reasons enumerated in footnote 135 above. All the chopping and changing excuses for not filling the three vacant posts will be treated in another part of this complaint to follow.

91. Section 55(2)(a) of the PFMA prescribes:

The annual report and financial statements ... must ... fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned.

92. In its Annual Performance Report 2011–12 presented to the Portfolio Committee on 9 October 2012,<sup>157</sup> LASA's Board<sup>158</sup> misleadingly stated in its 'Report on Completion of Strategic Plan 2009–2012': 'Senior Litigators employed are working on complex matters and matters in higher courts'.<sup>159</sup> Vedalankar repeatedly made the same misleadingly allegation in her CEO Report included in LASA's Annual Report 2011/12, presented to the Portfolio Committee on the same day: 'Senior Litigators employed are working on complex matters in the higher courts.'<sup>160</sup> Again in her discussion of 'the completion of our three-year Strategic Plan period 2009–12', she claimed: 'To a large extent we were able to make the strategic shift that we mapped for the 2009–12 Strategic Plan (SP) period as indicated below ... We employed Senior Litigators who are working on complex matters and matters in higher courts.'<sup>161</sup>

93. These statements about the employment of Senior Litigators made by the Board in LASA's Annual Performance Report 2011/12, prefaced by Mlambo JP's chairperson's report, and by Vedalankar in her CEO report for 2011/12, were intended to imply to the Portfolio Committee and to induce it to believe that LASA's Strategic Plan 2009–12 regarding the recruitment of Senior Litigators to handle complex constitutional and other specialist litigation and to mentor LASA's legal staff in conducting it had been successfully implemented and completed. Indeed, Vedalankar's claim that 'Senior Litigators employed are working on complex matters in the higher courts'<sup>162</sup> was immediately preceded by the statement: 'Our specialist capacity to cover commercial crimes courts,

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<sup>157</sup> Bundle 2, page 897.

<sup>158</sup> Bundle 3, paragraph 3.2.3.c.

<sup>159</sup> Bundle 2, page 897.

<sup>160</sup> Bundle 2, page 902.

<sup>161</sup> Bundle 2, page 1054.

<sup>162</sup> Bundle 2, page 902.

labour courts, sexual offences courts and children's matters is in place and practitioners are continuously trained in handling these specialist matters.'<sup>163</sup>

94. In truth and in fact, contrary to Vedalankar's false claim about this, such 'specialist capacity' wasn't 'in place', inasmuch as three of LASA's nine budgeted and funded Senior Litigator posts were still unfilled, then six years after the creation of the nine posts in 2006. As a result of recruitment corruption and a now disintegrated attempt to cover it up, KwaZulu-Natal had and still has no such 'specialist capacity' at all, and the Eastern Cape's 'specialist capacity' was and remains seriously constrained – ten years after the selection and recommendation of suitable candidates for appointment to the Pietermaritzburg, Durban and Mthatha Senior Litigator posts.

95. For the same reason, Vedalankar lied in her CEO Report in implying that in KwaZulu-Natal LASA's legal 'practitioners are continuously trained in handling these specialist matters', as in other provinces, because as a result of recruitment corruption and its fumbled cover-up, KwaZulu-Natal has no Senior Litigators at all to 'train' them, i.e. to 'Develop the litigation expertise within the LAB by providing individual mentoring and coaching to legal staff' as envisaged in the advertised job description;<sup>164</sup> to 'provide support for practitioners in more complex matters', as the respondent's Annual Report 2009/10 puts it;<sup>165</sup> and for 'protecting the rights of women and children ... In very complex matters, our Senior Litigators provide support and advice to practitioners that need it.'<sup>166</sup>

96. Mlambo JP and the Board well knew that these claims – that Senior Litigators had been employed in fulfilment of LASA's Strategic Plan 2009–12, and that specialist legal professional capacity was now in place for the conduct of complex litigation and for training LASA's practitioners – were false, because a year earlier in November 2011, NOE Nair presented a 'Report to Board' with the soporific title 'Senior Litigators Reporting Relationships and Job

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<sup>163</sup> Ibid.

<sup>164</sup> Bundle 1, page 45.

<sup>165</sup> Bundle 1, page 142, paragraph 153.

<sup>166</sup> Bundle 2, pages 825–6.

Clarification’,<sup>167</sup> in which he advanced new, quite different untruthful excuses (unsupported, contradicted and refuted by LASA’s own records) having nothing whatsoever to do with the budgetary insufficiency story initially falsely alleged (also unsupported, contradicted and refuted by LASA’s own records) to justify his failure (as chairperson of the Legal Services Technical Committee) to fill LASA’s remaining three Senior Litigator posts with the candidates recommended for them by approving the selection panels’ recommendations (his responsibility),<sup>168</sup> after the collapse, when tested and exposed, of the bogus financial insufficiency cover-story for ‘freezing’ the three vacant Senior Litigator posts at point that the recruitment processes had been completed. (All the different, clashing, chopping and changing cover-stories variously told in correspondence, on affidavit, to the Minister, to the Portfolio Committee, and in court will be quoted and treated in other parts of this complaint to follow.)

