
BRINK'S COMMENTS ON WAGLAY JP'S RESPONSE
TO HIS GROSS MISCONDUCT COMPLAINT

I, Anthony Brink, affirm:

1. I am the complainant in a complaint of gross misconduct filed with Judicial Service Commission ('JSC') in July 2017 against Waglay JP under section 14 of the Judicial Service Commission Act 9 of 1994 ('JSC Act'), and acknowledged by the Secretariat the following month. At its request on 14 June 2018, I resubmitted a copy of my complaint on the same day. The following are my invited comments on Waglay JP's response to my complaint.
2. To discredit my complaint, Waglay JP begins by falsely distilling it, and then ridiculing his caricature of it.
3. He makes allegations that are objectively demonstrably false in several instances and highly dubious in others.
4. In and among his variously clearly untrue and doubtful allegations, he weaves soothing bromides about how things are ordinarily done in his Labour Appeal Court ('LAC') – in doing so, obfuscating the incontrovertible, obvious, gross procedural irregularity in his disposal of my petition for leave to appeal the dismissal of my labour action¹ that tipped me to investigate it by having my LAC case file examined.
5. Throughout his response, in different ways, Waglay JP feigns unfamiliarity with the smoking gun in the case: the real evidence of the 'memorandum'² in my LAC file, which clearly perverted his disposal of my petition, having regard to the surrounding countryside of peculiar facts canvassed in my complaint.

¹ As mentioned in paragraphs 10 and 11 of my complaint, I established years after the trial of my action in the Labour Court that it had been correctly dismissed – in the practical result, if not on the law and on the evidence before the trial judge. His most basic reversible legal and factual errors are identified in my petition: annexure 'C' to the complaint.

² Complaint, annexure 'A'.

AB

A.M.N

6. Criticised in summary above, Waglay JP's disingenuous and deceptive response to misdirect the Judicial Conduct Committee ('Committee') in its determination of my extraordinarily serious³ complaint against him will be finely analysed and laid bare below. In a word, his response is shockingly dishonest.

Ad paragraph 2 of the response.

7. Waglay JP tees off by claiming my complaint comprises 'four' legs, which he enumerates in four subparagraphs – only, wrongly and misleadingly on every score, as is plain from the black-and-white of my complaint.

Ad paragraph 2, subparagraphs i–iv.

Ad i.

8. It's absolutely false to claim, as Waglay JP does, that I allege in my complaint a four-part 'conspiracy'⁴ between Mlambo JP, himself, and Davis and Sutherland JJA.

9. Apropos of the latter two appeal judges, my complaint records that there's no record in the appeal court file that they considered and decided my petition.⁵ For this and other reasons discussed below, I'm sure they've no knowledge of the case, much less 'conspired against [me]' over it.

10. Apropos of Mlambo JP: I might begin by quoting Vahed J of the KwaZulu-Natal division of the High Court in his just delivered⁶ reasons for dismissing Legal Aid South Africa's abortive application to interdict⁷ my use of

³ Albeit indeed extraordinarily serious, involving, as it does, perversion of the judicial process through improper interference of a judge, my complaint is not extraordinary, in that it's neither the first of its kind made to the Judicial Service Commission, nor first of its kind made against a Judge President. The Judicial Conduct Committee is currently seized with another such complaint, also involving a Judge President, John Hlophe JP, head of the Cape High Court, but with the distinction that he's the active rather than the passive accused in the enquiry.

⁴ He says 'conspired' in this subparagraph, 'conspiracy' in his subparagraph iv.

⁵ Complaint, paragraph 21. It's unimaginable in the constitutional era that a judge can take a judicial decision with colossal repercussions – in casu involving the integrity of a judge president and many millions of rands – and that he should make no public record of it.

⁶ On 25 June 2018.

⁷ By seeking to have me banned as a vexatious litigant for repeatedly applying to court to compel compliance with duly made requests for access to LASA's records. At court, just before argument, LASA conceded my first five applications, which I'd set down together. It then tried derailing my sixth application to enforce full and proper compliance with its total surrender treaty, and my

the Promotion of Access to Information Act 2 of 2000 ('PAIA') in my continuing investigation of high-level corruption in the organisation ('LASA'): I'm a 'trained lawyer and an advocate'.⁸ Words are my tools of trade,⁹ and I use them with meticulous care – particularly when engaging with power, for as I'm keenly aware, one deficiency on the frontline, one misstep on the high-wire, and it's all over.

11. In neither my complaint against Waglay JP nor in any of my eight complaints against Mlambo JP do I formally charge the latter with authoring the memorandum that perverted Waglay JP's decision of my petition, and none of these several complaints currently pending before the Committee require it to make a finding that he did.

12. As I've made clear, however, I'm quite sure Mlambo JP authored the memorandum and passed it to his long-time erstwhile colleague in the Labour- and Labour Appeal Courts,¹⁰ having regard to the stack of evidence to which I refer in paragraphs 36, 39 and 40 of my complaint, and I'm all the more certain now from the most recent potently cogent addition to the pile, namely his opening ad hominem attack on me and on my 'language' in his response to my eight complaints against him¹¹ – almost identical to the opening ad hominem

seventh application to compel compliance with a final PAIA request it had agreed to respond to, by applying to have me banned as a vexatious litigant. At the hearing, Vahed J gave the application short shrift, and didn't even call on me to argue against it.