97. In short, in making their false annual report to the Minister and to the Portfolio Committee, Mlambo JP and the other members of the Board well knew, as CEO Vedalankar did, that their claims in it were substantially false and misleading, and accordingly they all contravened section 55(2)(a) of the PFMA (fully quoted above), requiring that their ‘annual report and financial statements ... fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned.’

98. Section 83 of the PFMA (fully quoted above) provides that ‘The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently ... fails to comply with a requirement of section ... 55’ for which ‘every [‘board’] member is individually and severally liable<sup>169</sup> ... An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully

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<sup>167</sup> Bundle 2, page 869.

<sup>168</sup> Under section 8.2.2.b of the Approval Framework, NOE Nair has ‘Final approval’ authority, subject to the assent of the CEO (then Vedalankar); she ‘Must agree’. Bundle 2, page 1036.

<sup>169</sup> The Department’s representative on the Board, Pieter du Rand, was then and is still a member.

or negligently fails to exercise that power or perform that duty. ... Financial misconduct is a ground for dismissal or suspension’.

99. Having since retired from LASA, Mlambo JP and Vedalankar can't be dismissed or suspended under section 83,<sup>170</sup> but they remain exposed to criminal prosecution under section 86 of the PFMA, ‘Offences and penalties’, subsection (2) of which provides:

An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section ... 55.

100. In sum, by dishonestly misrepresenting ‘the state of affairs of [LASA], its business, its financial results, its performance against predetermined objectives [set out in its Strategic Plan 2009–12] and its financial position as at the end of the financial year concerned’ in LASA’s ‘annual report and financial statements’ for 2011/12, so as to mislead and defraud LASA’s constitutional oversight authority, the Justice Portfolio of the National Assembly, and induce it to believe wrongly that (i) LASA’s Strategic Plan 2009–12 regarding the employment of Senior Litigators had been implemented and that such specialist legal service delivery capacity was now in place, (ii) LASA had filled its vacant posts, especially its critical posts, and (iii) LASA was applying its Senior Litigator budget to the employment of Senior Litigators, Board chairperson Mlambo JP, his fellow directors in October 2012,<sup>171</sup> and CEO Vedalankar all committed financial misconduct and criminally contravened section 55 of the PFMA, for which they’re liable to be jailed under section 86(2).

101. In deliberately falsely reporting to and misleading the Justice Portfolio Committee in LASA’s annual report for 2011/12, prefaced with Vedalankar’s CEO report, Mlambo JP, other members of the Board at the time and CEO Vedalankar furthermore criminally contravened section 17(2) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of

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<sup>170</sup> Du Rand can be.

<sup>171</sup> Including Du Rand.

2004 ('Powers, Privileges and Immunities Act'),<sup>172</sup> for which they're liable to be jailed:

A person who –

...

(d) with intent to deceive a House or committee, produces to the House or committee any false, untrue, fabricated or falsified document; or

(e) ... wilfully furnishes a House or committee with information ... which is false or misleading,

commits an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.

102. Mlambo JP's and the Board's and CEO Vedalankar's fraudulent deception of the Minister and the National Assembly regarding the employment of Senior Litigators and specialist legal professional capacity being in place additionally failed to comply with 'Strategy C4' of the respondent's Strategic Plan 2009–12, namely 'To timeously account to Parliament and the Executive Authority so they are well informed of Legal Aid South Africa strategy and programmes' – a material irregularity. 'Strategy C4' specifically required 'Timeous and Accurate ... Interaction with Minister' and 'Accurate ... Interaction with Parliamentary Committees'.<sup>173</sup> And section 1 of the PAA includes 'fraud' as a 'material irregularity' of concern to the Auditor-General.

103. Displaying a similar flagrant contempt for the truth<sup>174</sup> in her<sup>175</sup> entry in LASA's 'Business Plan 2011/12' in section P26–10 headed 'Talent acquisition and retention', HRE Clark dishonestly concealed from the Board, to which the plan was submitted for review,<sup>176</sup> that a third of LASA's critical Senior Litigator posts

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<sup>172</sup> Under section 1 of the PAA, a 'material irregularity' includes 'any ... contravention of ... legislation', and under section 5(1A) this statutory crime is of direct concern to the Auditor-General.

<sup>173</sup> Bundle 2, page 1058. More examples of their dishonestly false, criminal reporting to the Portfolio Committee on other occasions will be canvassed in other parts of this complaint to follow.

<sup>174</sup> Clark's deposition to conflicting false affidavits, a crime, will be treated in another part of this complaint to follow.

<sup>175</sup> Bundle 2, page 877, 'Responsible Executive': 'HRE'.