⁸ Reasons for judgment delivered on 25 June 2018 in Pietermaritzburg High Court case 12124/16 heard and dismissed on 27 October 2018, paragraph 6. I'm also an experienced magistrate of the district, civil, and regional benches, my longest unbroken service having been as full-time civil trial magistrate for several years, with a sterling record on appeal. The quality of my civil judgments was raised appreciatively by judges in chambers when I went to meet them on joining the Bar.

⁹ My legal writing has repeatedly been commended from the bench, including by the Chief Justice. During argument of an urgent application I drew pro bono for Professor Sam Mhlongo for an amicus curiae hearing in the seminal nevirapine case, Chaskalson CJ pertinently commended my papers, so Khoza SC informed me afterwards (I was tied up in the Eastern Cape as a regional magistrate at the time, so he argued the case for me). I'm the author of several well reviewed books in recondite technical, philosophical and ideological subjects, online with reviews by inter alia high-ranking scientists and leading investigative journalists at www.openbooks.tig.org.za.

¹⁰ Complaint, paragraph 3.

¹¹ I canvass it in my comments on Mlambo JP's response, and in an annotation to the copy of my complaint I provided the JSC on 14 June 2018, at the foot of page 12, flagged under paragraph 36 on that page.

attack on me and on my 'language' made in the memorandum. In both instances the method used to discredit me, and my case with it, is exactly the same.

13. If I'm right about this and it was indeed LASA chairperson Mlambo JP who slipped Waglay JP the memorandum that perverted the decision of my petition,¹² as the evidence suggests to me on the compelling probabilities,¹³ this hardly evinces a conspiracy in the popular contemporary negative sense, which Waglay JP plainly intends, of unfounded, deluded and ridiculous, rather than the neutral legal sense of two or more minds covertly applied to a nefarious purpose.

14. Nor do I allege, as Waglay JP falsely claims, that he and the two other appeal judges he names 'refused my petition after taking into account superfluous documents particularly an unsigned and unfiled affidavit.' Waglay JP's statement here is materially misleading to the Committee on four counts:

15. *First*, as just said above, my complaint neither alleges nor implies any conspiracy between the four judges whom Waglay JP names, himself included.

16. *Second*, Waglay JP misleadingly exaggerates the documentation at the core of my complaint by speaking of 'superfluous documents', whereas he's well aware, not least because it's annexed to my complaint,¹⁴ that it's a single document, the memorandum, that threw the case, and nothing else.

17. *Third*, by calling it 'superfluous', Waglay JP falsely implies that the memorandum had no bearing on the outcome of my petition. And the necessary corollary of this false implication is that due process was followed in treating my petition like any other; only, on his own version discussed below, it wasn't.

¹² Besides the consistency of Mlambo JP's attacks on me, referred to in paragraphs 36, 39 and 40 of my the complaint, there's also the fact, mentioned in paragraph 6 of my complaint, that it must have been a 'well-connected, top-level LASA officer, especially motivated to torpedo my petition' who got the memorandum to Waglay JP under the counter, bypassing the registrar – someone Waglay JP 'knew and trusted', as noted in paragraph 34 of the complaint.

¹³ It's also telling that in his response to my complaints Mlambo JP doesn't say he's mortified to learn that someone at LASA acted to corrupt the judicial process by getting at the Judge President with the memorandum dishonestly urging the dismissal of my petition; and that he's going to investigate and find out who in his organisation did such a wicked thing.

¹⁴ Annexure 'A' to the complaint.

18. *Fourth*, Waglay JP falsely and misleadingly mischaracterises the document on two scores, by referring to it as ‘an unsigned ... affidavit’. As is apparent on its face, the memorandum bears no resemblance to an ‘unsigned ... affidavit’ in any respect: it’s anonymous; no author’s named in it; and there’s no provision for signature and attestation by a commissioner of oaths. Quite the contrary, the document is unambiguously styled ‘MEMORANDUM’ between tramlines under the appeal case header stating the parties and the appeal case number.

19. Waglay JP knows full well that I’m not complaining that he took into account ‘an unsigned ... affidavit’ in rejecting my petition. By misdescribing and mischaracterising the memorandum in these weasel words, his intention appears to be to distract from the gravity of his judicial misconduct by suggesting that at worst he erroneously entertained no more than a technically defective legal process.

20. In the same way, Waglay JP also dissembles unfamiliarity with the memorandum, as if he’s not seen it before. Oddly, he doesn’t exactly say so; he doesn’t say that the memorandum is complete news to him. He doesn’t say he’s horrified to learn about it from my complaint, and that as head of the LAC he’ll be conducting a thorough investigation to find out how it came to be in the file. Instead, caught dead to rights, he pretends it’s not there:

21. *Fifth*, Waglay JP falsely alleges that the memorandum is ‘unfiled’.¹⁵ Quite the contrary, as Rawlins found and the registrar’s clerk confirmed,¹⁶ it was unquestionably filed – in the real sense that it’s physically in the court file. And unless this criminal evidence has since been removed and destroyed, it’s still there.¹⁷

22. By calling for the file, the Committee can see this for itself – like someone else anxiously did, after I’d incidentally mentioned the memorandum in my

¹⁵ Later in his response, Waglay JP repeats the falsehood in a variant discussed in paragraphs 65–6 below.

¹⁶ Complaint, paragraphs 20–3, and annexure ‘B’, bearing the registrar’s stamp.

¹⁷ It was still in the file in August 2016, more than a year after Rawlins discovered it in April 2015: see paragraph 24 of the complaint, and Rawlins’s confirmatory affidavit.

PAIA litigation against LASA in the Magistrate's Court.¹⁸ Re-examining the file at my request in August 2016, Rawlins found that someone had retrieved the file from the registry subsequent to his original examination of it in April 2015, had searched the file for the memorandum and found it, and, presumably after examining it, had returned it to the file, only now at the top of the papers, out of the original order¹⁹ in which Rawlins had found it.²⁰

23. Certainly, though, the memorandum wasn't properly filed in the ordinary course, as is plain from the fact that it doesn't bear the registrar's stamp.²¹ And the obvious reason it didn't cross the registrar's counter for filing in the usual manner, getting stamped on the way, is that it was surreptitiously delivered to Waglay JP with the criminal purpose of defeating the ends of justice by improperly influencing him to throw my case.²²

Ad ii.

24. Waglay JP seriously misdirects the Committee in claiming I complained to the JSC that I was denied 'a proper opportunity to oppose [LASA's] condonation [application]', which LASA brought after I notified my objection²³ to its nonchalant late filing of its affidavit opposing my petition, in non-compliance with the LAC rules,²⁴ which I'd myself slaved to comply with in petitioning in time.

25. Waglay JP's violation of due process in this regard is not my complaint to the JSC at all, which is that he dismissed my petition on account of the improper

¹⁸ Complaint, paragraphs 24–5.

¹⁹ It was the eighth document in the LAC file when Rawlins called for and inspected it in April 2015. See certified inventory, annexure 'B' to the complaint.

²⁰ Complaint, paragraphs 20–23. Waglay JP hasn't in his response suggested that Rawlins planted the memorandum; and it's to be hoped that no one at some future time makes the serious mistake of suggesting he's an unprincipled crook. To the contrary, a devout practising Catholic, he's our country's first conscientious objector, who paid a heavy price for his personal integrity by going into decades of bitter political exile rather than complying with an apartheid military call-up in the early 60s. See his biography at goo.gl/QjAjiF.

²¹ Complaint, annexure 'A'.

²² The charge facing Hlophe JP on different facts.

²³ Complaint, annexure 'E'.

²⁴ Complaint, paragraphs 13–14.

influence exercised on him by the memorandum. His misrepresentation of my actual complaint is clearly intended to distract from it.

26. The reason I didn't complain to the JSC that I was denied 'a proper opportunity to oppose [LASA's] condonation [application]' is that the JSC has no jurisdiction to deal with the objective fact that in his alacrity to throw out my petition Waglay JP denied me due process (a) by preventing me from opposing LASA's application for condonation, and (b) by disposing of the case on a consideration of my petition and LASA's opposing affidavit in the appeal case file (if he considered them at all) before the latter affidavit was properly before court upon the grant of an order condoning its delivery out of time.

27. Waglay JP's gross procedural irregularity here would have been a matter for the Supreme Court of Appeal to treat on review.²⁵

28. As stated in my complaint,²⁶ I'd objected²⁷ to the fact that LASA hadn't bothered complying with the time limit for filing its affidavit opposing my punctually filed petition, and I'd required it to apply for condonation, which it did.²⁸

29. Waglay JP says I complained that I was not given 'a proper opportunity to oppose the condonation [application]'. This is itself misleading, because never mind 'a proper opportunity', he denied me any opportunity at all – in a glaring procedural irregularity that was the first indication to me of something seriously remiss in the disposal of my petition. But this is not my complaint to the JSC, because, as said, it's none of its business.

²⁵ The reason I didn't take the matter on review by the Supreme Court of Appeal is that I'd begun wondering about the correctness of my original cause of action in my labour claim, and was further investigating it with record requests made under PAIA. After prolonged illegal and unconstitutional resistance, and litigation brought to compel compliance with my requests, I finally forced out of LASA the complete, uncensored recommendation report by the selection panel, which confirmed I'd been barking up the wrong tree in my pleadings and at trial in the Labour Court. I discuss this in paragraphs 10–12 of my complaint. The course I've chosen is a rescission application to the Labour Court to be based on the fraud, easily shown, i.e. that the evidence of LASA's single witness at trial was perjured in multiple basic respects, and that documents sourced after trial prove it. I'll be seeking leave to proceed on fresh pleadings, basing my claim on simple recruitment corruption in the form of cronyism.

²⁶ Complaint, paragraphs 13–15.

²⁷ Complaint, annexure 'E'.

²⁸ Complaint, annexure 'F'.

30. To sum up, Waglay JP's violation of my fundamental right to 'Access to courts' guaranteed by section 34 of the Bill of Rights in Chapter 2 of the Constitution,²⁹ of which due process in litigation is implicitly integral³⁰ isn't part of my complaint to the JSC, because the JSC has no jurisdiction to address it. But it's certainly part of the *objective incontrovertible factual background of striking gross irregularity* in the disposal of my petition – ultimately explained by the memorandum that perverted it. In plain speech, the reason Waglay JP summarily tossed my petition before all the papers were in and before the matter was ripe for consideration is that the memorandum persuaded him that like me my petition was rubbish – the exact burden of the memorandum, which he understood perfectly; and trusting its author, he acted on it accordingly, by sending me away non-suited.

Ad iii.

31. This is precisely not my contention; and it's atrocious that Waglay JP should misdirect the Committee by making this utterly false claim. In truth and in fact, my complaint clearly and unambiguously states precisely the opposite.³¹

Ad iv.

32. Again, none of this forms any part of my complaint against Waglay JP, and he disgracefully misdirects the Committee in alleging otherwise, to distract it from its narrow enquiry into my actual complaint, which is that he abdicated his judicial independence in succumbing to improper influence in dismissing my petition:

²⁹ 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

³⁰ Like equality of arms in litigation, entailing equal access to all material evidence – another implicit incident of this fundamental right, recently affirmed by the Constitutional Court, which LASA denied me by furtively concealing from me, with a Koki marker blacking it out, the **KEY** all-explanatory evidence of Mlambo JP's long former judicial relationship with my rival for the top post, recorded on the selection panel's recommendation report, and finally released uncensored, but only after I'd sued for it and was about to argue for it, years after the trial and dismissal of my wrongly-founded labour claim.

³¹ Complaint, paragraphs 34 and 35.

33. *First*, Ngcamu wasn't 'eventually appointed ... to the post [to] which the complainant [Brink] should have been appointed'. To the contrary, the still budgeted and funded post remains vacant.³² In my complaint I stated that Ngcamu was 'interviewed and shortlisted'³³ for the post, not appointed. My petition states LASA's risibly false version³⁴ that after I'd been selected and recommended for it, the post was 'frozen' for lack of budget to fill it.³⁵ In his response to my complaint, Waglay JP is shockingly unreliable with the basic facts.

34. But his demonstrated unfamiliarity with these most basic facts of the case shows that he didn't bother reading my petition before tossing it on the strength of what the memorandum unpleasantly had to say about it and me, and not even when I put it before him a second time as an annexure to my complaint.

35. *Second*, by enclosing the word I used in my complaint – 'colleague' – in sneer quotes, Waglay JP falsely insinuates that my assertion of Mlambo JP's and my rival applicant Ngcamu's long judicial relationship between 'for "±6 years" before he applied for the post'³⁶ is questionable. By trying to dilute it in this way, he reveals his queasiness about my eventual discovery of this potent fact, unearthed by determined PAIA litigation years after trial and judgment in my failed labour claim and his dismissal of my petition.

36. In truth and in fact, and contrary to Waglay JP's false implication, there's no doubt about the said judicial relationship at all, because, exactly as I stated in my complaint, it's indisputable that 'Mzochitwayo Ngcamu AJ (as he used to be)'

³² Illegally. As the Constitutional Court noted in paragraphs 8 and 9 of its judgment in *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1 (22 January 2018), allowing a budgeted, funded post to be 'left vacant' constitutes a 'breach of the provisions of the Public Finance Management Act (PFMA) which preclude ... leaving the position ... vacant.' With Mlambo JP's blessing, LASA has unlawfully breached the PFMA annually since 2010 – and furtively, since the so-called freezing of LASA's three remaining top legal professional, critical Senior Litigator posts has never featured in any of LASA's annual performance reports.

³³ Complaint, paragraph 11.

³⁴ For all the reasons laid out in my petition, annexure 'C' to my complaint.

³⁵ Complaint, annexure 'C', paragraphs 11–14.

³⁶ Complaint, paragraph 12.

had been 'LASA Board chairperson Mlambo JP's judicial colleague for "±6 years" in the Labour Court'³⁷ to which Mlambo JP had repeatedly appointed him.

37. *Third*, Mlambo JP's conduct – be it in participating in 'a conspiracy' (Waglay JP's notion, not mine) or in any other regard – is not the subject of my complaint against Waglay JP, which is that he allowed himself to be improperly influenced by the memorandum in the disposal of my petition for leave to appeal. And it's deplorably misleading for him to misrepresent to the Committee my complaint against him by falsely alleging otherwise.

Ad 3.

38. Waglay JP is very correct in concluding about his preceding paragraph 2, subparagraphs i–iv, that 'All the above is patent nonsense.' Only, it's his nonsense not mine. He sets up a straw man and he shoots it down.

Ad 4.

39. Here Waglay JP offers the Committee the anodyne assurance that in the consideration and dismissal of my petition, everything went off just as it should have – perhaps with one exceptional qualification, which he doesn't mention here (after alluding to it in his preceding paragraph 2.ii), namely that my petition struck him and Davis and Sutherland JJA as such obvious junk that they didn't need to wait a minute longer before turfing it out; and accordingly there was no need to wait for me to answer LASA's condonation application³⁸ and for LASA to reply, and to then carefully assess and decide LASA's case for condonation in his customary, commendably thorough manner.³⁹

40. What Waglay JP doesn't own up to the Committee is that, besides the memorandum and the condonation application, he had two primary affidavits

³⁷ This approximate '±6 years' time period I quoted is directly sourced from the selection panel's recommendation report, recording (a) Ngcamu's background and qualifications, inter alia as a former long-time acting judge of the Labour Court (repeatedly appointed by Mlambo JP, which court he headed at the time) and (b) the reason the panel rejected and eliminated him from the running for the post: he lacked right of appearance, so had never litigated a case on his feet in the High Court, never mind in the country's top appeal courts.

³⁸ Complaint, annexure 'D' (material excerpt).

³⁹ Complaint, paragraph 19.2, citing Waglay JP's fine, careful judgment in the Eberspächer case.

before him in the LAC case file: mine supporting my petition and LASA's opposing it. But he's silent about LASA's opposing affidavit. He doesn't say he disregarded it and didn't read and ponder what it contended about my case; and that he didn't do so for the reason that it wasn't properly before him, having been delivered out of time, objected to on account of this, and therefore the subject of a pending condonation application. He just doesn't mention it.

41. Fact is, LASA's opposing affidavit was in the petition file – physically, but not lawfully, to the extent that it was improperly before him and therefore not ready to read and consider, because it had been delivered out of time, and this procedural irregularity hadn't yet been excused by way of an order for condonation, made upon an evaluation of (a) LASA's excuse(s) advanced in its condonation application in the court file; (b) my answer to it (I never did get to answer it, because Waglay JP rushed to throw my petition out before I'd completed and filed my answering affidavit opposing it, still in time to do so); and (c) LASA's reply (unnecessary, because by prematurely and irregularly deciding the main case, and thereby closing the door on me before I could get a word in to refute the blatant lies⁴⁰ LASA told him about why it came to court late

⁴⁰ I identified and refuted these lies in my answering affidavit in LASA's failed application to the Pietermaritzburg High Court (case 12124/16) to blow me out of court as a vexatious litigant (for successfully suing repeatedly for duly requested but persistently illegally and unconstitutionally refused records, and then suing to enforce (a) full and proper compliance with LASA's total surrender treaty signed at court just before argument, and (b) compliance with a further PAIA request specifically envisaged in the settlement agreement):

210. *On 8 December 2014, immediately after dispatching my petition for leave to appeal to the JP of the LAC at his chambers in Johannesburg, via the Post Office's express, next-day, door-delivery courier service, two days before it was due, I emailed Mtati, as a courtesy, to inform him that I'd just done so, and vouched this by attaching (a) a scan of the courier's waybill; (b) a scan of the final signature page of my petition bearing my and the commissioner of oath's signatures; and (c) the unsigned final PDF of the petition, because I'd previously found that LASA's email programme traps attachments over 3MB, and the scan of my signed petition exceeded this and was too large to go through. As I explained in my email, my considerate purpose in doing this was to give Mtati a head-start on answering my petition, as the rules allowed him only ten days to do so. (I'd raced to comply with my own ten days allowed to draw, sign, file and serve; and I expected LASA to comply likewise.) A copy of my email to Mtati is annexed marked 'Q'.*

211. *As permitted by the rules of the LC, I then formally served my signed petition on LASA as required, by faxing it within an hour or so to its Durban correspondent, appointed by notice to me for my service of all court processes in my appeal; and after doing that, drew, signed, filed and served my service affidavit.*

212. *That is, I duly served a copy of my petition on LASA at its Durban office appointed two days before it was due under the LAC rules.*

213. *It's impossible that LASA's corresponding attorney in Durban, Ngcamu, my erstwhile rival for the Senior Litigator post and a former judge of the LC for six-and-a-half years, so I discovered*

to oppose my petition, Waglay JP rendered LASA's condonation application moot).

42. Waglay JP doesn't say he didn't read LASA's opposing affidavit. He doesn't say he didn't need to read it – either because it wasn't properly before him, or

in April 2016, (a) didn't advise Mtati that I'd duly served my petition on him, and (b) just dropped the fax of my petition into an office file like an inexperienced articulated clerk. And indeed this wasn't ever alleged.

214. LASA filed an opposing affidavit on or after 22 January 2015, well out of time. When Sekgota phoned to ask whether I'd received it, I confirmed I had, but mentioned it was late, to which he responded, 'We'll argue that 15 December [sic] to 15 January are dies non.'

215. That is, LASA's excuse for filing late was its belief that it wasn't.

216. I told Sekgota he was wrong, because there're no dies non in applications and petitions, only in High Court actions.

217. Mtati and his head office lawyers evidently accepted my lesson for them in civil procedure, and recognised their mistake, because this true explanation given to me for why LASA filed late never came up again. But instead of honestly stating it and asking the court's pardon for it, Mtati fabricated two new false excuses for opposing me out of time.

218. In his affidavit making LASA's case for condonation, to which he swore under penalty of being jailed for perjury, and also being sacked and struck off, Mtati claimed he'd not known I'd petitioned until after his return in January from LASA's annual holiday, when out of curiosity he had a look at my case document index online and saw my signed petition posted there. (My heads of argument, the judgment dismissing my claim, national newspaper reporting about it, my petition, and further documents, including Mtati's perjured condonation affidavit, are openly accessible at: goo.gl/WAuLK6.)

219. Naturally Mtati deceptively omitted to mention to the JP my email to him, which flatly contradicted his new excuse and exposed it as a blatant lie. And there's no possible pretending he didn't read it, because in telling this new lie of his under oath Mtati blundered by annexing to his condonation affidavit my scan of the waybill I'd emailed to him – but not the signature page of my petition, nor the final unsigned PDF I'd also emailed him. He made very sure not to share those with the JP, contradicting his new lying explanation for opposing me out of time.

220. Mtati's second false excuse, intended to garnish his first, refuted it. Immediately on receiving my petition at the Johannesburg LAC, delivered the day after I couriered it and faxed to LASA's appointed correspondent, in time and with a day to spare, registry clerk James Kamanga there phoned to say he needed an appeal case number from the LAC registry in Durban. Which he very obligingly immediately himself obtained, and phoned back shortly afterwards the same morning to convey it and to tell me he'd already given it to LASA so there was no need for me to.

221. Which means LASA had a copy of my signed and attested petition by fax the day before I filed it at the LAC, and got a new case number the next day, the day it arrived at the LAC, one day ahead of my ten days allowed to file and serve. All in good time and all in good order.

222. In a logically incomprehensible manner, Mtati tried falsely blaming the day between service of my petition on his correspondent and the allocation of a new appeal case number as reason to be confused about whether I'd petitioned or not, as a further basis to justify his inaction on receiving my petition and just pushing off for LASA's annual summer holiday without attending to oppose it. Except that his correspondent had received both my signed petition by fax, and the new Durban LAC case number by phone from the LAC in Johannesburg, so there could be no honest confusion about whether I'd petitioned or not.

223. The true reason, revealed to me by Sekgota, was that they all thought LASA's national Christmas holiday – dies non in high Court actions – didn't count in the reckoning of LASA's ten days to oppose my petition.

because my petition was such obvious garbage that he didn't even need to hear what LASA had to say about it.⁴¹

43. Nor of course does he say that he didn't even read my petition, because it was clear to him from the memorandum that it was complete rubbish. In other words, he doesn't say the memorandum spared him the trouble of reading any of the papers.

44. Shown in my petition,⁴² the trial judge made the most basic legal blunders vitiating the fairness of the trial even before getting his facts wrong.⁴³ The Committee will agree that no appeal judge giving my petition an honest, attentive reading could have concluded that it disclosed no fairly arguable case for appeal, because it identifies a multitude of fundamental reversible errors. Put another way, the contents of my petition absolutely eliminate the possibility that Waglay JP, Davis and Sutherland JJA 'unanimously ... concluded that the petition was without merit'.

45. Waglay JP's claim that 'We did not consider the condonation application of the respondent [LASA] as we concluded that the petition was without merit' implies that, besides LASA's sworn excuses for filing its opposing affidavit out of time, which he says weren't considered, he assessed the other evidence on affidavit before him before arriving at his conclusion that my petition was worthless. As said, he doesn't say that he also 'did not consider' LASA's opposing affidavit; he's silent about it.

46. This evidence on affidavit before Waglay JP comprised my supporting affidavit, and LASA's opposing affidavit not properly before him, the subject of a pending condonation application, and therefore – if the petition papers were read

⁴¹ Cf Vahed J's dismissal of the just mentioned application without calling on me to argue, the difference being that it was clear from the debate that he'd studied my 'expansive heads of argument' (from which he later 'borrow[ed] freely') before the hearing, in which I demonstrated that LASA's case was still-born, so there was really nothing for me to add from the bar. They're online at goo.gl/GUKfNj.

⁴² Annexure 'C' to the complaint.

⁴³ Concerning LASA's transparently false financial insufficiency justification for aborting my appointment (comprehensively dismantled in my petition), which lying justification was repeated in the memorandum, see paragraphs 31–4 of the complaint and the annexures to which they refer.

at all, as Waglay JP claims – were considered before I'd had the opportunity under the audi rule to answer and refute the two flagrant lies told him on oath to justify LASA's filing of the opposing affidavit out of time.

47. Which is to say, on his own showing, Waglay JP denied me my fundamental right to due process; and to my considerable prejudice, because had he heard me in the condonation application, and not hurriedly slammed the door on me before I could answer it, he'd have appreciated that (a) LASA's two excuses given under oath for filing its opposing affidavit late were both perjured; (b) the same deponent to LASA's affidavit in the main case, opposing my petition, lies freely under oath whenever necessary to pervert a legal process, and (c) his several claims in his opposing affidavit were untrustworthy, more especially where they contradicted LASA's own shambolic case at trial.

48. Waglay JP's manifestly untruthful claim that the 'three individual files' compiled by the registrar for each of 'the three judges who are allocated the petitions ... only contain relevant documents properly filed' is flatly contradicted by the fact that the petition file in the Durban Labour Appeal Court registry contains the memorandum, as the registrar's office certified.⁴⁴

49. And being unstamped by the registrar, the memorandum certainly wasn't 'properly filed'.

50. It's not my complaint that additional copies of the memorandum were made and passed to Davis and Sutherland JA in the files that Waglay JP claims the registrar prepared for them. They would have been horrified by it. So I'm sure they weren't shown it.

51. Furthermore, it's inconceivable to me that apprised by the registrar that LASA had filed a condonation application, in which my answering affidavit opposing it was still due, Davis and Sutherland JA would have countenanced and participated in Waglay JP's (a) violation of my constitutional right to due process by prematurely considering my petition, along with LASA's affidavit opposing it, before the latter had been properly received into the evidence, and

⁴⁴ Complaint, paragraph 23 and annexure 'B'.

(b) dismissal of my petition in those grossly irregular circumstances. In other words, I'm sure Davis and Sutherland JA weren't given a file with LASA's yet to be answered condonation application in it.

52. Waglay JP tells the Committee how petitions are ordinarily dealt with in the Labour Appeal Court. I don't doubt it, but the real evidence in the master file archived in the Durban LAC registry – found by Rawlins, and certified present in the file by the registrar's clerk – contradicts and exposes as false Waglay JP's feeble, untrue claim that 'The files only contain relevant documents properly filed.' To the contrary, the court file contains an irrelevant document not properly filed: the memorandum. And it's there for all to see right now.

53. If indeed the registrar prepared files for Davis and Sutherland JJA containing copies of all 'relevant documents properly filed', I don't doubt this would have been true of their files; because had they contained the irrelevant, improperly filed memorandum, they'd surely have cried foul. But it's wholly improbable that Davis and Sutherland JJA had all the 'relevant documents properly filed', because had that been so, they'd have appreciated that the case wasn't yet ripe for decision.

54. The flat fact that the memorandum was found in, and remains in, the master petition file archived in the Durban LAC registry contradicts and refutes Waglay JP's false claim here.

55. His false denial that the main LAC file contains the memorandum dishonestly suggests that the concrete foundation of my complaint to the JSC about this is just wind.

56. The Committee can safely exclude the possibility that the memorandum was placed in the primary LAC file containing the original documents⁴⁵ *after* my petition had been dismissed, and without Waglay JP's knowledge, because the

⁴⁵ Namely, the file kept and archived by the LAC registry in Durban. In his paragraph 4, Waglay JP describes the usual process, in which his registrar makes three files, one for each of the three judges of appeal allocated to decide the petitions. The first file opened contains the original court processes, and the other two contain copies.

author of the memorandum wouldn't have had any reason to torpedo a petition already sunk.

Ad 5.

57. My petition was manifestly not 'properly considered and refused', and this is incontestable having regard to the objective facts. It was rejected prematurely before all the papers were in, in a gross breach of the LAC's own rules, to say nothing of the most basic principle of natural justice to which I was entitled the benefit: the audi alteram partem rule. In his handling of my petition, and LASA's interlocutory application for condonation, Waglay JP denied me due process in the LAC as regulated by the rules of the court he heads.⁴⁶

58. The complete explanation of why he did so is contained in my LAC file: the real evidence (the memorandum) that he allowed himself to be improperly influenced against me and my petition, and thereby induced to summarily and prematurely dismiss my plea for leave to appeal Cele J's dismissal of my claim.

59. Waglay JP says I 'was informed about' the fact that my petition was refused. Sure I was – right in the middle of drawing my answering affidavit to oppose LASA's condonation application, on the basis that its two excuses tendered on oath for opposing me late were outright lies.⁴⁷ So the fact that I 'was informed' that my petition had been rejected, stated by Waglay JP here, is deceptive distraction to create a patina of propriety over a grossly irregular proceeding.

60. Since Waglay JP denied me the opportunity to refute LASA's lies to him, and on this basis defeat LASA's fraudulent condonation application and thereby exclude from his consideration the profusion of other lies told in LASA's main affidavit opposing my petition, including brand new lies not told at trial, 'the complainant's petition was' clearly not 'properly considered', contrary to his false allegation to the Committee about this.

⁴⁶ As noted above, Waglay JP's violation of my fundamental right to due process is a matter outside the JSC's jurisdiction.

⁴⁷ Complaint, paragraphs 16–17; and footnote 40 above.

Ad 6.

61. Every assertion Waglay JP makes in this paragraph is untruthful, false and misleading.

62. *First*, he persists in falsely exaggerating that I complain of 'documents' found in the court file, as if he doesn't know exactly what I'm talking about. In truth and in fact, as my complaint makes perfectly clear, it concerns a single memorandum in the court file and nothing else.

63. *Second*, he falsely alleges that I claim to have 'found' the memorandum 'in the Labour Court file.' This is absolutely untrue. In my complaint I claim precisely to have found it in 'the petition file'⁴⁸ (under Durban Labour Appeal Court case number DA21/14) and not in the Durban Labour Court file (LCD529/11).

64. *Third*, to construct the false alibi that he couldn't have violated Article 4 of the Code of Judicial Conduct as charged, by failing to maintain 'Judicial Independence', to wit by allowing himself to have been influenced against me and my petition by the memorandum and to have summarily dismissed my petition as it energetically urged, Waglay JP untruthfully distances himself from the scene of the crime.

65. He says my discovery of the memorandum 'in the Labour Court file ... has nothing to do with the Labour Appeal Court (LAC).' Quite the contrary, since the memorandum was indeed found in the LAC file, in truth and in fact it has everything 'to do with the Labour Appeal Court (LAC)', and more particularly 'to do with' him as head of that court, who dealt with my petition personally.

66. He falsely claims that 'The LAC has its own files, retained by its registrar Mr Phophi who is based in Johannesburg.' Indeed, 'The LAC has its own files', different from the Labour Court's files, but they're not 'retained by its registrar Mr Phophi who is based in Johannesburg', where the trial court sat in a different city. The registrar in Durban keeps the files of LAC cases in regard to Durban

⁴⁸ Complaint, paragraphs 20 and 21.2.

cases, not registrar Phophi in Johannesburg. My LAC case file is in Durban, and there's no such file in Johannesburg – so I directly ascertained from enquiries I made personally at the Johannesburg Labour Appeal Court registry, which I visited in July 2016.⁴⁹

67. Understanding from the LAC rules that I had to deliver my petition directly to Waglay JP within 10 days, and believing him to be at his chambers in Johannesburg at the time, I'd couriered it directly to him there. On its arrival, my petition was allocated case number DA21/14 (D for Durban, A for appeals).⁵⁰

68. After the dismissal of my petition – in Johannesburg, and not in Durban, as falsely stated on the dismissal order⁵¹ – the case file was transferred to the Durban LAC registry for archiving there. It was not 'retained by [LAC] registrar Mr Phophi who is based in Johannesburg.'

69. In responding to my complaint, Waglay JP can't get even his most basic facts straight.

Ad 7.

70. Of course, generally speaking, 'Mlambo JP has no role to play in the decisions of the LAC',⁵² as Waglay JP's predecessor as head of the LAC. Of course

⁴⁹ In my answering affidavit in LASA's vexatious application, I affirmed:

76. The Memorandum turned up during a search of the petition file in April 2015. I wanted to see whether there was any record of Davis and Sutherland JJA's decision of my petition in Durban, as alleged on the order oddly issued by the registrar of the LAC in Johannesburg. There isn't. And there's no possible duplicate file containing any such record in the latter's office, because in July 2015 I drove up to the LAC in Johannesburg especially to check, and personally established this as a fact from two registry clerks up there.

⁵⁰ The Durban LAC case number appears on the memorandum, annexure 'A' to my complaint. Obtained from the LAC registry in Durban, the Durban LAC case number was annotated on the face of my petition by a clerk in the Johannesburg LAC registry shortly after receiving my petition by courier. So he told me on the telephone.

⁵¹ Complaint, annexure 'G'. I established from a thorough investigation that none of the appeal judges named in the order were in Durban on the date the order claimed they were.

⁵² The Committee might find it relevant that as a *non-executive* director and chairperson of LASA's Board of Directors Mlambo JP also 'has no role to play in the decisions of' CEO Vedalankar and NOE Nair, LASA's management executives jointly delegated by its Approval Framework to confirm or reject selection panel recommendations of Senior Litigator candidates; but in cavalier breach of LASA's internal regulations and indifferent to such niceties as the rule of law in public administration, he's illegally arrogated to himself the power to approve and reject such candidates as he pleases, in committee (for appearances) with various incompetent, unauthorised national management executives. In a word, Mlambo JP just does whatever he likes.

'it does not need to be said'. Strangely enough, though, Waglay JP finds it necessary to 'say it anyway.' He's evidently concerned to exculpate his long-time former superior in the Labour Appeal Court, under whom he'd been deputy head of court before being appointed Judge President himself when Mlambo JP was appointed to head the Gauteng Division of the High Court.

71. My instant complaint is against Waglay JP, arising from his judicial misconduct in the disposal of my petition, not against Mlambo JP. As said above, I've not specifically charged Mlambo JP with perverting the decision of my petition; and for the purpose of determining my complaint against Waglay JP (and my complaints against Mlambo JP), I don't require the Committee to make a finding as to who authored and gave the memorandum to Waglay JP, strenuously urging him to reject my petition.

72. It's untrue that I've 'filed a complaint against Mlambo JP in connection with this matter', to the extent that 'this matter' before the Committee is the criminal perversion of my petition for leave to appeal, and more particularly Waglay JP's breach of Article 4 of the Code of Judicial Conduct in abdicating his judicial independence in throwing my petition out on the strength of the memorandum's contentions that I'm an off-beam professional reprobate bringing obviously baseless cases to trial and on petition.

73. It's equally untrue that I 'intend... to [file complaints] against Davis JA and Sutherland JA.' Nowhere in my complaint do I state or suggest such an intention, as Waglay JP falsely alleges. Certainly not at this stage on the information currently known to me, because, as I've said, I don't believe they were party to the unlawful and corrupt disposal of my petition. Waglay JP just makes it up as he goes along. His intention here seems to be to portray me as funny in the head, endlessly complaining about everybody, baselessly.

74. Waglay JP betrays his concern that the Committee should not ask Davis and Sutherland JJA about 'this matter', by claiming to 'doubt that either of them will have anything further to add'. Quite the contrary, I'm confident that both will positively confirm to the Committee that neither had anything to do with the

case, and will refute Waglay JP's false claim in his response that 'we unanimously decided to refuse [my] petition.'

75. Waglay JP's intention in dissembling this 'doubt' is clearly to put the Committee off questioning Davis and Sutherland JJA about my complaint, or more precisely, about Waglay JP's claims about them in his response to it, with a view to verifying them.

76. To assist the Committee arrive at the truth of the matter, in its further investigation, obviously necessary, a draft interrogatory for Davis and Sutherland JJA will follow the submission of these comments.

77. Wherefore I persist with my complaint.

Signed at Eshowe on 9 June 2018.


ANTHONY BRINK

Signed before me at Eshowe on 9 June 2018 by the deponent who has acknowledged that he knows and understands the contents of this affidavit and affirms its contents to be true to the best of his knowledge and belief.


COMMISSIONER OF OATHS

Name: **ANANDU MANUKOSI NSELE**

Address: **S.A.P. 73 MAIN STREET**

Capacity: **ESHOWE,
W/OFFICER**