<sup>176</sup> Bundle 3, page 1104, paragraph 6.1.

had long been vacant since their creation in November 2006,<sup>177</sup> despite the selection and recommendation of suitable candidates for appointment to them in November 2009<sup>178</sup> and May 2010.<sup>179</sup> To the contrary, full well aware that the posts hadn't been filled, and in a fraud on the Board, and hence a 'material irregularity', Clark deliberately falsely claimed: 'No longstanding vacancies'.<sup>180</sup>

104. Profoundly aggravating Mlambo JP's and the Board's and CEO Vedalankar's criminal contraventions of the PFMA and of the Powers, Privileges and Immunities Act in their and their colleagues' fraudulent cover-up of ethical recruitment corruption (jobs for pals) gone wrong,<sup>181</sup> is their corrupt motive for dishonestly misleading the Portfolio Committee in their reports, namely to frustrate and defeat the National Assembly's constitutional oversight responsibility imposed by section 55(2)(b)(ii) of the Constitution 'to maintain oversight of ... organ[s] of state' like LASA, and to prevent the National Assembly holding them to account for unlawfully deliberately not filling LASA's three remaining Senior Litigator posts at Pietermaritzburg, Durban and Mthatha: (i) in contravention of the PFMA; (ii) in an illegal unauthorised deviation from LASA's Strategic Plan 2009–12 and Business Plans based on it; and (iii) in contemptuous disregard for both the Minister's and the Portfolio Committee's express wishes that LASA fill its vacant posts, especially critical posts, and that LASA hire Senior Litigators to ensure that the indigent have access to specialist litigation expertise and that LASA's lawyers have experienced litigation lawyers to mentor them.

105. Had chairperson Mlambo JP and the Board and CEO Vedalankar not criminally deceived and defrauded the Portfolio Committee it would have detected (i) their financial misconduct in unlawfully deliberately not filling LASA's three remaining vacant, budgeted and funded Senior Litigator posts, and

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<sup>177</sup> As mentioned in paragraph 60 above, in March 2010 the Kimberly post was abolished and a new post created at Mthatha, with the budget for the former transferred to the latter.

<sup>178</sup> Bundle 1, pages 244–8.

<sup>179</sup> Bundle 2, pages 994–7.

<sup>180</sup> Bundle 2, page 877. To be shown in another part of this complaint to follow, Clark mendaciously and later perjurally participated in covering up the corrupt, illegal abortion of the Pietermaritzburg and Durban Senior Litigator recruitments.

<sup>181</sup> To be detailed with supporting documents in another part of this complaint to follow.

in not applying the budgeted revenue received for them to the employment of suitably senior lawyers to fill them, and (ii) the multitude of capital transgressions of the PFMA committed in corruptly and illegally cancelling – off the record and without authority – the substantially completed Pietermaritzburg, Durban and Mthatha Senior Litigator recruitments after the selection and recommendation of suitable candidates for appointment to the posts.

106. Chairperson Mlambo JP's and the Board's and CEO Vedalankar's successful criminal fraud perpetrated on the National Assembly, by presenting to it a false and misleading annual report for 2011/12, constitutes a clear-cut 'material irregularity' on multiple scores within the definition given in section 1 of the PAA, including 'non-compliance with, or contravention of, legislation, fraud ... or a breach of fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in ... the misuse ... of a public resource or substantial harm to a public sector institution or the general public'.

## **CONCLUSION**

107. In the language of section 20(2)(c) of the PAA, LASA's 'reported performance' repeatedly falsely described in its annual report for 2011/12 concerning the employment of Senior Litigators, in which it was alleged that LASA had completed its Strategic Plan 2009–12 and had put 'in place' its planned specialist litigation and professional mentoring capacity, is seriously at odds with 'its predetermined objectives' in this regard set out in the plan.

108. LASA's deliberate failure over the past ten years to fill its budgeted and funded Senior Litigator posts at Pietermaritzburg, Durban and Mthatha, created to provide expert constitutional and other specialist litigation services to the indigent, is a seriously unlawful dereliction of its obligation stipulated in section 20(3) of the PAA to ensure its 'resources [are] procured economically and utilised efficiently and effectively.'

109. This 'serious or persistent material breach of ... uniform treasury norms and standards', per section 216 of the Constitution, every year for the past

decade – ‘compliance with’ which ‘norms and standards ... [t]he national treasury must enforce’ – presents a constitutional basis for the Treasury to ‘stop the transfer of funds to’ LASA as a seriously and persistently delinquent ‘organ of state’.

110. Section 5(3) of the PAA empowers the ‘Auditor-General ... in the public interest [to] report on’ Mlambo JP’s, the Board’s and Vedalankar’s criminal and other contraventions both of the PFMA and of the Powers, Privileges and Immunities Act and to ‘submit such a report to the relevant legislature’, namely the National Assembly – specifically the Speaker and the Justice Portfolio Committee – ‘and to any other organs of state with a direct interest in the matter’, namely the Treasury; the Minister; the Department’s Director: Third Party Funds; the Public Protector; the Judicial Service Commission; and the National Director of Public Prosecutions.

Signed at Eshowe on 19 February 2020

ANTHONY BRINK

Signed before me at Eshowe on 19 February 2020 by the deponent who has acknowledged that he knows and understands the contents of this affidavit and who affirms its contents to be true to the best of his knowledge and belief.

COMMISSIONER OF OATHS

Name:

Address:

Capacity: