R59

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D529/11

In the matter between

ANTHONY ROBIN BRINK Applicant

and

LEGAL AID SOUTH AFRICA Respondent

APPLICATION FOR LEAVE TO APPEAL AND TO LEAD FURTHER EVIDENCE ON APPEAL

The applicant hereby applies for leave to appeal to the Labour Appeal Court against the dismissal of his claim, and to present further evidence in that court, on the grounds set out herein.

PART ONE
APPLICATION FOR LEAVE TO LEAD FURTHER EVIDENCE ON APPEAL

1. The applicant applies for leave to lead further evidence of two email records, discovered by the respondent after trial, proving categorically that the respondent's single witness Brian Nair perjured himself in court on two distinct peripheral issues – thus devastating his credibility as a witness generally, and specifically the reliability of his pivotal allegation, which the court accepted and believed as the perfect truth and on which the case largely turned, that he didn't know the applicant's political background at the material time, because he didn't open and read the applicant's CV detailing it and the selection panel's recommendation of him referring to it when these were emailed to him on 26 November 2009 as PDF attachments after the interviews and selection – not until the end of the following year or maybe early the year after that when he decided to read them out of curiosity.

2. At trial Nair testified under cross-examination that (following the applicant's several complaints to the SAHRC about the respondent's persistent unlawful refusals to comply with his requests for records under the Promotion of Access to Information Act 2 of 2000 ('PAIA') probing the reason for the abortion of his recruitment, and the respondent's repeated false reporting to the SAHRC under section 32 to conceal this from the National Assembly in the SAHRC's section 84 annual reports on public body compliance with PAIA):

    (i) he didn't know that the SAHRC had held a special PAIA training workshop for the respondent's national office staff; and,

    (ii) he didn't know that the SAHRC had targeted and audited the respondent for PAIA compliance.

3. After trial, and with a view to gathering further documentary evidence inter alia for Nair's criminal prosecution for his many perjuries in the case – one being his novel claim in court not to have known of the applicant's political background until the end of 2010 or early 2011 when he decided out of curiosity to read the applicant's CV, which new story contradicted his earlier, different story told on affidavit before trial in this regard, telling a totally different story (see Part Two below) – the applicant tested the veracity of these novel, unanticipated, and improbable allegations made in court under oath by the respondent's deputy information officer Nair with a request for records under the Promotion of Access to Information Act 2 of 2000 ('PAIA').

4. Among the records flushed out of the respondent with the applicant's PAIA requests were two emails showing that, contrary to his lies about this under oath in court, Nair indeed:

    (i) well knew that the SAHRC had held a special PAIA training workshop for the respondent's national office staff; and,

    (ii) well knew that the SAHRC had targeted and audited the respondent for PAIA compliance.

5. *Ad the PAIA workshop*: On 26 August 2011 Nair was briefed by one of the respondent's in-house attorneys, Upkaar Mungar, about the SAHRC's intention to hold a special PAIA training workshop for the respondent's national office staff. In a comprehensive, one-and-a-half page email to Nair under the pointed subject-heading 'Training in Promotion of Access to Information Act 2 of 2000', Mungar informed Nair: 'The South African Human Rights Commission is planning a training programme for Legal Aid SA' and asked him to 'indicate the names of staff who you would like to attend the training and who deal with PAIA matters'. Mungar detailed the 'Draft Programme' for the PAIA

training workshop; some 'Reading Materials' on the Act; and the intended 'Outcomes' for attendees, which, in a nut, were their future ability to handle PAIA requests in compliance with the Act.

6. This new evidence shows Nair indeed knew about the SAHRC's special PAIA training workshop held for the respondent's national office staff, and that in denying it he brazenly and contemptuously lied to court under oath, confident that the court would accept and believe any lie he told it.

7. *Ad the PAIA audit*: In its section 84 report on public body compliance with PAIA included in its 2011/12 report for the Minister and the National Assembly, following the applicant's complaints, the SAHRC reported the respondent as a PAIA defaulter. Concerning the failure of such public 'institutions' as LASA to comply with their PAIA compliance reporting obligations, the SAHRC singled LASA out by citing 'A case in point … where a complainant brought to the attention of the Commission a number of requests made to LASA which were not reported in LASA's 2010/11 section 32 report despite the fact that the requests were made in that financial year. … The Commission intends auditing LASA fully in the course of the 2012/13 financial year.' (All records quoted here are in the applicant's trial document bundles.)

8. When on 9 October 2012 Nair and CEO Vedalankar appeared together before the Portfolio Committee to present the respondent's annual report, Committee chairperson Luwellyn Landers MP queried SAHRC's negative section 84 report with them, as did Committee member John Jeffery MP (now Deputy Minister), who voiced the Committee's consternation about the 'report … that stated the South African Human Rights Commission was unhappy with LASA and their cooperation in terms of PAIA' (per the Parliamentary Monitoring Group's transcription of the record of the presentation). 'The Chairperson [of the Portfolio Committee] told the [LASA] delegation that they would arrange for Legal Aid to view the PAIA report.'

9. After viewing the SAHRC's PAIA report of the respondent to the National Assembly as a PAIA defaulter, Nair knew full well of the SAHRC's intentions of 'auditing LASA fully in the course of the 2012/13 financial year'; and indeed he saw them realised: On 14 January 2013 the SAHRC emailed Nair's PA: 'Please find attached a PAIA Audit Questionnaire and Letter for the Information Officer's consideration. The email to be placed before Mr Thembile Mtati and Mr Brian Nair (their respective PAs are cited in the email) as well.' (the words in parenthesis appear in the original, and their PAs are indeed 'cited in the email' address bar)

10. This new evidence shows Nair indeed knew full well about the SAHRC's audit of the respondent for PAIA compliance, and that in denying it he brazenly and contemptuously

lied to court under oath, confident that the court would accept and believe any lie he told it.

11. Besides unequivocally demonstrating Nair to be a perjurer, and so an unconvicted criminal, who evidently lies freely on oath about anything, and whose evidence generally therefore can't be trusted and relied on in any respect, the new evidence of these email records very directly relevantly demonstrates that Nair's denials of knowledge of facts recorded in documents emailed to him can't be trusted – such as his similar denial of his knowledge of the applicant's political background detailed in his CV, and referred to in the recommendation, emailed to him after the interviews by KZN ROE Mdaka.

12. It follows from Nair's proven lies on oath in (i) denying his knowledge of the SAHRC's PAIA training workshop and (ii) denying his knowledge of the SAHRC's PAIA audit, that in similarly denying his knowledge of the applicant's political background at the material time (innately improbable and already contradicted by him on affidavit before trial), Nair lied about this as well, thus committing a fraud on the court, and successfully defrauding it, thereby leading to the failure of justice that resulted from the dismissal of the applicant's claim.

PART TWO
APPLICATION FOR LEAVE TO APPEAL

Introductory Note

13. The applicant records that, to his prejudice, this application has been drawn without sight of the transcript of the trial; that the registrar refused to transmit to the trial judge his written request, telefaxed to court and copied to the respondent, for a directive that the respondent deliver to the applicant the extra copy of the transcript that it long ago printed for him, and insisted that he instead travel to court and make a photocopy of the court's copy at a likely cost of about R3000; and that the respondent's Corporate Legal Manager Solly Sekgota refused to agree to release the extra copy of the transcript sitting idly on a shelf in the respondent's Durban office, remarking that since the applicant had no case and his suit had cost the respondent a lot of money, it had been discussed and decided that the applicant should content himself with listening to the audio recording of the two-week trial on the CD sent him. There was no time for any of this.

14. Consequently, this application is not referenced to the record of the trial by page and line number in the usual course as the respondent intended it to be, in the similar manner that his heads of argument are meticulously and comprehensively footnote-

referenced to the documentary record, pleadings and affidavits. Nor is this application referenced to the latter papers. All references to these herein can be found in the applicant's heads, which likewise contain all references to the contradictions canvassed below between Nair's evidence in court and his and the respondent's different pleaded and sworn versions before trial and yet more different versions advanced in correspondence and reports. The applicant's heads also contain all relevant references to the respondent's Approval Framework and Recruitment code and other documents mentioned herein.

Grounds of Application for Leave to Appeal

15. In summary, the applicant applies for leave to appeal on the grounds inter alia that the court:

- fundamentally misdirected itself in misallocating both the evidential and final onuses;
- wrongly failed to hold the respondent to its pleaded case, and upheld a defence never pleaded;
- cited and relied on irrelevant reported cases as precedent authority for a wrong proposition of law;
- duly found that Nair had not been an honest witness, without identifying any of his many perjuries that it found the applicant had demonstrated, then failed to weigh the implications of this nuclear adverse finding for his general credibility and the trustworthiness and reliability of his core claims (i) as to why he didn't process the applicant's appointment (two successive excuses, one new) and (ii) that he didn't know of the applicant's political background described in his CV and referenced in the recommendation, because he never opened and read them until more than a year after receiving them;
- wrongly failed to assess and reject Nair's evidence in light, variously on different scores, of: its inherent improbability; his contradictory evidence on affidavit before trial; the contradictions between his evidence and the respondent's pleaded and sworn case before trial; and the contradictions between his evidence and the documentary record flatly refuting it;
- wrongly failed to reject Nair's new excuse never pleaded (too busy taking stock of court coverage, and preparing for management and Board meetings), variants of which had been previously alleged (too busy preparing the budget; too busy presenting the budget; and difficulty 'coordinating a meeting time suitable for all

members of the panel' – explicitly retracted by him on affidavit, after the applicant had shown it to be false, then revived by him in court, claiming that his retraction on oath was a mistake, then contradicting this excuse;

- wrongly failed to reject the budgetary insufficiency excuse, indeed pleaded, but flatly contradicted and refuted by the respondent's comprehensive documentary record, concerning its transient budgetary uncertainty for a few months in 2010 and the specific limited measures the record shows it took to meet it;

- wrongly failed to reject Nair's pivotal claim that he was unaware of the applicant's opprobrious and deeply unpopular minority political background at the material time, because he only learned of it more than a year after receiving the applicant's CV mentioning it, along with his recommendation by the selection panel referencing it, when he decided out of curiosity to open and read these documents emailed to him as PDF attachments after the interviews and selections – having regard to the inherent implausibility of this story, and moreover to the fact that he diametrically contradicted it by telling a different story on affidavit before the trial, namely that he'd learned of the applicant's politics much earlier and from a different document, namely from the applicant's letter to CEO Vedalankar in July 2010 describing it;

- wrongly failed to note that Nair's evidence diametrically contradicted and demolished the respondent's version, repeatedly advanced in correspondence, pleadings and affidavits before trial, that (i) budgetary insufficiency at the time the applicant applied for and was interviewed and recommended for the post prevented his appointment, and (ii) the respondent's three vacant senior Litigator posts at Pietermaritzburg, Durban, and Mthatha had to be simultaneously frozen for this reason;

- wrongly failed to apply the principle it duly stated, namely that when an employer lies about its reason for an adverse employment decision, the most likely reason it does so is to cover an illegal discriminatory motive – having regard to the lies Nair told at trial about why he didn't proceed with the applicant's appointment, all unequivocally demonstrated by the applicant;

- wrongly held the applicant had failed to lead evidence to prove an issue that was common cause on the pleadings – that the Pietermaritzburg Senior Litigator post was a critical position – when the applicant nonetheless indeed referred in his heads to several pieces of evidence in the documentary record before court, refuting Nair's false denial in his evidence of this agreed fact; and,

- unfairly and massively prejudiced the applicant by ruling at the outset of trial that he would not be permitted to cross-examine the respondent's officers whom he'd subpoenaed.

Particulars of the applicant's grounds of appeal

16. Ad paragraph 1 of the judgment: The court overlooked the applicant's amended Draft Order, handed up at the close of argument drawn to accord with Mlambo AJA's (as he then was) formulation of the special damages (i.e. lost income) award he made in the Gordon case, also handed up.

17. Ad paragraph 2: The court failed to note the fact that the applicant's pleaded defence version that the three Senior Litigator posts at Pietermaritzburg, Durban, and Mthatha – consistently advanced prior to trial to the applicant in correspondence and on affidavit, and repeatedly to court in pleadings and interlocutory affidavits – was contradicted and wrecked by its single witness Nair, who testified that the cancellation of the Mthatha Senior Litigator recruitment had nothing to do with any budgetary consideration.

18. The court erred in not finding that the comprehensive documentary record before it shows that the respondent's transitory budgetary uncertainty arising on 10 March 2010 and the sole measure taken much later in July 2010 to meet it, namely to temporarily hold recruitment to some lower criminal court public defender posts, had no bearing on its massively accelerated recruitment and new post creation drives across all ranks, including another Senior Litigator recruitment at Mthatha, in the following April to June first financial quarter, which staff recruitment drive otherwise continued in the second quarter July to September 2010 and then peaked in the third October to December quarter, and that *this record diametrically contradicted and refuted as untrue* CEO Vedalankar's claim to the applicant on 18 October 2010 that 'In July 2010' she had frozen the Pietermaritzburg, Durban, and Mthatha posts as a cost saving measure, in that had this been true, there'd have been a record of this alleged management resolution and necessary Board resolution approving this major deviation from its Strategic Plan, which part of it the respondent specifically, but falsely, has reported to the Minister and to Parliament as having been completed.

19. Ad paragraph 5: The court failed to note the evidently abnormal telephonic instruction given that all CVs should be sent up to Nair, including those of the interviewed candidates whom the selection panel had rejected and had 'eliminated' (respondent's word in its pleadings) from consideration for appointment.

20. Ad paragraph 7: The court failed to note the implication of Clark's initial communication with the applicant noted in this paragraph, namely that five months after deciding not to proceed with finalizing the applicant's recruitment, Nair had not informed her as the

respondent's national HRE about this, even as (as LSTC chairperson) he'd invited applications from the regions to motivate for a new Senior Litigator post on 25 February 2010, and, having accepted Mthatha's motivation, had ordered the 'Immediate' recruitment of a Senior Litigator for Mthatha on 24 March 2010, with advertising taking place in April, the same month that the applicant approached Clark, while the finalisation of his recruitment stood halted all the while.

21. Ad paragraph 8: In her affidavit handed in at trial in lieu of oral evidence (she'd failed to remain in attendance), Clark expressly confirmed it was certainly Brijlal; it was not 'probably' him as misstated in the judgment.

22. Ad paragraph 9: The court failed to note the striking change in Clark's animus towards the applicant and her preceding unprofessional, strange avoidance of the applicant's calls, after Nair returned to head office from Cape Town, mentioned in paragraph 8.

23. The applicant will contend on appeal that Clark's change of conduct and newly hostile animus towards the applicant after Nair's return to head office strongly suggests the prejudice the applicant complained of, especially her appalling rudeness; her calculated opacity in response to the applicant's pressing plea for information either way; her false pretence that the respondent's failure to communicate with the applicant for five months since his interview was normal and acceptable business practice (having implicitly conceded in her previous email that the silent delay was untoward), and that his enquiry for information five silent months after his interview was somehow unreasonable; her dishonest concealment of the fact that the applicant had been recommended, by stating he'd merely been interviewed, and her dishonest suggestion that the applicant had an unfounded expectation of being appointed; her dishonest suggestion that the selection panel hadn't made a clear recommendation; her telling proposal that the applicant should withdraw his application for the post; and her radical change of tune in now discouraging him from contacting the respondent again, having previously encouraged it.

24. Ad paragraph 11: The court failed to note the significance of this email, namely that it shows categorically that (a) eight months after the applicant's selection, with nothing done to finalize his appointment, even as the Mthatha recruitment had commenced and concluded on 24 May 2010 with Skibi's recommendation as 'best candidate', Vedalankar knew nothing of the Pietermaritzburg and Durban Senior Litigator recruitments; and that (b) until the applicant's letter to Vedalankar in July, the freezing of Senior Litigator posts had never been discussed and agreed with her as a possible cost-saving measure between 'early this year' and the end of July, as she falsely alleged in her October 2010 letter.

25. Ad paragraph 11: The court failed to note that Skibi, and no other candidate interviewed for Mthatha, was orally told his appointment and transfer had been cancelled. Though the letter Mdaka sent to the applicant indeed conveyed 'an apology for the delay in informing candidates of the outcome of the interview process' (per the judgment), in fact it didn't inform the candidates of the outcome of the interview process, which was that the applicant and Mngadi had been recommended and the two other candidates 'eliminated' (respondent's word in its pleadings).

26. Ad paragraph 12: Section 27 automatically deems as a refusal a failure to respond within the 30 calendar days of the delivery of a PAIA request allowed by section 25. This wasn't the applicant's interpretation of the situation, as the court wrongly suggested here.

27. The court failed to note that Vedalankar strangely initially tacitly (later expressly) refused to provide the applicant with any of the records he'd requested about the circumstances in which his appointment had been aborted, instead of playing open cards with him about this, as someone with nothing to hide would have done, as PAIA and section 32 of the Constitution required of her.

28. Ad paragraph 13: The court failed to note that the budgetary explanation advanced to the applicant was a blatant lie to him: The 'recession' had nothing to do with it, and the respondent's 'baseline budget' wasn't 'cut' at all, even less 'by a significant amount'.

29. The only financial issue the respondent faced in 2010 was when its additional OSD phase 1 allocation would be paid – not if. It had been paid the previous year 2009/10 (during the year, not included in the baseline budget) and was expected to be included in the 2010/11 baseline budget, but wasn't (again it was paid during the year in December 2010).

30. So there was never any serious question in the minds of the respondent's management executives, Nair included, that it would be paid; and this is why recruitment and new post creation soared across all ranks, even after the respondent was 'suddenly confronted' (respondent's expression in its pleadings) with this budgetary issue on 10 March 2010.

31. The court failed to note that the full documentary record shows that, contrary to the lie told the applicant in Vedalankar's letter that 'Since early this year, management has had to identify positions which could be frozen', the first suggestion that any posts might be frozen was in Vedalankar's second letter to the Director General on 13 April 2010, and that the posts she was referring to were lower criminal court public defender posts only, not Senior Litigator posts at the top of the respondent's specialist professional staff establishment.

32. The freezing of recruitment to 56 of these posts to save costs was proposed by Nair to Makokoane, Vedalankar and Clark on 15 July 2010; and on the 16th Makokoane recommended this to the Board for approval. Which measure, a deviation from its Strategic Plan, the Board approved on 31 July 2010.

33. The court failed to note that no record whatsoever exists to vouch that Senior Litigator posts were to be frozen, having particular regard to Cachalia JA's reported observation during the debate of the Presidency's appeal to the SCA in the *Mail and Guardian*'s PAIA case, quoted by the applicant in his reply to the respondent's heads, 'Government is not a glorified spaza shop'. There must 'a paper trail', 'a minute', 'a record' for all its decisions and operations.

34. To the contrary, the extant records contradict Vedalankar's lie to the applicant about this: critical posts, distinguished in Makokoane's report to the Board from the non-critical posts he identified to be frozen, were to be prioritised for filling.

35. The court failed to note that Vedalankar lied to the applicant in alleging that the Senior Litigator posts at Durban and Pietermaritzburg had been frozen for budgetary reasons, and that the Mthatha Senior Litigator post had been frozen for the same budgetary reasons, repeated in the pleadings and interlocutory affidavits – which story Nair disclaimed in his evidence.

36. Ad paragraph 14: The court failed to note that when Vedalankar wrote to applicant on 18 October 2010 claiming that budgetary insufficiency prevented his appointment, the respondent's budgetary uncertainty over when its OSD phase 1 funding would come through had been resolved, not just 'in principle' (per the judgment) but in fact, by inclusion of the outstanding OSD allocation in the national medium term budget in October, as she'd told the Justice Portfolio Committee the week before.

37. Ad paragraph 16: The court failed to note that the fact that the Department had paid the respondent its OSD phase 1 funding the previous year shows that the respondent's real concern was *when* its OSD phase 1 allocation would be paid, not *whether* it would be paid. This is why recruitment took off and spiked in the first quarter April to June 2010, while the respondent's appointment remained halted, off the record, with Clark not told about it before the second half of April 2010 and Vedalankar not told until the end of July, both communications prompted only by the applicant's insistent appeals to Clark for information and then to Vedalankar for the finalisation of his appointment.

38. Ad paragraph 17: The court failed to note the fact that the LSTC was the respondent's operational engine room responsible for the practical implementation of the Board's Strategic Plan, inter alia to recruit Senior Litigators to beef up its professional service delivery capacity; and that Nair had no power, on his own initiative and without Board

approval, to frustrate the implementation of the Strategic Plan and to silently stop the recruitment of duly selected candidates to two of the respondent's most senior professional posts.

39. Ad paragraph 18: The court failed to note that the urgently mandated Mthatha recruitment process shows that budgetary concerns about when OSD phase 1 for 2010/11 would be paid had no bearing on Senior Litigator recruitment, or indeed any other recruitment, whose increase actually spiked, relative to the preceding and succeeding quarter, as recorded in paragraphs 20 and 21 of the judgment.

40. The court failed to note that the dire need for a second Senior Litigator to serve the Eastern Cape, based at Mthatha, pressed by Mtati in his motivation for it – whereas the Northern Cape had reported it had no need for a Senior Litigator at Kimberly – made utter nonsense of Nair's new claim in court that he couldn't persuade Vedalankar of the need for the new Mthatha post and to approve the abolition of the unneeded Kimberly one.

41. Ad paragraph 19: The court failed to note anywhere in the judgment that Vedalankar was referring to public defenders appearing in the lower criminal courts only, not to the respondent's specialist professional posts – as borne out by Nair's and Makokoane's later recommendations in this regard in July.

42. Paragraph 20: The court failed to note that the respondent's massive new post creation drive in the first quarter April to June 2010, after learning on 10 March 2010 that its OSD phase 1 allocation hadn't been included in its baseline budget (just as it hadn't the previous year, and was paid later in the year), did not dampen the respondent's implementation of its Strategic Plan to expand its services in the least. To the contrary this boomed, just as new staff recruitment did. And that this brute fact is inconsistent with and completely discredits Nair's false evidence that he'd stopped the applicant's recruitment on account of budgetary concerns.

43. The court failed to note that the respondent's boom in recruitment in the first quarter refutes as a blatant lie the respondent's repeated, sworn claim to court before trial that it froze recruitment to *all* its vacant posts on account of its uncertainty over when it would get its OSD phase 1 funding.

44. The court also failed to note that by 13 October 2010, the date of chairperson Mlambo JP's sunny public statement quoted in this paragraph, the respondent's budgetary uncertainty about when its OSD phase 1 grant would be paid had ended, and it accordingly resumed recruiting lawyers to fill the lower criminal court posts duly frozen on the record with Board approval, with its energetic recruitment in the third quarter October to December 2010 then peaking for the year.

45. On these uncontested facts, the respondent's claim to have been unable to finalise the applicant's appointment is manifestly insupportable, and the court erred in not making this obvious, objectively indicated finding.

46. Ad paragraph 21: The court gravely misdirected itself by unjustifiably talking down the potent cogency, lethal to the respondent's case, of the hard statistics that the applicant extracted from the respondent's own reports and tabulated for court, which statistics the respondent expressly admitted after the first pre-trial conference, and which shatter the respondent's false budgetary alibi for not concluding the applicant's appointment over the period of April to June 2010 after the March disappointment to learn that the OSD phase 1 allocation hadn't been included in the respondent's baseline budget for the year as promised and repeatedly confirmed in January.

47. On any objective appraisal, these brute statistics exploded the respondent's false budgetary alibi for stopping the applicant's appointment; and the court misdirected itself to the applicant's great prejudice by wetting this dynamite he brought to court, by suggesting, by dint of its unwarranted, repeated insertion of phrase 'appeared to', that these figures were less than rock-solid.

48. Since there's no indication in the judgment that it did so, the court then, after discounting the destructive force of the respondent's own statistics, failed to accord them due consideration and weight in assessing the truth of the respondent's budgetary justification pleaded for aborting the applicant's recruitment.

49. Ad paragraph 22: After duly noting that Skibi was indeed selected and recommended for a lateral transfer to the Mthatha post, the court failed to address the fact that, as shown by the applicant, the respondent's claims that he'd been shortlisted for a second round of interviews was false on both scores, being contradicted by (i) the language of the recommendation that he be appointed directly to the post, without any second interview, and (ii) the respondent's admission that, contrary to its earlier false claim to court about this, no shortlist was drawn for second interviews for the Mthatha post. That is, the applicant showed unequivocally that the respondent had been untruthful in previously alleging to court that a shortlist had been drawn.

50. The court failed to note the obvious contradiction between Nair's evidence, ridiculous on its face and consistently contradicted by the respondent's pleadings and interlocutory affidavits, that all interviewed candidates had to undergo second interviews, including those rejected and eliminated by the selection panel as unsuitable, in that had this been true, there wouldn't have been a shortlist drawn for a second round of interviews for Mthatha, because, according to Nair in court, all interviewed candidates interviewed by the selection panel would have to be interviewed again by his

so-called second round panel – just as he claimed in evidence, all interviewed candidates, including rejected candidates, had been interviewed by his second round panel in all past Senior Litigator recruitment.

51. Ad paragraph 23: The court failed to mention anywhere in its judgment that although the Department didn't have spare funds to *immediately* pay the respondent its OSD phase 1 (and now phase 2) funding, as recorded in the Report to Board of 16 July, the Minister had assured it that provision for payment would be made in the 'mid-year budget adjustments in September/October 2010', and said he didn't want service delivery interrupted.

52. (The court failed to note the likelihood that the Minister's concern that service delivery not be interrupted is why the respondent has concealed from the Minister and Parliament (also concerned that the respondent should fill its budgeted vacant posts) the fact that it has indefinitely frozen its three remaining vacant Senior Litigator posts with no record of this whatsoever. The respondent has repeatedly falsely reported to them that Senior Litigators have been employed in the implementation and completion of the Strategic Plan.)

53. That is, even before Nair proposed to Makokoane to freeze recruitment to some lower criminal court public defender posts, which he explained in his evidence was really just to send a message to spur the Department into paying, the money was assured by the Minister.

54. Ad paragraph 24: The court failed to note that Nair's proposal to freeze recruitment to 56 lower criminal court practitioner posts had no bearing on Senior Litigator recruitment; and that had Nair contemplated further savings by freezing recruitment to the respondent's top three vacant professional posts to save costs, he would have proposed this. These enormously important facts didn't even get a mention in the judgment.

55. The court failed to note that Nair's explicit email subject-heading and the contents of his email very precisely identified the posts he had in mind to freeze: some lower criminal court public defender posts, more of them if necessary and some even lighter paralegal and administrative positions if more savings were still necessary after that.

56. The court failed to note that this refuted Nair's perjury that his identification of posts was not specific and exhaustive. To the contrary, his email shows there was no question of freezing recruitment to any higher level posts, much less at the very top of the respondent's professional staff establishment.

57. Ad paragraph 25: The court failed to note that the record unambiguously shows that the only posts to be frozen for budgetary reasons were some lower criminal court public defender posts, but only temporarily, and that unspent savings from the 2010/11 financial year were to be applied to make up any balance.

58. Ad paragraph 26: With respect, all this is correct. The record referred to here shows there was never any question of freezing Senior Litigator recruitment to save costs. And it shows that any management decision not to implement its Business Plan based on the Board's Strategic Plan to hire Senior Litigators, for which the Department had provided funding, required Board approval. There's never been any. Yet the court failed to note in its judgment (i) the telling absence of any record to support the pleaded defence of budgetary insufficiency preventing the applicant's appointment, and (ii) the glaring irregularity of the wholly off the record unauthorised abortion of the applicant's recruitment to the respondent's top professional post.

59. The court also failed to find and note that according to the LSTC Terms of Reference in the Legal Aid Guide, and the Approval Framework, (i) Nair and Vedalankar didn't have the power on their own to freeze recruitment to the respondent's vacant Senior Litigator posts, and (ii) such a resolution for any operational reason was the prerogative of the LSTC – with Vedalankar and Nair approving or disproving it as executing authorities delegated by the Approval Framework. All on the record, obviously.

60. Ad paragraph 27: The court failed to note that the only posts affected by the OSD uncertainty were 56 public defender posts. All other recruitment carried on normally, thus contradicting Vedalankar's claim to the applicant in her October 2010 letter that 'In July 2010' she and Nair had 'immediately' frozen the Pietermaritzburg, Durban, and Mthatha Senior Litigator posts for want of sufficient budget. About which there's no record whatsoever.

61. Ad paragraph 28: The court misdirected itself on the facts. It was on 3 August 2010, four days after the Board approved on 30 July the temporary freezing of some lower criminal court posts only, that Nair alleged to the applicant that the respondent had decided to put on hold the finalization of its Senior Litigator appointment processes and had now decided not to fill the positions. No records whatsoever exist to vouch this, and the extant records contradict it, as mentioned earlier. On 16 August 2010 the applicant received another letter this time from Mdaka on Nair's instructions, alleging similarly.

62. The court failed to note the tremendous significance of the respondent's studied failure to communicate with the applicant after his selection, and its studied unpleasant communication on 30 April 2010 calculated to drive him away. The court also failed to note the respondent's purpose in not communicating with him (until his letter to

Vedalankar in July forced its hand). In an own-goal scoring question, the applicant was asked in cross-examination why he hadn't concluded from the silence that he'd been unsuccessful and walked away. The question revealed precisely Nair's fraudulent intention at the time, but the court didn't note it.

63. Ad paragraph 29: The court misdirected itself in wrongly stating that the applicant 'changed track and dispensed with' calling the witnesses he'd subpoenaed.

64. The record shows that besides Nair, the three other officers whom the applicant subpoenaed (Vedalankar, Clark, and Board member du Rand) failed to remain in attendance during the trial, and had returned to Gauteng without the court's leave when the applicant wanted to call them.

65. In light of the court's ruling on the first day of the case that the applicant would not be permitted to cross-examine them, he elected to salvage the situation by accepting, in lieu of their oral evidence, affidavits submitted by Clark and Du Rand answering his brief interrogatories. When Vedalankar refused to cooperate in this way like the others, and refused to answer the few neutral written questions he asked her, the applicant declined to call her, expecting in light of the respondent's repeated sworn assurances to court, in the supporting affidavit founding its failed application to quash the applicant's subpoenas, that she was a central witness for the respondent, and that she would testify for the respondent and thereby subject herself to cross examination by the applicant. (But she stayed away to avoid this.)

66. Ad paragraph 30–41: With respect, all this is correct, and it establishes the applicant's reasonably supported apprehension of political prejudice, fortified by the documentary evidence he extracted from the respondent, under persistent, determined, illegal resistance (refusal to comply with PAIA, then refusal to discover), that the budgetary and several other explanations advanced for the abortion of his appointment were fake.

67. Ad paragraph 42: With respect, all this is correct. Indeed the comprehensive financial records – determinedly withheld and very reluctantly discovered by the respondent only following the applicant's repeated appeals to the SAHRC and then his repeated appeals to court (application brought to compel discovery, and two judicially supervised pre-trial conferences at court) – show that its transient budgetary uncertainty for a few months in 2010 never had any bearing on Senior Litigator recruitment generally, as especially evinced by the Mthatha recruitment, and that it was not the reason his appointment was aborted. The court failed to draw this obvious conclusion.

68. Ad paragraph 43: With respect, all this is correct. However, the applicant also testified with reference to the respondent's records that its OSD phase 1 funding had been paid in the previous year, so there was never any genuine apprehension that it wouldn't be

paid at all in 2010/11; the trouble was just that until it was paid, the respondent was operating on an unbalanced budget.

69. The court failed to note that indeed the respondent's certain expectation of its OSD phase 1 funding is evidenced by its massively escalated recruitment and new post creation drives in April to June 2010, which objectively refute Nair's perjury in claiming he'd halted the applicant's appointment in this period out of financial concern.

70. Ad paragraph 44: In fact it's common cause that Mngadi was put off in April/May 2010, i.e. after the applicant began pressing Clark about his recruitment, but the court failed to note the contradiction between this admission and Nair's lying denial that Mngadi was put off at this time. The respondent even volunteered in its answer to the applicant's first pre-trial conference agenda that Nair gave the instruction that Mngadi be put off at this time, and later justified why it did so, and why it didn't tell the applicant the same thing at the time. The court failed to note Nair's clearly demonstrated perjury in court about this.

71. Indeed Skibi was recommended on or about 24 May, but the court failed to note the significance of the fact that only Skibi was told of the cancellation of the Mthatha appointment and no other candidates, which further tends to show that he'd indeed been approved, which is why he was 'ready to start' when his transfer was abruptly cancelled wholly off the record after the applicant asked Vedalankar to finalise his appointment, now eight silent months (besides Clark's second 'Get lost' email in April) after his interview, and Nair needed to contrive a cover story for having aborted it, involving the alleged simultaneous cancellation of the Mthatha recruitment – only to abandon this major leg of the false alibi in court.

72. Indeed the respondent's claims that Skibi was (i) recommended and (ii) shortlisted for a second interview were exposed as lies by the plain language of the recommendation itself and by the respondent's admission that in truth and in fact no such shortlist was drawn, after falsely claiming on oath before trial that one was.

73. Ad paragraph 45: Indeed it's the respondent's own version that no posts were cut – this is not just the applicant's averment. The undisputed facts are that recruitment to some lower criminal court public defender posts were frozen for two months before recruitment to them resumed upon news of the inclusion of OSD funding in the national mid-term budget, and all these frozen posts were then filled '100%' as Vedalankar later reported.

74. Indeed the record shows (it was not just according to the applicant) that Nair didn't propose that cancelling the Senior Litigator recruitments and freezing the remaining posts could achieve further savings. His email spoke only of a number of lower criminal

court public defender posts, more if necessary, and some even lighter paralegal and administration posts if further budget savings were still necessary after that.

75. Nair's email plainly shows that he never stated to Makokoane, Vedalankar, Clark, and CFO Hlabatau that the recruitment process to finalize the appointments to all vacant Senior Litigator posts had already been put on hold for various reasons. The court failed to note the destructive significance of this for Nair's evidence and for the respondent's case.

76. Ad paragraph 46: The court seriously misdirected itself in stating that the applicant's case against the budgetary alibi advanced to him comprised the points listed in the judgment here: a crude mishmash of facts indeed material to discrediting the budgetary alibi, others immaterial to it and relevant to various other unrelated aspects, with other crucial facts on which the applicant relied omitted. The applicant emphasized in oral argument that his case was made comprehensively in his meticulously referenced heads, and that his summary and oral address were no substitute.

77. The applicant's main case against the respondent's budgetary alibi for aborting his recruitment is that the respondent's records comprehensively document the OSD phase 1 funding uncertainty, its resolution in January 2010, its reappearance on 10 March 2010, and its resolution again in October and December 2010; and these records show categorically that the abortion of the applicant's recruitment had nothing to do with any budgetary consideration – as do the complete record of the cost-cutting measures proposed and approved in July 2010, and the respondent's recruitment statistics in 2010.

78. With respect, the first point, '> Mr Nair…', is correct; and this is why, appreciating his decision to block the applicant was gravely illegal and a contravention of the EEA, Nair did not sign his approval or disapproval of the applicant for a second interview, as provided at the foot of the recommendation. (His new story in court about not opening and reading the recommendation and CVs emailed to him, contradicted by him on affidavit before trial, is dealt with below.)

79. The Approval Framework required Nair, in consultation with Vedalankar, to approve or disapprove the recommendation as delegated executing authorities; and the public service codes required him to record his reason for not approving, if he didn't. Nair's so-called second round interview scheme was incontestably illegal for all the many different reasons repeatedly set out by the applicant in court and in his heads with reference to the relevant provisions of the Recruitment code and Approval Framework.

80. In its second point, '> Mr Nair…', the court misdirected itself in stating that Nair was specifically personally prejudiced against the applicant. This was not the applicant's

case, which was that the respondent is institutionally opposed to the applicant's particular political activism. Reciting the applicant's case extensively on this score earlier in the judgment, the court didn't record any reason to doubt it.

81. In oral argument, the applicant illustrated the sort of general prejudice exhibited by Nair by mentioning the analogy of a white loans officer in a bank in a deep Southern town in the US in 1965, approached by a black lawyer or businessman for a mortgage to buy a house in the white suburbs. Racial discrimination in housing and education has just been outlawed by the federal Civil Rights Act of 1964. The loans officer is no seething racist, but because the situation is awkward for him, since racial discrimination was until recently fine and the norm in refusing such applications, he merely pushes the loan application aside, unsigned either way, hoping the applicant will just go away. This was the illegal act of discrimination, no more, no less, and it's essentially what happened in the instant case.

82. It wasn't in issue at trial that the applicant is a member of a constitutionally protected, politically vulnerable, aggressively marginalised and politically ghettoised minority class, and in need of the protection of the Bill of Rights of the Constitution and of the EEA to safeguard his fundamental rights in our democracy.

83. The applicant's apprehension of prejudice was not solely based on Nair's and Vedalankar's repeated appearance on an in-group mailing list of some of the world's leading ARV-drug promoting activists. It was based on much more; and the court misdirected itself in mischaracterising the applicant's apprehension of prejudice in the narrow, reduced and simplistic manner in this paragraph. It had a much broader factual basis, as correctly recited earlier in the judgment.

84. Ad '> In any event…': Indeed the off the record, unauthorised, unapproved abortion first of the Durban and later the Mthatha appointments was contrived to camouflage the abortion of the applicant's appointment. At trial, however, Nair abandoned the Mthatha leg of the cover-story, which means Vedalankar lied to the applicant about it in her correspondence with him; and the respondent, Nair instructing, lied to court before trial in consistently alleging that the Mthatha recruitment was also cancelled for budgetary reasons in its pleadings and interlocutory affidavits. Indeed the budget constraints story in relation to the cancellation of the Senior Litigator recruitments was an afterthought, wholly unsupported and contradicted by the records.

85. The court failed to note Nair's major departure from, and contradiction of the respondent's pleaded case about Mthatha, a story alleged to the applicant right from the beginning and consistently through the respondent's many pleadings and affidavits. The court failed to attach the due weight this radical shift warranted in its assessment of

the veracity of the respondent's defence version and Nair's starkly contradictory evidence about it. The court failed to note the boldly invented and staunchly maintained defence version started falling apart as soon as Nair started testifying.

86. Ad '> There had been…': Indeed the respondent's own statistics, admitted by it after the first pre-trial conference, show a massive increase in staff recruitment in 2010 and a massive increase in new post creation in the April to June first quarter of 2010. The court failed to note the destructive significance of this for the respondent's case.

87. The court failed to note, much less give any weight to Nair's blatant, stupid lie in court, when confronted with the new post creation statistics, that the respondent didn't increase its staff establishment during the year – when the respondent had formally admitted before trial that its own statistics show that in the first quarter April to June 2010 alone it had created almost as many new posts as it did in the whole of the preceding year. The court failed to note Nair's blatant, stupid perjury about this, showing that he'll lie on oath about anything, even in the teeth of the objective hard admitted facts that refute his stupid lies at a glance.

88. And indeed the respondent's December 2010 statistics reflect that the Pietermaritzburg and Durban Senior Litigator posts remained budgeted vacant posts and not frozen as Vedalankar falsely alleged to the applicant on 18 October 2010 for the first time eleven months after his successful interview.

89. The court failed to note, much less give any weight to this incontrovertible fact refuting the lie told the applicant and repeated to court that the posts have duly been permanently frozen. Before trial, Vedalankar and the respondent had alleged that Mthatha had been frozen too. At court Nair changed the story about this completely. The court failed to note this, much less record its destructive implications for the assessment of Nair's honesty or mendacity under oath.

90. Ad '> The next round…': Indeed Nair had no power to create a second round interview process, for all the reasons detailed by the applicant in evidence and recapitulated in argument; and there can be no serious dispute about this. The respondent is not a 'glorified spaza shop'. The conduct of its officers in carrying out staff recruitment is finely and precisely regulated, as in other public entities, to prevent corruption, nepotism, and unfair discrimination. Nair's and other officers' unauthorised deviation from the Recruitment code and Approval Framework was a clear-cut breach of 'the rule of law', which Mlambo JP claims the respondent respects, but which the court failed to note. But the illegality of the second round interview scheme had nothing to do with the falsity of the budgetary alibi, for which reason the applicant never contended it did.

91. Ad '> Mrs Vedalankar's …': Indeed Vedalankar and Nair had no power on their own without (i) an LSTC resolution, (ii) full national management executive committee approval, and (iii) Board approval, to permanently freeze recruitment to three Senior Litigator posts. The employment of Senior Litigators, whom Parliament is specifically concerned should be employed, is part of the Board's Strategic Plan presented to the Minister and Parliament; and the employment of Senior Litigators has been repeatedly been reported in the respondent's reports on its completion of its last Strategic Plan as such, with the off the record abortion of three Senior Litigator appointments and the permanent, off the record freezing of the three vacant posts dishonestly concealed from both the Minister and from Parliament. The court failed to note this scandalous state of affairs, and left it under the carpet.

92. The court failed to note that the provisions of the LSTC Terms of Reference and the Approval Framework show that Vedalankar and Nair acted ultra vires on their own version of how they aborted the applicant's appointment, as alleged in Vedalankar's October letter – which story Nair changed in court, now deleting the Mthatha bit, contradicting the respondent's pleaded case, and implying that Vedalankar lied to the applicant in October 2010 (and in her affidavit in April 2011) to pump up the story, on the time-tested principle, well know to liars, that the grander the lie the more convincing it sounds.

93. Ad '> The respondent's annual …' to the end, '> In short …': All this is incontestably true, and it flatly refutes the story told to the applicant about why his appointment was aborted, yet the court failed to note it.

94. Ad paragraph 47: The court misdirected itself on the facts in stating that Nair placed the bundle of documents he'd received (the recommendation and the CVs) in his drawer, implying he'd printed them. This wasn't his evidence. The expression 'dropped them into his bottom drawer' was the applicant's, an old English idiom meaning to deliberately put a document aside, permanently unattended.

95. The court failed to note, as the applicant pointed out in argument, that there could have been nothing 'premature' about Nair opening and reading the important documents sent to him concerning the respondent's most senior, repeatedly advertised professional posts. Nothing prevented him recording his approval or disapproval of the recommendations – either as he was required to do by the Approval Framework after consulting with Vedalankar to establish her agreement with the appointments or otherwise, or for second round interviews, as the form provided under his home-brewed double interview scheme.

96. The respondent consistently insisted in its pleadings and affidavits that Nair had to sign the recommendation before second round interviews could take place. In court, contradicting the respondent's pleaded and sworn version on this score, Nair denied it.

97. Nair's evidence that he only opened the documents well over a year after receiving them, out of curiosity, which is when he learnt of the applicant's political background stands contradicted by the different story he confirmed on in an affidavit before trial, namely that it was when the applicant wrote to Vedalankar in July 2010, again detailing his political background, that he became aware of it.

98. Ad paragraph 48: The court failed to note that Nair's evidence that all the CVs of the interviewed candidates, including those not recommended and eliminated, had to be given to the so-called second round panel for consideration by him and other mostly legally unqualified officers was a childishly obvious lie, making nonsense of the selection process and rendering futile its considered selections.

99. The whole point of the selection panel was to weed out the less suitable and identify the 'most suitable' candidates for appointment to the Pietermaritzburg and Durban posts respectively.

100. The court failed to note that Nair's suggestion that he, a former schoolmaster now business manager, along with some other business managers in the head office plus the *non-executive* board chairperson, could choose and recommend for appointment somebody found unsuitable and rejected by the selection panel of senior lawyers is too foolish to warrant further argument.

101. The court failed to note that Nair's unbelievably silly new story, which it accepted and believed without demur, is contradicted most recently in the case, and many times before this, by section 4.6 of the amended response: 'the selection panel had to identify candidates who had to undergo a second round of interviews' – from among all the shortlisted, interviewed candidates.

102. The court failed to note that Nair's evidence that there was nothing for him to sign and that provision for his signature was included at the foot of the recommendation report by the regional office by mistake, is exposed as perjury on two counts.

103. First, the form provides for his approval of the recommended candidates for second round interviews, and it's the respondent's consistently repeated, pleaded and sworn version that without Nair's signature, there could be no second round interviews. Nair's new story in court was contradicted and refuted by the respondent's own pleadings and affidavits.

104. Second, provision was duly made for Nair's approval at the foot of Skibi's recommendation, although this time there was no mention of any so-called second round interviews.

105. The court failed to note Nair's obvious perjury about this, and its implications for the credibility of his evidence regarding the central dispute in the case.

106. But most important, the court failed to note the fundamental hard fact that Nair's so-called second interview scheme was illegal for all the reasons stated by the applicant in evidence and in his heads, referenced to the respondent's Recruitment code and Approval Framework.

107. The court failed to note Nair's ludicrous lie in alleging that his so-called second interview panel was free to interview for appointment a candidate rejected as unsuitable by the duly constituted selection panel of senior lawyers. More especially since this contradicted the respondent's pleadings and affidavits about the eliminated candidates being out of the running. And the court failed to note the implications of this lie for the credibility of his evidence about the central dispute.

108. Since it was never the applicant's contention that the so-called second interview panel was 'a rubber-stamp of the first panel', Nair's evidence in this regard was entirely pointless, except to confound the truth and attempt to throw sand in the court's eyes by setting up this non-issue as a distraction.

109. The court failed to note that the applicant showed incontestably with reference to the provisions of the Recruitment code and Approval Framework that he cited, that Nair's unauthorised, legally and practically incompetent second interview panel that he'd devised off the record without the Board's approval, as required, was wholly illegal.

110. Nair's evidence that he and his so-called second round panel could interview applicants including those 'who may have not been recommended for further interviews' is too absurd to require further discussion, more especially since it's contradicted by the respondent's own pleadings and affidavits. The court failed to note this.

111. Forced by the incontrovertible objective recorded facts, Nair conceded that no budgetary problem of any sort prevented the applicant's appointment when he was recommended. This evidence contradicted the respondent's lies to the contrary, repeatedly made in the respondent's pleadings and affidavits, that budgetary uncertainty at the time the applicant applied for the post and was recommended for it prevented his employment.

112. Ad paragraph 49: The court failed to note the transparency of Nair's feeble perjury to justify not looking at and signing the recommendation and acting to finalise the applicant's appointment, namely that January was the busiest month of the year because: (i) the executives had to take stock of coverage under the business plan – in truth and in fact, statistics were compiled monthly, (ii) they had a management executive committee meeting at the end of the month – in truth and in fact this was routine throughout the year, and (iii) they had to prepare for the Board meeting in February – in truth and in fact this was also routine.

113. The court failed to note that the respondent had previously concocted and advanced quite different excuses for not finalising the applicant's appointment, namely that it was too busy preparing its budget, and too busy presenting its budget.

114. The court failed to note that this shows Nair was improvising a pile of lying excuses in court, contradicted by previous lying excuses given.

115. The court also failed to note that Nair had told the Minister and Parliament yet further different excuses, contradicting all these: it was not that the executives on his second round interview panel were too busy doing all these things, it was just that they had difficulty 'coordinating a meeting time suitable for all members of the panel' – except that Clark didn't even know of the selections until April 2010, and being in charge of arranging the second panel, the respondent said before the case, couldn't have asked anyone for dates by then, and when this lie to the Minister and to Parliament was pointed out by the applicant, Nair retracted his lie to them on affidavit as 'an error', 'palpably an error', then in court, again under oath, retracted his sworn retraction as a mistake.

116. The court failed to note that all these different contradictory stories told the applicant, told the Minister and Parliament, and told court (a variety of stories told court before and at trial) about why the applicant's appointment was not promptly finalised meant none could be accepted and believed, and the court erred in not rejecting them all as lies told to cover the real reason.

117. Ad paragraph 50: Nair's evidence in court that he first heard the applicant's name in July but didn't learn of his political background until the end of the year or early the following year, when he decided to read his CV and the recommendation of him out of curiosity, is exposed as perjury by his different story told on his instructions and confirmed by him on affidavit that he learned of the applicant's political background much earlier and in a different way, namely in July 2010 when he read the applicant's letter to Vedalankar that she'd passed to him for reply.

118. It follows that Nair lied under oath in court, as well as under oath before commissioner of oaths before trial, in claiming ignorance of the applicant's political background until at least eight months after receiving the applicant's CV when he read his July letter to Vedalankar (claimed before trial) or more than a year later (claimed in court).

119. The applicant pertinently raised this fatally destructive central contradiction in his heads and during oral argument. The court failed to even mention it, even less note that neither of Nair's mutually destructive contradictory versions given under oath could be accepted.

120. The court also failed to note that Nair's brand-new claim in court that he didn't know of the applicant's political background until more than a year after receiving the recommendation and CV revealing it, when he finally read them, features nowhere in the respondent's many reports, pleadings and affidavits addressing the applicant's complaints of political prejudice.

121. Since Nair repeatedly lied about his knowledge of the applicant's political background at the material time, i.e. late November/December 2009, only, telling different lies on oath about this, his denial built on this false denial that the applicant's political background played no part in the matter could obviously not be accepted and relied on. The court failed to note this.

122. The court failed to note that Nair's false denial in court that the applicant's appointment was immediately aborted is squarely contradicted by the respondent in its very true claim on affidavit (Nair instructing) that the applicant's recruitment was 'aborted immediately' after his interview.

123. Ad paragraph 51: The court failed to note that the only problem at the end of 2009 was that funding for OSD phase 1 hadn't yet been assured for inclusion in the baseline budget for 2010/11 – like in the previous financial year 2009/10, when the money had been paid separately during the year.

124. The court failed to note that in January 2010 the question of OSD phase 1 funding was completely resolved at a meeting with the Department, and confirmed by a subsequent letter from it and another from the Treasury.

125. The court failed to note that Nair's claim in court that about that time, March/April 2010, the executives began to deliberate intensively on the possibility that the department would not fulfil its financial commitments was outright perjury contradicted and exposed by the respondent's records.

126. First, Vedalankar's March and April letters show that the respondent was concerned about the Department's failure to include OSD phase 1 funding in the respondent's

baseline budget as undertaken. And her April letter shows that the only posts contemplated for possible freezing were lower criminal court practitioner posts.

127. Second, there was never any question of the Department not fulfilling its commitment to provide OSD phase 1 funding for the year, as Nair falsely told the court under oath, because it had duly paid this money in the previous financial year, albeit separately.

128. Third, Senior Litigators are not employed to provide 'coverage at courts', but rather, as the respondent states in its advertisements and reports, to provide expert litigation services in major cases in the upper courts, mentor junior staff, and furnish legal opinions as and when required.

129. Fourth, the cost cutting records of July 2010 confirm that the only posts contemplated for freezing in Vedalankar's April letter were lower criminal court public defender posts.

130. And fifth, irrespective of the OSD phase 1 uncertainty recruitment and new post creation boomed tremendously. As Vedalankar (truthfully) told the applicant in her January 2011 letter, the respondent had embarked on these hugely accelerated recruitment and new post creation drives confident the money would come through – despite the discovery that the money hadn't been included in the baseline budget.

131. The court failed to note Vedalankar's contradiction of Nair's perjury that the executives worried that the Department wouldn't honour its commitment to continue funding in 2010/11 the respondent's OSD phase 1 scheme that it had commenced implementing the previous year. Which commitment the Department did honour, after the Minister's assurance recorded in Makokoane's Report to Board of 16 July 2010; and the funding was included in the national mid-term budget in September/October, resulting in the respondent's resumption of recruitment to some of its briefly frozen lower court public defender posts – but not the resumption of the applicant's recruitment to the applicant's top-echelon specialist Senior Litigator post at Pietermaritzburg, frozen off the record. The court failed to note any of this.

132. Ad paragraph 52: The court failed to note that Nair's claim that 'To his mind Senior Litigator recruitment was not an urgent consideration' so didn't have to be achieved promptly was transparent perjury: (i) the Durban and Pietermaritzburg posts had been advertised three times, and twice in 2009; (ii) Nair and his LSTC had designated the recruitment of a Senior Litigator for Mthatha as 'Immediate', meaning it was an 'urgent consideration', and indeed, recruitment for it proceeded briskly; and (iii) the recruitment of Senior Litigators was part of the Board's Strategic Plan, repeatedly reported as such, for Nair and his LSTC to implement, and Nair had no power to decide on his own not to do so.

133. The court failed to note that Nair's claim that 'There was a real possibility that the respondent would not get the money' was transparent perjury. The OSD scheme had been extended to the respondent, and phase 1 implemented; and the money had been paid for the previous year 2009/10, albeit separately from the baseline budget payment, so there couldn't have been any genuine apprehension that the OSD phase 1 funding wouldn't come through for 2010/11, as it had the previous year.

134. The court failed to note that at the same time that Nair claimed to have delayed the finalization of the applicant's appointment 'until clarity on the issue was obtained', the respondent had embarked on massively accelerated recruitment and new post creation drives.

135. The court failed to note that Nair did not have the power to freeze any recruitment envisaged by the Strategic Plan, budgeted by the respondent's management executives, approved by the Board, and funded by the Department, without a resolution of the LSTC, the agreement of the entire management executive committee, and a resolution of the Board approving it.

136. The court failed to note the absurdity of Nair's transparently dishonest claim that there was no need to inform anyone of his decision to silently halt the applicant's appointment (and Mngadi's promotion), even as the Mthatha recruitment commenced. The Justice Centre Executives concerned, the Human Resources Executive, and the Regional Human Resources Manager, all needed to be informed. Equally the successful candidates needed to be informed, especially the applicant (unlike Mngadi, not already employed by the respondent) lest he mistakenly conclude from the silence that he'd been unsuccessful, walk away and make other career plans. (Indeed, that the applicant should walk away under this mistaken impression was Nair's fraudulent intention, betrayed during the applicant's cross-examination on Nair's instructions.)

137. The court failed to note the transparent dishonesty of Nair's childishly feeble claim that he didn't inform the Justice Centre Executives in Durban and Pietermaritzburg because he didn't want to cause panic. They could hardly have been panicked by being told that he'd decided to freeze the appointments of the candidates recommended for appointment as Senior Litigators at their centres until the OSD uncertainty had passed.

138. Ad paragraph 53: The court failed to note the transparent falsity of Nair's claim to have told Vedalankar and Clark that he'd delayed finalizing the Senior Litigator appointments on account of budgetary concerns, considering that he was (i) signing his approval for the appointment of scores of other legal and general staff in the first quarter April to June 2010 – before this in the last financial quarter of 2009/10 and in January to March 2010 too; and (ii) he had overseen the recruitment of a Senior Litigator for Mthatha,

urgently mandated by him and his LSTC in March two weeks after the news of the OSD issue.

139. The court failed to note that Vedalankar did not have the power to advise Nair to freeze the posts without Board approval.

140. The court failed to note that no record whatsoever exists to vouch Nair's claim that it was resolved between Vedalankar, Clark and himself to freeze the Senior Litigator appointments. The court failed to note that had they duly done so in July 2010, as alleged, a record would have existed, for as Cachalia JA remarked during the debate of the Presidency v Mail & Guardian PAIA appeal in the SCA, 'Government is not a glorified spaza shop'; there must be a 'paper trail', 'a record', 'a minute' of all its decisions and operations, and remarking further that even high officers tell lies – like General Colin Powell telling lies to the Security Council about Iraq's so-called Weapons of Mass Destruction – so they can't be believed by a court without substantiating documents for their disputed claims. The court failed to evaluate Nair's evidence in light of this.

141. The court failed to note that the Senior Litigator posts were never abolished and remain fully funded budgeted posts to this day, so Nair's evidence about his and Vedalankar's power to abolish posts on their own is irrelevant; but anyway they can't abolish them without a resolution of the LSTC recommending this, because as illustrated by (i) the abolition of the Kimberly Senior Litigator post, the LSTC decides and Vedalankar and he agree or disagree as executing authorities; and (ii) according to Nair in evidence, Vedalankar would not agree to approve the *LSTC's resolution to abolish* the Kimberly post and create another at Mthatha, despite his and the LSTC's unanimous support for this, based on the recommendation and motivation of the two regions concerned.

142. The court failed to note that Nair's perjury in court that Mngadi was definitely not told in April/May 2010 that the Senior Litigator recruitments had been cancelled, is contradicted and exposed by both the respondent's pleadings and affidavits, in which (i) it's explicitly admitted that Nair instructed that Mngadi be told this at that time, long before July, and (ii) this information given to Mngadi at this time, 'instead of the Applicant', is even justified with a feeble reason.

143. The court failed to note that Nair's perjury that the information of Mngadi about the cancellation of the recruitments definitely didn't originate from him is contradicted and exposed by the respondent's pleadings, drawn on Nair's instructions, in which the respondent actually *volunteers* that 'Mr Nair issued the instruction' that Mngadi be told this in April/May 2010, many months before the applicant was told in August, only after he pressed Vedalankar to finalise his appointment.

144. Ad paragraph 54: The court failed to note that although nothing in the Recruitment code prevents the holding of second round interviews, nothing in the code provides for it either; and that in recruiting staff the respondent's officers are bound to comply with the Recruitment code and Approval Framework, both instruments mandated by the Board, to transparently regulate recruitment and eliminate corruption, nepotism, and unfair discrimination, repeatedly cautioned against in the code.

145. The court failed to note that Nair had no power to devise a second round interview scheme by mostly unqualified administrative personnel with no legal knowledge to second-guess or even supplant the selection panel constituted of senior lawyers.

146. The court failed to note that *non-executive* Board chairperson Mlambo JP's powers in staff recruitment are limited by the Approval Framework to approving or disapproving the appointment of the CEO and NOE – and no other staff – in committee with the rest of the Board, not alone or with any management executives; and his unauthorised involvement in Senior Litigator recruitment, stepping in to interview candidates already comprehensively interrogated by duly constituted selection panels comprised of the respondent's senior lawyers has been ultra vires and unlawful, irrespective of his preeminent legal acumen as senior judge.

147. The court failed to note the ludicrous, transparent dishonesty of Nair's perjury that all the CVs in Senior Litigator recruitments had to be sent to his so-called second round panel, including those of the rejected candidates, and that this panel of his was free to interview for appointment a candidate found unsuitable and eliminated by the selection panel. The court failed to note the implications of Nair's obvious perjury about this for the credibility of his evidence going to the centre of the case.

148. The court failed to note the significance of Nair's special telephonic instruction (it wasn't Clark; she was kept in the dark until April 2010) ordering the KZN RHRM to include the CVs of the rejected candidates, which plainly shows that the rejected candidates' CVs were not sent up in the ordinary course, and obviously so since they were out of the running; and indeed the respondent admits they were out of the running in its pleadings.

149. The court failed to note Nair's perjurious exaggeration in claiming that his second panel had 'often' rejected candidates recommended by selection panels, when in truth and in fact this had only happened once, in the case of the candidate previously recommended by the selection panel for the Pietermaritzburg Senior Litigation post, but rejected by the second interview panel. The court failed to note that even when testifying about a true fact, Nair compulsively perjured himself by dishonestly exaggerating under oath.

150. The court failed to note the contradiction between Nair's allegation in court that all Senior Litigators had been interviewed twice, and the pleadings which alleged that some of them hadn't, and that those who hadn't had proved to be professionally incompetent.

151. The court failed to note the contradiction between this pleaded story about the allegedly incompetent Senior Litigators and Nair's changed story in court, now retracting this false slur on them and testifying that their professional performance wasn't in question, he was just concerned about the type of work they were doing. The court failed to note this clear instance of perjury on Nair's part, since the pleadings were drawn on his instructions.

152. The court failed to note that under cross-examination, contradicting his repeated allegation about this in the pleadings and affidavits, including in the amended response, that the ROE has the final say, Nair admitted that the Approval Framework allows the ROE no role in the approval of Senior Litigator appointments at all, after the recommendations made by selection panels.

153. Ad paragraph 55: The court failed to note that Nair's new lie to the Board in his November 2011 'Report to Board' (after the applicant had refuted the respondent's budgetary-three-posts-frozen-at-once sham in his extensive original statement of claim) that the Pietermaritzburg, Durban and Mthatha Senior Litigator recruitment processes had *failed to attract suitable candidates* is contradicted by the fact that (i) Skibi was already a Senior Litigator, (ii) no question has ever been raised about Durban High Court Unit Manager Mngadi's suitability (he was found suitable by the selection panel), and (iii) after first pretending that the applicant, an admitted advocate for thirty-one years, and widely experienced on both sides of the bar and bench, was under-qualified, he switched to pretending that he was over-qualified, because his experience was predominantly civil, whereas the respondent wanted Senior Litigators to argue criminal appeals.

154. The court failed to note that Nair's dull, changing perjury regarding the work Senior Litigators do – to mainly argue pedestrian criminal appeals – is exposed again and again by the respondent's records describing it very differently.

155. The court failed to note the transparent dishonesty of Nair's claim in court that the applicant didn't meet the qualifying criteria. He did, and the selection panel's note that he had only eight years high court experience was wrong in light of the information about this in his CV. But anyway it was irrelevant, because no record exists to show that the uniquely high qualifying criteria imposed on the second KZN recruitment process in

2009, but not on the Kimberly one in the same year, nor in the Mthatha one the following year, were ever duly authorised.

156. The court failed to note that had Nair honestly believed that the applicant, an admitted advocate of then twenty-five years vintage, with an unusually wide breadth of legal experience was unqualified for the post, he could have recorded this as his reason for rejecting the applicant.

157. The court failed to note that Nair's dissembling in his evidence that the applicant, probably more highly professionally experienced than anyone else employed by the respondent, was unqualified for the post was just more of his endless, easy, casual, mindless, obvious, dull-witted perjury.

158. The court failed to note that Nair transparently perjured himself in pretending that he doubted the truth of the applicant's claims in his CV to have litigated in the Supreme Court of Appeal and Constitutional Court, merely because he hadn't provided the specific case citations, as if he really believed the applicant had lied in his CV about his professional experience in these forums (both cases in fact reported).

159. The court failed to note that Nair's dishonest insinuation that the short-listing and selection of the applicant was in some manner corrupt was not supported by any particulars, and was itself a corrupt and perjurious attempt to deceive and misdirect the court and a fine illustration of his basically dishonest personal character, the truth simply not being in him.

160. Ad paragraph 56: The court failed to note the dull and obvious contradiction between Nair's claims that (i) he intended pending his approval of the Mthatha candidate following his selection until the resolution of the OSD uncertainty, and that once it was resolved he would then finalize the appointment and not have to start again with the recruitment process, and (ii) the frozen appointment process for the applicant could not be revived in the same way on resolution of the OSD uncertainty and the applicant appointed to avoid the respondent having to start again with the recruitment process.

161. The court failed to note the gross improbability of Nair's brand-new story in court about the reason for the cancellation of the Mthatha recruitment, contradicting the respondent's repeatedly pleaded and sworn case about this, and contradicting the different story Vedalankar told the applicant in October 2010, repeated in January 2011, and confirmed before a commissioner of oaths as the perfect truth by her, Nair and Clark in their PAIA affidavits in April 2011.

162. The court failed to note that Vedalankar could have had no reason to disapprove the LSTC's unanimous resolution to abolish the long vacant and redundant Kimberly Senior

Litigator post, where it reportedly wasn't needed, and to create a new post at Mthatha, where it was sorely needed according to then ROE Mtati. As NOE and chairperson of the LSTC, Nair was better aware of the respondent's operational requirement on the ground than Vedalankar was, and he supported the cost-neutral transfer of the budget, and (as he claimed under oath) repeatedly tried to persuade her to agree, but she wouldn't, so the Mthatha recruitment had to be aborted, and the Senior Litigator budget sent back to where it wasn't needed.

163. The court failed to note that any such alleged executive decision by Vedalankar had to be minuted, and Nair admitted he knew of no such minute.

164. The court failed to note that the Mthatha post couldn't have been advertised unless it had been created and approved, because the Approval Framework required that Clark confirm the available budget for it, thus further giving the lie to Nair's rank perjury in court about this.

165. The court failed to note that this brand-new story of Nair's in court about why the Mthatha appointment was cancelled couldn't possibly have been true, and his obvious perjury about it meant nothing he said in court could safely be believed.

166. The court failed to assess the credibility of Nair's evidence about this having regard to its inherent improbability for the above reasons and further to the fact that Vedalankar told the applicant a completely different story in her letter of 18 October 2010 three months after allegedly disapproving the transfer of the budget, which story she persisted with in her January 2011 letter and then under oath in April 2011.

167. The court failed to note the significance of Nair's claim to have ordered the cancellation of the Mthatha recruitment wholly off the record, and that no record whatsoever exists of this.

168. The court failed to note the plainly obvious perjury of Nair's claim that the Eastern Cape selection panel never signed its recommendation of Skibi for Mthatha, having regard to the sworn allegation in the first discovery affidavit that the letter covering its transmission from the regional office in Port Elizabeth to head office in Johannesburg had been 'lost in transit'. It goes without saying that the covering letter wouldn't have been sent without the recommendation it covered. And the recommendation wouldn't have been sent to Nair unsigned, because Nair couldn't have acted on an unsigned recommendation.

169. The court failed to note the likelihood from this and from all the other material facts that Nair indeed received the signed recommendation of Skibi and that he approved it, which is why Skibi had been 'ready to start' and the Mthatha Justice Centre was

expecting him, when his transfer was abruptly cancelled, orally, off the record, itself a glaring irregularity.

170. The court failed to note that the record unequivocally shows that Nair had no reason not to approve the appointment of Skibi following a briskly conducted recruitment he'd urgently mandated, because his 15 July 2010 email proves that he only had in mind to freeze a limited number of lower criminal court posts to trim costs, more if necessary, and some even lighter posts if still necessary after that – not Senior Litigator posts.

171. The court failed to note that Skibi wouldn't have been 'ready to start' had he not been approved by Nair, and told so.

172. The court failed to note that only Skibi was telephoned and told the Mthatha Senior Litigator job was off, not the other interviewed candidates, showing further that Skibi had been selected and approved and was about to begin, when Nair cancelled his transfer off the record.

173. The court failed to note that Nair's manifest perjury that his July email to Makokoane was not meant to be exhaustive is exposed by both the cold print of its subject-heading and by its contents, both of which proposed cutting, i.e. freezing recruitment to 56 lower criminal court public defender posts, more of the same, and some even more junior paralegal and administration positions if still necessary after that to find more savings.

174. The court failed to note that had Nair considered freezing recruitment to any other more senior posts such as Senior Litigator posts, he would have included them in his email to Makokoane and other management executives to agree and for the Board to approve.

175. The court failed to note that before the applicant's letter came in at the end of the month, there was no question of freezing recruitment to any of the respondent's other posts, let alone critical top level professional posts.

176. The court failed to note that although Nair's proposed cuts didn't completely meet the OSD phase 1 shortfall, Makokoane proposed to the Board the following day that this shortfall be accommodated by applying unspent budget savings to the balance to be made up – not freezing senior professional staff recruitment, which the record shows anyway proceeded after July uninterrupted.

177. The court failed to note Makokoane's information to the Board that critical posts would be prioritized for recruitment, implicitly referring inter alia to Senior Litigator posts. (It was common cause on the pleadings that Senior Litigator posts are critical, and the court's mistake about this later in the judgment will be addressed below, as will

Nair's perjury in pretending they aren't critical and that the respondent's bottom-professional-rung lower criminal court public defender posts are – contradicted by the respondent's pleadings volunteering that Senior Litigator posts are critical.) That is, there was no question of freezing critical Senior Litigator posts, and Nair's email to his fellow executives and Makokoane's report to the Board, both in July, prove it beyond serious disputation.

178. The court failed to note the contradiction between Nair's claims to have merely slowed down the recruitment process – absolutely true (for a change) in regard to the recruitment of a limited number of lower criminal court public defenders – with his permanent, off the record abortion of three critical Senior Litigator recruitments.

179. The court failed to note Nair's manifest perjury in claiming that its public defender posts at the bottom of the respondent's professional ranks are critical posts, whereas its top echelon specialists posts, specially created to address Parliament's concerns about inadequate legal expertise within the respondent, are not critical.

180. The court failed to take note of all the many pieces of evidence enumerated by the applicant in his heads that unequivocally show Nair to have perjured himself about this. Also because it's common cause on the pleadings (the respondent actually volunteered the description) that Senior Litigator posts at the summit of its professional ranks are critical.

181. The court failed to note that the Senior Litigator posts have always been budgeted and funded ever since they were created (spare budget was reported available at the time), and the respondent's 'tough times' were no more than some temporary uncertainty about when its OSD phase 1 funding would come through in the 2010/11 financial year, having regard (i) to its payment the previous year, and (ii) to the Minister's undertaking to ensure it would be included in the national mid-term budget in October. There was never any question that it would be paid, as indeed it was.

182. The court failed to note that if any of the respondent's Senior Litigator posts were to be *permanently* done without, for any reason, the Board had to approve this – just as it had to approve, and did approve, executive management's proposal to do without 56 lower courts public defenders, but only *temporarily* until the end of the financial year.

183. The court failed to note that Nair did not have the power to decide on his own to 'do without' Senior Litigators, whose employment was mandated by the Board's Strategic Plan and whose employment was repeatedly specifically reported to the Minister and to Parliament. Nor did he have the power to decide this with Vedalankar. Especially off the record, and then concealed from the Minister and from Parliament in the respondent's reports on its completion of its last Strategic Plan, in the course of the cover-up.

184. The court failed to note the transparent dishonesty of Nair's perjurious dissembling that Parliament isn't especially concerned that the respondent's critical posts be filled, having regard to the fact that the respondent is part of the Justice cluster, and having regard further to Parliament's pointed enquiries about the vacancy rate among the respondent's professional staff.

185. Ad paragraphs 59 and 60: With respect, all this is correct.

186. The court failed to weigh and assess the veracity of Nair's evidence. Instead, the court took everything Nair said on its face, and accepted and believed it, even when it was childishly incredible on its face, contradicted by the records, unsupported by the records, contradicted by the respondent's pleadings and affidavits, and contradicted by his reports to the Minister, to Parliament, to the Board, and by his own affidavits.

187. The court mischaracterised the case as one involving contradictory versions, to the extent that the veracity of the applicant's evidence, objectively supported every leg of the way, was never in question, only the correctness or otherwise of his conclusion from all the objective facts he presented that the respondent had unfairly discriminated against him under cover of a lying budgetary camouflage alibi – advanced to him for the first time nearly a year after his interview under pressure of his repeated enquiries, and finally at the sharp point of a comprehensive PIAIA request, first illegally ignored then repeatedly illegally expressly refused.

188. On the other hand, the veracity of the respondent's elaborate justification for aborting his appointment was squarely in issue, and it accordingly behoved the court to carefully assess the credibility of the respondent's sworn and pleaded claims that budgetary considerations prevented the finalisation of the application's appointment, and that such considerations had resulted in the abortion of the simultaneously recruited Durban post and the subsequently recruited Mthatha post – stories Nair completely changed at trial (i) in conceding there was no financial bar to prevent the applicant's appointment at the time he was interviewed and recommended, and (ii) in admitting that the cancellation of the Mthatha Senior Litigator recruitment had nothing to do with any budgetary consideration, which means Vedalankar lied to the applicant in her letters of 18 October 2010 and 28 January 2011, and perjured herself in her affidavit of 8 April 2011.

189. Ad paragraph 61: The court completely misdirected itself in citing and relying on the Barnard case for direction in determining the applicant's complaint that the respondent had unfairly discriminated against him under cover of a lying budgetary camouflage. The Barnard case involved frank discrimination, which the employer properly justified with

regard to its constitutional imperative to achieve fair racial representivity in its senior ranks.

190. Ad paragraph 62–63: The court's dicta in these paragraphs are entirely irrelevant, as indeed it mentions in the first sentence of its following paragraph 64 (except to suggest that the court surmised undeclared racial discrimination in the instant case).

191. Ad paragraph 64: The court fundamentally misdirected itself in holding that 'the determination of the issue at hand as well as the controlling law should still be the one outlined in Harksen vs Lane and others', because, as in Barnard, the Harksen case involved *frank differentiation* and whether it was justified or not – and not disputed *covert* discrimination under a financial camouflage, as alleged by the applicant in the instant case. The instant and cited cases are totally incomparable.

192. The Barnard and Harksen cases consequently had zero application to the determination of the applicant's complaint, and the court misdirected itself in relying on them.

193. Ad paragraph 65: The court fundamentally misdirected itself by misallocating the onus of proof, and in determining the dispute on the mistaken premise that 'The applicant … carried the burden to prove the existence of the discrimination complained of' and that there was an 'onus resting on him' to do so – irrelevantly citing as authority for this wrong basic premise the Harksen, Kadiaka and Germishuys cases, none of which had any bearing on the issue – and then proceeding to hold that the applicant had failed to discharge this onus.

194. The Employment Equity Amendment Act 47 of 2013 ('EEAA'), assented to by the President on 14 January 2014, was proclaimed under section 30 to be effective from 1 August 2014.

195. Section 6 of the EEAA amended section 11 of the Employment Equity Act 55 of 1998 ('EEA'), which deals with the 'Burden of Proof' in unfair discrimination claims.

196. Through a manifest oversight by the legislature (shown below), section 11 of the EEA had previously been silent regarding the incidence of the onus of proof in *covert* unfair discrimination claims, and had reversed the onus only in *frank* unfair discrimination claims (as in the Barnard case). That is, until the amendment, there was no *statutory provision* in South African labour law governing the allocation of onus in *covert* unfair discrimination litigation in the labour arena (but not outside it; see below).

197. A *covert* employment discrimination complainant naturally has a much harder row to hoe in establishing his claim where the discrimination is denied and the employer's *unspoken mental prejudice* against him must be inferred from the totality of the

circumstantial evidence, than one in *frank* employment discrimination, where it is openly admitted but justified. So for his effective legal protection, such a *covert* unfair discrimination complainant has an even greater need for a reversed onus than a complainant in a *frank* discrimination case.

198. Section 11 used to provide:

> Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.

199. The old section 11 made no provision for the reallocation of onus in *covert* unfair discrimination claims, such as the applicant's.

200. Amended, the new section 11(1) provides:

> If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –
>
> (a) did not take place as alleged, or
>
> (b) is rational and not unfair, or is otherwise justifiable.

201. Whereas section 11(1)(b) restates and refines the original provision reversing the onus of proof in *frank* unfair discrimination complaints, section 11(1)(a) fills the statutory lacuna in regard to *covert* ones and likewise reverses the onus in these cases too.

202. In weighing the evidence and deciding the applicant's claim, the court was bound to apply section 11 as amended. Judgment was delivered many weeks after the amendment of section 11, and the applicant was entitled to the benefit of this amendment and to the decision of his claim under *current* South African labour law as *codified* by the amended section regarding the incidence of the onus of proof in *covert* unfair discrimination claims.

203. It didn't do so, and it wrongly adjudicated the case on the basis that the applicant bore the ordinary onus of proof – such as rests on civil plaintiffs in the ordinary course. This was a fundamental and fatal misdirection vitiating the fairness of the trial.

204. For the several reasons enumerated below, however, even *before* the statutory *codification* of the reallocation of the onus of proof in *covert* unfair employment discrimination claims on 1 August 2014, and in the absence of a statutory provision regulating the incidence of onus in such claims, the respondent nonetheless bore the ultimate onus to prove that it had not unfairly discriminated against the applicant as he'd complained.

205. (The applicant was himself mistaken both at trial and during argument in believing that, prior to the proclamation of the EEAA on 1 August 2014 explicitly shifting the final onus, he bore it – as under US federal law. The McDonnell Douglas framework prescribed by the US Supreme Court in 1973 (mentioned in the applicant's heads), imposes an *evidential onus* on the employer where a grievant makes out a plausible case that he has been unfairly discriminated against, but it doesn't shift the *ultimate burden of proof*, as many countries have done in accordance with progressive international labour law trends reported and recommended by the ILO, given effect either by way of statutory provision or judicial development of the law. The McDonnell Douglas framework was just the first, early, partial move in the development of equitable onus allocation in unfair discrimination litigation, supported by the ILO.)

206. As the Minister of Labour explained during the Second Reading of the Employment Equity Amendment Bill on 24 October 2013:

> The main aim of this bill is to give effect to fundamental Constitutional rights, including the right to equality, fair labour practice and protection against unfair discrimination … and to ensure that South Africa complies with and meets its obligations in terms of the International Labour Organisation standards.[1] … [T]his Bill emanates from the International Labour Organisation, ILO, Convention'.[2] … [South Africa] participated in the standard commissions during the ILO conference.[3]

207. Since the EEA had been silent about the onus of proof in *covert* unfair discrimination claims before its amendment, the Labour Court was bound to look to the equities and to 'the International Labour Organisation standards' of labour jurisprudence in its allocation of the final onus in the applicant's case, agreed to by South Africa's representatives participating in the commissions setting them, and recommended and reported by the ILO.

208. The amendment of section 11 of the EEA, codifying the reversed onus in *covert* unfair discrimination claims, conforms to the ILO's recommendations in this regard, in keeping with South Africa's obligations to apply and comply with the international labour standards it sets in its reports:

> ***Equality at work: The continuing challenge*. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General. International Labor Conference 100th Session 2011**:

[1] Law and case bundle, page 228.
[2] Law and case bundle, page 233.
[3] Ibid.

Provisions maintaining the burden of proof on the claimant in discrimination cases limit the effectiveness of protection in judicial proceedings and the possibilities of seeking remedies for damages inflicted.'[4] (NB: Prior to the amendment of section 11 of the EEA, there were no such 'provisions' in South African law, only a statutory lacuna, now filled in accordance with ILO standards and recommendations.)

Giving globalization a human face. **General Survey on the fundamental Conventions concerning rights at work in light of the ILO. Declaration on Social Justice for a Fair Globalization, 2008. Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution). Report III (Part 1B). First edition 2012:**

Burden of proof
One of the main difficulties in relation to allegations of discrimination in general … relates to the burden of proof. … Provisions introducing a "reversal of the burden of proof" … are among the preventive mechanisms designed to afford protection against … discrimination … in the view of the Committee. … This is also the view of certain national jurisdictions. For example, in Argentina,[457] the National Court of Appeal found that, when a worker considers her or himself to be a victim of discrimination, there must be a shifting of the burden of proof whenever the worker can "provide a reasonable indication" of the employer's hidden reason.'[5]

Fn. 457: National Court of Appeal, Fifth Chamber, Parra Vera Maxima v. San Timoteo SA conc., 14 June 2006, ruling No. 144/05 68536.

HIV and AIDS and Labour Rights: A Handbook for Judges and Legal Professionals Office**. – Geneva: ILO, 2013**

Burden of proof
… Placing the burden of proof on the worker in a discrimination case may present an insurmountable obstacle, particularly when the information and documentation necessary to establish a prima facie case of discrimination is in the hands of the employer, such as in a case of denial of access to employment. [6] … Acknowledging these difficulties, some countries have provided for a shifting burden of proof. For example, in a case alleging discriminatory failure to hire, the burden of proof will shift to the employer to show that there were other reasons for rejecting the candidate – once the complainant has produced plausible or prima facie evidence of discrimination. In Switzerland, section 6 of the Federal Act respecting equality between men and women, which came into force in mid-1996, provides for the

[4] Law and case bundle, page 207, paragraph 65.
[5] Law and case bundle, ILO, Giving globalization a human face, page 212, paragraph 192.
[6] Law and case bundle, HIV and AIDS and Labor Rights, page 220.

presumption of alleged discrimination "as long as the person invoking the procedure makes a plausible case". The CEACR [ILO Committee of Experts on the Application of Conventions and Recommendations][7] has stated that allocating the burden of proof in this way may be a helpful tool to correct a situation that could otherwise result in inequality.**[118]** A number of European countries, such as France, Germany and Italy, have adopted provisions for shifting the burden of proof to the employer in cases of employment discrimination, based on European Directives.[8] … National courts have ruled on the issue of burden of proof in cases involving allegations of HIV-related discrimination in employment. The Brazilian Federal Superior Labour Tribunal has held that, where the employer knows of the worker's HIV status, the burden rests on the employer to show that his or her decision to dismiss the worker was not discriminatory.'[9]

Fn. 118: 'ILO, *Equality in employment and occupation,* ibid, paragraph 231; see also ILO, Giving globalization a human face, op.cit., para. 885.'

209. In the absence of a statutory provision reallocating the onus in covert unfair discrimination claims before the effective date of amendment of section 11 of the EEA, this court had the jurisdiction as a court both of law and of equity[10] to allocate the incidence of onus *equitably*, and to reverse it by placing it on the employer, as courts in Argentina[11] and Brazil[12] have done, having regard to (i) the reversed onus in *frank* discrimination claims stipulated by section 11 of the EEA before it was amended, (ii) the obvious oversight of the legislature, recently remedied, in reversing the onus only in *frank* discrimination claims and neglecting to reverse it in *covert* discrimination claims, all the more necessarily for effective legal protection against unfair discrimination in such cases, (iii) the recommendations and reports of the ILO consistently urging the reallocation of the onus of proof in *covert* unfair discrimination litigation, and (iv) the reversed onus in both *covert* and *frank* unfair discrimination litigation outside the labour sphere under section 13 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA'), which has stipulated, since its enactment, that in *covert* unfair discrimination litigation the respondent should bear the onus of proving

[7] Law and case bundle, page 209.
[8] Law and case bundle, HIV and AIDS and Labor Rights, page 222.
[9] Ibid, page 224.
[10] Section 151(1) of the Labour Relations Act 66 of 1995: 'The Labour Court is hereby established as a court of law and equity.'
[11] National Court of Appeal, Fifth Chamber, Parra Vera Maxima v. San Timoteo SA conc., 14 June 2006, ruling No. 144/05 68536. (Cited with approval by the ILO.)
[12] Federal Superior Labour Tribunal/Tribunal Superior do Trabalho (TST), Adriana Ricardo da Rosa v. Sociedade de Ònibus Porto Alegrense LTDA – SOPAL, Case No. TST-RR-104900-64.2002.5.04.0022, Judgment of 3 August 2011 (published 2 September 2011) (Cited with approval by the ILO.)

it did not discriminate as alleged by the complainant – evidencing the intention of our democratic Parliament in unfair discrimination claims generally in the democratic era:

> Burden of proof
> 13 If the complainant makes out a prima facie case of discrimination –
>
> (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
>
> (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

210. So as to comply with section 3 of the EEA, requiring the Act to be 'interpreted –

> (a) in compliance with the Constitution;
>
> (b) so as to give effect to its purpose;
>
> (c) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.

– and to conform itself with international standards agreed by member countries, including South Africa, and reported and recommended by the ILO, the court was bound to shift the ultimate onus of proof and allocate it to the respondent – as courts in Argentina and Brazil took the initiative and did – even had it not been shifted by the proclamation of the EEAA.

211. In sum, the respondent carried the ultimate burden of persuasion; and the court's unfair misallocation of the final onus in deciding the case vitiates its judgment.

212. On appeal, the applicant will show that on a full and proper consideration of the dismal, manifestly untruthful, unsupported, internally contradictory and contradicted evidence given by the respondent's witness Nair – much of which wasn't treated in the judgment, despite having been pertinently pointed up in the applicant's heads of argument and in oral argument – no reasonable court would find on a correct allocation of the burden of proof that the respondent discharged its onus on a balance of probabilities to show that it did not unfairly discriminate against the applicant when it halted his appointment to the post for which he'd been recommended.

213. If the Labour Appeal Court disagrees with the applicant's case concerning onus, and holds that he, and not the respondent, bore the final onus, albeit that the respondent was subject to an evidential onus to justify its failure to appoint (which is why the respondent's application for absolution was dismissed after the close of the applicant's

case, having made out a prima facie case to answer), the applicant will show that the respondent failed to prove its pleaded case and thus to justify its failure to appoint.

214. Ad paragraph 66: In correctly noting that 'in some employment discrimination cases in which an issue of pretext arises the respondents often provide all sorts of seemingly legitimate reasons to justify its behaviour', the court failed to note the wide assortment of different, contradictory seemingly legitimate reasons advanced by the respondent to justify its behaviour: to the applicant, to the SAHRC, to the Minister, to Parliament and to this court before and during trial, one advanced, then retracted by Nair on oath, then revived adjusted, to wit: that the respondent was too busy preparing/presenting its budget to finalise the applicant's appointment (a story repeated, then dropped); that it froze *all* its vacant posts because of its budgetary concerns (a story repeated, then dropped); that the initial reason the second interview of the applicant couldn't proceed was because of difficulty fixing a date suitable to all members of the panel (Clark hadn't even been asked by April; and after the applicant, in his original statement of claim, nailed this lie told to the Minister and Parliament, the respondent (Nair instructing and confirming on oath) retracted it as 'an error', 'palpably an error'; and when in court Nair was reminded of this retraction, he feebly responded that the retraction was a mistake. In court Nair revived the initial delay story, saying he knew the second interviews couldn't proceed until mid-February, thereby contradicting the lying story he'd told the Minister and Parliament about the panel members not being able to meet because of trouble agreeing a suitable date, when the truth of it is that no one had been asked.

215. The court failed to note that even on his own new version in court, nothing prevented Nair from arranging the second interviews in the three-week period between the mid-February and 10 March 2010 when the respondent learned that its OSD phase 1 funding wasn't in its baseline budget; and that Nair's failure to take any action at all, even reading and approving or disapproving the recommendations, stands wholly unexplained. (In March despite the OSD disappointment, (i) he and his LSTC urgently mandated the Mthatha Senior Litigator recruitment, which blows his lie that from then on the OSD issue prevented Senior Litigator recruitment in particular, and (ii) recruitment generally rapidly accelerated in the next quarter, which blows his lie that any recruitment at all was affected by the OSD issue before mid-July 2010.)

216. Ad paragraph 67: The court duly noted the many instances ('a number of facts and circumstances') pointed up by the applicant showing that Nair was 'not generous with the truth', in other words, and put plainly instead of soft-soaping it in the respondent's favour, he'd not been honest with the court on a number of scores, which is to say he'd repeatedly lied to court under oath, meaning he'd repeatedly committed perjury; but the court failed to identify a single instance of Nair's gushing perjury, and failed to weigh

his many demonstrated lies on oath concerning the surrounding issues in its assessment of whether or not to accept and believe his central claims in court that (i) he didn't know who the applicant was and what he stood for at the material time because he didn't open and read the applicant's CV detailing his political background and the selection panel's recommendation referencing it until more than a year after receiving them, when he claimed in court to have opened and read them out of curiosity because he wanted to find out at last who the applicant was and what he stood for; (ii) he and his colleagues had been too busy to interview the applicant a second time until mid-February; and (iii) the uncertainty over when the respondent's OSD phase 1 funding would be paid caused him to halt the applicant's appointment in March and then freeze it at Vedalankar's suggestion in July.

217. The many obvious lies Nair told under oath in court, which the court failed to identify, are identified throughout this application, and two more are proved by the new evidence.

218. The court failed to note (even before mention of the new evidence categorically proving it), that Nair obviously perjured himself in alleging falsely that as the respondent's deputy information officer he didn't know that the SAHRC had conducted (i) a special PAIA training workshop for the respondent's national office staff, and (ii) an audit of the respondent for PAIA compliance.

219. The court failed to note that since Nair lied freely under oath about all manner of things, nothing he says could be trusted and relied on. That is, his evidence was not worthy of credence and couldn't reasonably be accepted and believed.

220. The court failed to note that besides the surrounding countryside of Nair's many lies on oath about many other things, Nair's claim to have first known of the applicant's political background at the end of 2010 or early 2011 is contradicted by him in a different story he told under oath before trial, namely that he first learned of the applicant's political background in July 2010 on reading the applicant's letter to Vedalankar, canvassing it in some detail. That is, he learned much earlier and from a different document.

221. The court failed to note these mutually destructive contradictory versions on oath before and at trial, despite being pertinently pressed in the applicant's heads of argument and again at the oral argument.

222. Instead, the trial court accepted and believed Nair's lie in court about this, describing his evidence about it as standing intact, on the basis that Nair was adamant and unshaken about it, whereas he stood exposed as a perjurer on the point – and on innumerable others as the court obliquely and insouciantly acknowledged.

223. Indeed as the court correctly noted, citing American law laid down by the Supreme Court, proof that an employer has lied generates the highly probable inference that it has lied to conceal an illegal discriminatory motive.

224. The court failed to note that the profusion of lies Nair told about his knowledge of the applicant's political background, why he didn't act to finalise the applicant's appointment, and so many other things, including his different lies to other authorities, reasonably suggested that he lied about all this to cover his real reason for aborting the applicant's appointment.

225. Since race prejudice was eliminated from the case having regard to the Calitz case in Cape Town, mentioned by the applicant in evidence and in his heads, and nepotism too in view of the fact that after three advertisements none of Nair's friends applied for the post, as the applicant mentioned in argument, the court failed, as it ought to have done, to find political prejudice to be the most probable reason for Nair's peculiar, furtive, dishonest conduct in stopping the applicant's appointment.

226. Cross-examined on the fact that Nair had told a different story in his report to the Minister and to Parliament from what he'd told court, namely that he'd learned who the applicant was when reading his July letter to Vedalankar, Nair claimed that he'd stopped reading the letter just at the point where it began detailing the applicant's political background. Which is to say, he only learned of his name in late July. The court failed to note the ridiculous, inherent implausibility of this convenient evidence Nair made up to escape the corner he was in.

227. At the commencement of oral argument, the applicant informed court that he had only received after trial Nair's confirmatory affidavit to Mtati's answering affidavit in the applicant's application for leave to subpoena Board chairperson Mlambo JP, and that Nair had confirmed thereby his instructions to Mtati that he learned of the applicant's political background on reading his July letter – brightly exposing Nair's already improbable perjury in court that he stopped reading the letter at the point it began dealing with the applicant's politics.

228. The court's failure to address this, and its absolutely wrong statement that Nair's evidence stood unshaken and intact regarding when he learned of the applicant's politics, was a fundamental failure of the judgment. In fact, Nair's already obvious perjury about this was smashed to pieces by his earlier contradictory perjury on affidavit.

229. Ad paragraph 68: The record will show that on the very eve of trial the applicant found evidence that Nair had ghost-written Vedalankar's letter of 18 October 2010 illegally refusing his entire PAIA request for 51 specified records and falsely advancing a

budgetary justification for the abortion of his recruitment, and that he'd had ghost-written Mlambo JP's secret reports to the Minister and to Parliament reiterating this lying budgetary justification and concocting a new logistical one, subsequently retracted as 'an error', 'palpably an error', by Nair on affidavit (confirming his instructions to Mtati to retract it as such) only to revive it in it court, and then give evidence contradicting it.

230. The applicant explained why in light of these stunning last-minute discoveries he'd decided to hold Vedalankar and Mlambo JP clear at trial.

231. In his replying argument, and in view of Nair's inculpation/incrimination of Vedalankar and/or Mlambo JP – denying he'd written her letters, and accusing one or the other of them of having added new (false) allegations to the report to Parliament that he'd written for Mlambo JP to sign – the applicant recorded his misgivings about this concession about their involvement, and wondered on the objective evidence whether his decisions to hold them clear of complicity (in the cover-up, not the original unfair discrimination) was justified, having regard to the pointed facts and documents he referred to in his replying argument.

232. The word 'exonerate' was opposing counsel's; was not used by the applicant; and has a different meaning from the expression to 'hold clear'.

233. The court's inadequate recordal in its judgment of the clear uncontroverted reason given on the record by the applicant for his last-minute shift regarding Vedalankar's and Mlambo JP's complicity (he'd just discovered that Nair had written their letters and reports) unjustifiably suggests the applicant was unsure about his core complaint.

234. The court failed to note that Nair implicated both of them in his evidence; and it failed to deal with the extremely grave implications of this.

235. Ad paragraph 69: The court failed to note the striking change of animus exhibited by Clark towards the applicant between her emails of 14 and 30 April 2010, the first after she had consulted Brijlal in Pinetown as to the status of the recruitment and learned from him that the applicant had been recommended, since Nair was in Cape Town on the day or on his way back from briefing the Portfolio Committee, and the second after his return to the office. She'd encouraged him to keep enquiring in her first email, but rudely put him off doing so in her second email after Nair's return.

236. The court failed to note that Clark's palpable hostility towards the applicant in her second email reeks of prejudice.

237. It was never the applicant's case that Clark knew anything about him before his first approach to her on 14 April 2010, and the record of her email later that day vouches

that his call to her was received and followed up in an impeccably professional and friendly manner. Not so her second disgraceful email.

238. Subsequent to the respondent's delivery to the applicant *during the litigation* of the record of Vedalankar's email to Nair calling on him to discuss the applicant's letter to her enquiring about when his appointment might be finalized, the applicant accepted that she knew nothing of him and his recommendation before this, and indeed Nair confirmed this in his evidence. After receiving the recommendation in November 2009, he did nothing to finalize it for eight months, and said he only told Vedalankar that he had decided not to proceed with it when she called him in to discuss the applicant's letter to her at the end of July 2010.

239. It was never the applicant's case that Nair knew of the applicant and of his political background before reading his CV, for there's no evidence that he did. It's always been the applicant's case that Nair learned of the applicant's background when he read his CV.

240. The court gravely erred in finding that 'with the exception of possibly having read the CV of the applicant, Mr Nair did not know of the applicant'.

241. On Nair's own version he read the applicant's CV and learned the applicant's political background from it. Only, he claims to have read it more than a year after receiving it, and only out of curiosity.

242. More importantly, before the trial Nair told a completely different story on oath: he confirmed on oath the instructions he gave attorney Mtati to allege to this court that it was in July 2010 when *he read the applicant's letter to Vedalankar mentioning the applicant's political background*, that he learned of it. The court failed to note this, and that the two stories under oath are irreconcilable and mutually destructive, and neither can stand and be believed.

243. Contrary to Nair's perjury that the recruitment of Senior Litigators for KwaZulu-Natal and Mthatha was a low priority, the KZN post had been advertised twice in 2009 and the recruitment of a Senior Litigator for Mthatha was designated an immediate priority after then ROE Mtati's plea for it in view of the wide distances between the four high courts that the Eastern Cape's single Senior Litigator at Port Elizabeth had to service.

244. The court failed to consider the inherent improbability of Nair's claim that he didn't open and read the recommendations and CVs to find out who the recommended candidates were, in light of the two contradictory and equally perjurious accounts he gave about when he learned of the applicant's political background.

245. Ad paragraph 70: The court failed to note the inherent implausibility of Nair's claim under cross examination – when confronted with and cornered by his claim to the Minister and to Parliament before the trial to have learned who the applicant was in July when he read his letter to Vedalankar – to have stopped reading the letter just at the point where it began to detail the applicant's political background, so he learned only of his name at that point, not his politics.

246. The court failed to find Nair's quick-thinking but hopelessly obvious cunning dodge here to be highly implausible.

247. The record of the oral argument confirms that during his preliminary 'housekeeping' remarks at the outset, the applicant informed court that the respondent had discovered Nair's confirmatory affidavit supporting Mtati's answering affidavit in the application for leave to subpoena Board chairperson Mlambo JP, after the trial. And he recorded that his cross-examination of Nair would have been quite different had Nair's affidavit not been withheld, and had it been given him before trial. (No dispute was raised by the respondent's representatives that Nair's affidavit was indeed delivered to the applicant only after the trial.)

248. The colossal implication of Nair's affidavit for the decision of the case is that Nair confirmed on oath Mtati's statement (as attorney) made on Nair's instructions that it was when the applicant wrote to Vedalankar in July 2010 that they all became aware of his political background. That is, Nair gave two completely different versions on oath about when and how he learned of the applicant's politics.

249. The court failed to weigh the veracity of Nair's claim not to have read the applicant's CV on receiving it by email attachment and only to have read it more than a year later out of curiosity, in light of his many perjuries, either manifestly obvious on their face, or categorically established having regard to his affidavits, the documentary record, and the respondent's pleadings and affidavits contradicting and exposing his perjuries.

250. Before he began testifying, Nair solemnly swore an oath before court 'to tell the truth the whole truth and nothing but the truth'.

251. The court's finding, set in insupportably euphemistic and forgiving language, that in multiple respects the applicant showed Nair to have been 'less than generous with the truth' means Nair was shown to have repeatedly violated the oath he took to be completely open and honest with the court, and that he repeatedly perjured himself, as indeed he certainly and uncontrovertibly did, manifestly so on the very face of what he said, or exposed by his previous contradictory evidence on affidavit, by the respondent's contradictory affidavits and pleadings drawn on his instructions, and by the documentary record against him.

252. The court failed to record directly, instead of obliquely and indulgently, that it found Nair to have lied on oath on numerous aspects of his evidence, and that his central evidence about not knowing the applicant's political background at the material time – innately improbable and contradicted by him in his reports to the Minister and to Parliament and his interlocutory affidavit in the Mlambo JP application – consequently couldn't be trusted, and fell to be rejected.

253. In light of its vague general finding that as a witness under oath Nair was not entirely honest, the court ought to have assessed the credibility of Nair's claim not to have opened and read his email correspondence after the KZN interviews with the greatest caution and circumspection, more especially because it's elementary that a witness found to have lied on oath on any aspect obviously can't be trusted on any central disputed claim he makes.

254. (Like in the applicant's biggest criminal case on brief: 9 counts of murder, another 7 attempted, in an AK47 attack on a jam-packed taxi during the Inkatha/UDF war. A front seat survivor was *adamant* it was the accused, was *unshaken* under relentless cross-examination, and his evidence stood *intact*. The Judge President's friendly questions and interjections indicated he believed him. Then the applicant asked a peripheral question: What were the conditions in the area at the time of the attack? Perfectly quiet and peaceful, he replied. But the investigating officer called to testify during the defence case told court that just before the taxi attack things were so tense that the police were out in force every night patrolling the area to prevent further killings, and people were sleeping in the forest in terror of being slaughtered in their beds. With the state witness's peripheral lie on oath exposed, his central identification evidence was accordingly found untrustworthy and unreliable, and the innocent accused was rightly acquitted.)

255. After allowing (in paragraph 67) that 'the applicant pointed out a number of facts and circumstances in the case of the respondent to suggest that Mr Nair was not generous with the truth', the court failed to canvass all Nair's clearly established lies and their implications for his general credibility.

256. As said, subsequent to the trial the applicant extracted further records from the respondent by dint of another PAIA request, and they prove categorically that Nair committed perjury in court on two other peripheral scores concerning the respondent's persistent, repeated illegal withholding of records duly requested by the applicant under PAIA for the purpose of interrogating the truth of the budgetary justification fed him for not proceeding with his appointment.

257. The court's finding that Nair's claim not to have read the applicant's CV when he received it 'stands intact' is insupportable. It bears repeating that Nair was equally 'adamant' and 'unshaken' in regard to several other obviously false allegations that he made, such as that all rejected and eliminated candidates were to be interviewed for possible appointment by his so-called second round panel, whereas the respondent repeatedly contradicts this in its pleadings and affidavits; and such as his claim that he didn't have to sign his approval of the recommended candidates for second interviews, also repeatedly contradicted and refuted by the respondent's own pleadings and affidavits, drawn on his instructions, and even confirmed by him on affidavit.

258. As said, and very importantly, Nair's brand-new story in court that he didn't open and read the recommendation and accompanying CVs for more than a year after receiving them features nowhere in any of the respondent's correspondence, reports, pleadings and affidavits before trial, all addressing the applicant's complaint that his appointment was blocked on account of political prejudice and giving different explanations for why the applicant wasn't appointed. The court failed to note this.

259. Ad paragraph 71: The respondent advanced completely different stories before trial for why it did not process the applicant's appointment promptly after receiving the recommendations. On Nair's instructions, it also repeatedly lied that all posts had been frozen, whereas the record shows exactly the opposite: recruitment spiked and new post creation exploded in the 2010/11 first quarter after the respondent was 'suddenly confronted' (its pleaded expression) with budgetary issues on 10 March 2010, on learning that its OSD phase 1 allocation hadn't been included in its baseline budget as undertaken and confirmed in January.

260. On any reasonable evaluation of Nair's claim about this, there could have been nothing 'premature' about opening reading and approving or disapproving the recommendations for the second round of interviews on receiving them. Had he disapproved the candidates recommended, as he was entitled to do in consultation with Vedalankar as executing authority delegated by the Approval Framework for such senior appointments, he wouldn't have had to bother asking Clark to arrange the so-called second round interviews; there would have been none to arrange. His 'premature' evidence was plainly perjury.

261. The court misdirected itself in incorrectly recording that Nair 'merely placed the bundle of documents he had received in his drawer without reading and scrutinizing the recommendation.' This wasn't his evidence. In court Nair claimed, for the first time, that he never opened and read the recommendation and CV for over a year after receiving them.

262. The court insupportably found there was nothing 'unusual or out of the ordinary which would attract his curiosity to the bundle with the email such that I should find that he probably read the applicant's CV'.

263. The documents were necessary to finalize the respondent's recruitment to its two long-vacant, critical, top-echelon, repeatedly advertised most senior professional posts in KwaZulu Natal, which Nair and his LSTC had to fill in their implementation of the Board's Strategic Plan.

264. The court's finding that these were the sort of routinely sent documents that Nair didn't have to open and read is manifestly insupportable on any reasonable objective appraisal; the court was wrong to find this; and the Labour Appeal Court will undoubtedly agree.

265. The court failed to consider the implication (not argued in court) of the *special telephonic instruction* Nair (Clark wasn't yet involved) gave the regional office in Pinetown to send him all four CVs, including those of the rejected, eliminated candidates. Had this been routine, as with the previous Senior Litigator selection process, Nair wouldn't have needed to specially call for all CVs to be sent to him.

266. The court failed to note that Mdaka sent the documents to only Nair, not to Clark as well, despite Brijlal's email to Mdaka stating that the documents were to be sent to both Nair and Clark, consistent with the respondent repeated statement in its correspondence, pleadings and affidavits that Clark was in charge of arranging the second interviews. The court failed to note that, contradicting this and perjuring himself, Nair denied she was in charge of arranging the second interviews.

267. The court failed to draw the necessary conclusion from Nair's telephone instruction that *he knew even before receiving the documents that there'd been a problematic selection*, that he'd had his finger on the pulse all along, and that he was scheming from the start to appoint a candidate rejected by the selection panel instead of the applicant.

268. The court failed to note Vedalankar's and the respondent's repeated blatant lie to the applicant, Parliament (to Hon Schäffer MP), and court that the applicant was not the only candidate selected for the post he'd applied for, and that others had been recommended for it too.

269. The court massively misdirected itself in stating that from February to July 2010 'Mr Nair was then preoccupied with a deficient budget of the respondent until he received an email from Ms Vedalankar enquiring about the applicant'.

270. First, the uncontested and incontrovertible brute evidence flatly contradicts this completely insupportable finding. The record shows that despite the respondent's

uncertainty arising on 10 March 2010 about when its OSD phase 1 funding would come through for 2010/11 (when, not if), the respondent embarked on a massively accelerated recruitment and new post creation drive, overseen by Nair as NOE and chair of the LSTC. It was not until mid-July that the respondent decided to spur the Department into paying up by resolving to freeze recruitment to a limited number of lower criminal court public defender posts, but only temporarily until the end of the year, and in the result for just two months. That is, recruitment wasn't disturbed in the least by the 'deficient budget' issue.

271. Second, the record shows that Vedalankar's letters in March and April, and meetings with the Department and Minister in July, were the sum total of the respondent's agitation to get its OSD phase 1 funding paid, and NOE Nair wasn't involved in this end of the respondent's business at all.

272. Third, there were no 'deficient budget' concerns before 10 March ('from February', per the judgment) when Vedalankar recorded in her letter to the Department that contrary to assurances given, the respondent's OSD phase 1 allocation had not been included in its baseline budget. So nothing precluded Nair from finalising the applicant's appointment in the second half of February and the first 10 days of March (or even after that, as recruitment boomed).

273. The court's finding that 'the applicant has not succeeded in showing that Mr Nair probably read his CV around the time of its receipt' is fatally incorrect both on the probabilities and as a matter of law, where the court has lumped the applicant with an evidential onus he doesn't bear.

274. To the contrary, the onus lay on the respondent to prove that Nair never read the recommendation and CVs sent to him, until more than a year after receiving them.

275. The court erred in not finding that all the applicant had to do here was show that Nair received the documents, and that he did so by presenting the evidence of Mdaka's email to Nair covering them. That Nair got the documents buy email wasn't in issue at trial.

276. It wasn't for the applicant to prove that Nair examined the documents as was required of him by the Approval Framework, delegating him executing officer with final approval power, subject to Vedalankar's agreement. There was no onus on the applicant to prove Nair read what was sent him; it was the other way round.

277. The court fundamentally and fatally misdirected itself in misallocating the onus in this regard, and holding that the applicant failed to prove that Nair read the documents sent

to him for his consideration and approval of the recommended candidates, on his version, for second round interviews.

278. The applicant will argue on appeal that it's highly material to consider that the respondent determinedly withheld Mdaka's email to Nair transmitting the recommendation and CVs.

279. The record before the court shows that, first requested by the applicant under PAIA in August 2010 and repeatedly demanded in the litigation thereafter, the respondent only surrendered it three years later, just a couple of weeks before trial, but only after the applicant had applied for and been granted a second judicially supervised pre-trial conference at court to force the discovery of this and other withheld documents – hence the change from the applicant's amended statement of claim, when he couldn't show Mdaka had sent the recommendation and CVs to Nair, to his intended second amended statement of claim, when after finally receiving Mdaka's email, he could, and pertinently pleaded the date Mdaka did so.

280. The applicant will argue on appeal (this was not argued in court) that until it was forced out of him a few weeks before trial, following the second pre-trial conference at court in June 2011 to compel full and proper document discovery, Nair intended denying having received the recommendation and CV – just as he denied receiving Skibi's recommendation for Mthatha, with its covering letter to him claimed, on oath on his instructions, to have been 'lost in transit', which at least, even on this version, means it was signed and sent (in court Nair claimed it wasn't signed), since it obviously wouldn't have been sent if not signed.

281. The applicant finally disgorged Mdaka's email to Nair covering his transmission of the recommendation and CVs with the greatest difficulty. Relying on this evidence, the applicant was finally able to prove Nair received the recommendation and his CV, detailing his politics, so as to refute the story Nair told the Minister and Parliament that he only learned who the applicant was in July when he read his letter to Vedalankar.

282. The court was wrong to hold that Nair could so easily defeat this hard-won evidence, exposing his lie to the Minster and to Parliament, by simply claiming not to have opened and read the important documents Mdaka sent him after the recommendation had been signed by all members of the selection panel, *more especially because Nair had especially phoned for all the CVs to be sent up with it*, including those of the rejected, eliminated candidates.

283. The court failed to note the respondent's first discovery affidavit was obviously perjurious and a transparent attempt to defraud the court, in alleging the covering letter for Skibi's recommendation was 'lost in transit'.

284. Ad paragraph 72: The court's finding that Nair needed to read the applicant's CV to know about his political background at the material time, namely when he decided to halt his recruitment, is not in contention.

285. It was never the applicant's case that Nair had any prior knowledge of him, but the overwhelming probabilities support the different finding that Nair indeed learned of the applicant's political background on reading his CV when he got it in November 2009 and not from reading the applicant's letter to Vedalankar in July 2010 (as he confirmed on affidavit before the trial) nor from reading the applicant's CV at the end of the year or maybe early the year after that (as he testified differently at trial).

286. The court was wrong to hold, totally irrelevantly, that he was not 'meted with any different treatment that was given to the recommended candidates for Durban and Mthatha'.

287. First, this was not his complaint for trial. Second, as a matter of recorded fact the Durban and Mthatha candidates were indeed treated differently from the applicant. Whereas the applicant was kept in the dark and given discouraging, dishonest, opaque, mixed messages by Clark in her second email of 30 April 2010, after Nair had returned to his office in Johannesburg, it's the respondent's own pleaded case that Mngadi was informed, on Nair's instructions, in April or May 2010 that the recruitment had been cancelled. This different treatment 'meted out' is even justified in the respondent's affidavits. And whereas after the applicant's appeal to Vedalankar to see to the finalization of his appointment, he was sent not one but two vague letters pretending that it had been resolved not to fill the vacant Senior Litigator posts (no record whatsoever exists to vouch this) so as to create a patina of legality, Skibi got no more than a phone call to tell him that his hoped-for transfer to Mthatha close to his home at Bizana had been cancelled. But this by the way; as said, this different treatment was not the applicant's complaint.

288. The respondent's justification advanced to the applicant and to this court before trial was that the applicant's recruitment was not preceded with for budgetary reasons. This was its pleaded defence and the respondent was bound by its pleadings at trial.

289. At trial however, Nair came up with a new story that featured nowhere in the respondent's correspondence, pleadings or affidavits, namely that it was not possible for practical reasons to convene the so-called second round interviews until mid-February 2010. A closely similar excuse was given by Nair to the Minister and Parliament. When the applicant exposed this practical excuse as a lie in his first statement of claim and in his application for leave to subpoena Mlambo JP (before his discovery on the eve of trial that Nair had ghost-written his reports), Mtati, on Nair's

instructions, and confirmed by Nair on affidavit, retracted this explanation as 'an error', 'palpably an error'.

290. So it was never the applicant's pleaded case for trial that any practical obstacles prevented the prompt finalization of the applicant's appointment. Its case for trial was that budgetary insufficiency prevented the applicant's appointment.

291. The court was therefore wrong to accept Nair's new practical excuse for not proceeding with the recruitment, never pleaded, and indeed retracted by him on oath before the case.

292. The pleaded defence was budgetary. As late as the morning of the trial the respondent repeated on affidavit in its failed application to quash the applicant's subpoenas that budgetary constraints *at the time the applicant was interviewed and recommended prevented his appointment*.

293. This lie also told earlier, and repeatedly, is blown to pieces by the hard documentary record. This record unquestionably exposes the budgetary defence as a false pretext advanced to camouflage the true reason for halting the applicant's appointment, and the court was wrong not to find this.

294. Ad paragraph 73: The court agreed with Nair's evidence in court that he didn't have to sign his approval or otherwise (with reasons if negative) of the selection panel's recommendations at the foot of the recommendation report emailed to him. But since Nair's evidence about this is repeatedly contradicted by the respondent's own pleaded and sworn case before trial, the court was wrong to accept Nair's evidence radically at odds with the respondent's own pleaded and sworn case.

295. What's more, the recommendation form provided for Nair to approve or disapprove, with his signature in this box or that one, the recommended candidates *for second round interviews*, and on the respondent's own repeatedly pleaded and sworn version Nair had to approve or disapprove the recommended candidates for second round interviews (under Nair's illicit, unauthorised, incompetent second round interview scheme that he'd devised, whereas the Approval Framework read with the Recruitment code required Nair to record his approval or disapproval of the recommendations, with Vedalankar's agreement).

296. The Recruitment code and Approval Framework do not permit legally unqualified persons like Nair, Clark and Makokoane to re-interview Senior Litigator candidates duly selected and recommended by selection panels of the respondent's senior lawyers in KwaZulu-Natal.

297. Indeed, as the judgment very rightly suggests, it's perfectly absurd that Nair should have to first approve the recommended candidate for his so-called second round interview; then approve him again in committee with the so-called second round panel (excluding Vedalankar); and then approve him a third time (now with Vedalankar).

298. Nair's second round interview scheme was plainly illegal; and although embarrassing, the court ought to have recorded its finding that Board chairperson Mlambo JP's participation in this illegal scheme, as a non-executive director whose only power in recruitment is limited to approval of the appointment of the NOE and CEO, has been unlawful, whatever his fine intentions.

299. The court failed to note the further gross irregularity of Nair's second round interview scheme in not keeping minutes and recording the proceedings – as in the case, admitted by the respondent, of the applicant previously selected for the Pietermaritzburg Senior Litigator post, but rejected off the record by the second panel; and therefore probably also the case with the candidate that the second panel approved for Port Elizabeth, re-interviewed on the same day as him. (They were the only candidates re-interviewed, not the eliminated candidates too, as Nair lied in court; but this is for the police.)

300. Ad paragraph 74: The court failed to address itself to the substance of the applicant's attack on the illegal second round interview scheme, namely that it was ultra vires, incompetent, and unlawful for all the many reasons he gave in evidence and repeated in argument; and the court was wrong not to adjudicate this ancillary issue pertinently raised by the applicant in his amended statement of claim, and find for all the reasons he set out that Nair's unauthorised, off the record, second interview scheme was illegal and therefore no lawful prerequisite to the finalization of the applicant's appointment.

301. Indeed the applicant never suggested that Nair's second round interview scheme violated Section 6(1) or the EEA, as correctly stated in the judgment, but this was irrelevant to the decision of his unfair discrimination complaint.

302. The court wrongly found that the applicant's demonstrations that Clark, Vedalankar and Nair all lied to him about the reason his appointment had not been finalised did not lay the basis for his claim that he'd been unfairly discriminated against under cover of a lying budgetary pretext falling foul of Section 6(1) of the EEA. The court failed to apply settled law in this regard.

303. The court wrongly suggested that the applicant's proper remedy was to take the matter on review. Quite the contrary, he perfectly properly referred his unfair discrimination complaint brought under the EEA to the CCMA for conciliation, as the Act required of him, and thereafter, upon the issue of a certificate of non-resolution, referred it to this court for trial, as the Act further required of him. The court wrongly

suggested that the applicant shouldn't have wasted its time referring his claim to it under the Act, but should rather have gone seeking justice somewhere else in a different sort of case.

304. The court wrongly rejected the applicant's evidence that the Pietermaritzburg and eight other Senior Litigator post at various seats of the High Court around the country are critical posts. It was common cause at trial that the top echelon Senior Litigator posts were critical, because the respondent duly categorised them as such in its own pleadings.

305. Nair's obvious perjury that the respondent's most junior professional posts are critical – whereas its most senior specialist Senior Litigator posts, specifically reported to the Minister and to Parliament as having been filled in completion of the Strategic Plan, are not critical – had only to be stated to be rejected.

306. Yet like Nair's many other obvious dull lies, the court accepted and believed his evidence about this, even as it was contradicted by the record and by the respondent's own pleadings.

307. Since it was common cause on the pleadings that the Pietermaritzburg Senior Litigator post was critical, the applicant wasn't required to present evidence to prove it was. But invited by the respondent's counsel early in the applicant's evidence to refer to the vast documentary record in his heads of argument rather than walk the court through it all, the applicant did show it was critical (even though this fact had already been admitted – actually volunteered).

308. Likewise the applicant again unequivocally showed in his heads, with reference to the respondent's records, that Nair's ridiculous allegation that the respondent's most junior professional posts were critical, not its most senior ones, was a blatant lie told under oath. The court was accordingly wrong to find the applicant never proved the post in question is critical.

309. Ad paragraph 75: The court's costs order against the applicant was unfair and at odds with legal precedent in unsuccessful suits to vindicate fundamental rights. After painstakingly carefully and very thoroughly interrogating the respondent's budgetary justification for the abortion of his recruitment by way of three successive requests for records under PAIA, and then finding this budgetary story unsupported and contradicted by the respondent's records extracted from the respondent in the face of considerable sustained resistance, causing him much lost time and hardship, the applicant finally referred his claim to this court for trial more than a year-and-a-half after the occurrence of the unfair discrimination he complained of.

310. A substantial part of the costs incurred in the case then arose on account of the respondent's fully documented consistent failures and refusals to discover documents duly requested by the applicant for trial, calculated to hinder the applicant establish the true facts, and the trial court ought to have marked its disapproval of the respondent's deplorably corrupt conduct in the litigation this regard, calculated to pervert the true and just determination of the applicant's claim on a full ventilation of all available relevant evidence.

311. The court should have likewise marked its disapproval of the further extraordinarily dishonest manner in which the respondent conducted its defence of the action, stooping to telling the foulest blatant lies about the applicant on affidavit (abandoned at trial) to cast him in the worst possible light and to poison the court against him before the trial began.

312. That is, the respondent corruptly defamed the applicant to prejudice the court against him in order to defeat the ends of justice (for precisely which criminal conduct US President Richard Nixon's special counsel Charles Colson was convicted and jailed). Yet all this went unremarked in the judgment.

313. The court accepted that the applicant made out a prima facie case for unfair discrimination, as evinced by its dismissal of the respondent's application for absolution at the close of his case, i.e. the court implicitly held that the respondent had a case to answer. As in the Barnard case. So the court ought to have made a costs order in accordance with the precedent followed in the said case, in which no orders for costs were made against the applicant for any of the litigation commencing in the Labour Court, proceeding through the LAC, the SCA, and finally the Constitutional Court, where she ultimately lost her bona fide unfair discrimination claim.

314. As a court of law and equity, the court had no good reason to annihilate the respondent in costs for bringing a carefully considered and prima facie well-supported claim to vindicate his fundamental right to political equality guaranteed by section 9 of the Constitution, after decades of oppressive political prejudice and repression during the apartheid era.

315. Punishing bona fide grievants embarking on such difficult litigation to vindicate their fundamental rights has the negative effect of chilling and deterring others whose rights have been violated and are contemplating approaching the courts for justice. It's established law (the Biowatch case) that such costs orders run contrary to the spirit and intent of our Constitution, and are contrary to public policy.

316. In the situation, the applicant respectfully contends that the LAC is likely to find differently from the trial court and uphold his claim, and that he has accordingly made out a sound, triable case for appeal.

317. On appeal, the applicant will argue that the court massively prejudiced him in the presentation and proof of his claim by wrongly and unfairly holding at the outset that he would not be permitted to cross-examine the respondent's officers whom he'd subpoenaed for trial. And that because he appreciated that they were already hostile when he subpoenaed them, he wouldn't be able to have them declared hostile for this purpose.

318. No good reason in fact or principle existed for the court's substantial hindrance of the applicant in this manner. In the U.S., for instance, Rule 607, 'Who May Impeach a Witness' under Article VI: 'Witnesses' contained in the 'Federal Rules of Evidence' provides: 'Any party, including the party that called the witness, may attack the witness's credibility.' Citing a wide range of supporting state evidence codes and reported decisions, the 'Notes of Advisory Committee on Proposed Rules' explain: 'The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary.'

319. Precisely, and the court ought to have ruled accordingly. If there's been such an old rule in South African law, it's manifestly unfair, stale, and wrong; and as a court of law and equity, this court should not have invoked it against the applicant to his immense disadvantage, hugely limiting the bounds of the enquiry and impacting hard on the fairness of the trial.

320. Well appreciating that the applicant was not calling the respondent's officers to the witness stand as friendly witnesses to support his claim, but rather had subpoenaed them so as to drive them out of their offices and force them into the hard light of a high court to be examined before a judge on oath under penalty of imprisonment for perjury, the court ought to have allowed and not hampered the applicant in his bid to prove his case, by prohibiting him from attacking their credibility, given that their honesty in their several written communications with him was very much in issue, as was clear to this court from the applicant's pleadings and founding affidavits in his interlocutory applications.

321. It was hugely important to the ventilation of the truth and to the just decision of the case – arising from an allegation of illegal camouflaged *prejudice* – that the applicant should have been permitted to cross-examine HRE Clark on the reason for her sharp,

palpable, radical change in animus towards the applicant from cheerfully solicitous in her telephone conversation and first email to the applicant on 14 April 2010 after speaking to KZN Human Resources Manager Baboo Brijlal about the status of the recruitment process five silent months after the interviews, to snarlingly hostile, discouraging, disingenuous, dishonest, opaque, and off-putting in her second email on 30 April, after National Operations Executive Brian Nair had returned to their Johannesburg head office. And why she failed to communicate with him again, as she ought to have done, knowing from Nair that he was the recommended candidate, who – all things being equal – the respondent wouldn't have wanted to lose.

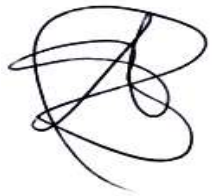
322. It was even more important to the ventilation of the truth and to the just decision of the case that the applicant should have been permitted to cross-examine CEO Vedalankar inter alia on (i) why she unlawfully disregarded and thereby tacitly refused, and then expressly refused the applicant's entire PAIA request for 51 specified records in August probing the circumstances in which his appointment had been aborted, under cover of a fake quotation from a reported judgment claimed to justify her refusal, in which words were attributed to the judge that she never wrote, whereas her actual reported dicta squarely confirmed the applicant's entitlement to the records he'd requested; and persisted in illegally refusing his PAIA requests in her second letter; (ii) her false claims concerning the respondent's budgetary issues, falsely linking them directly to the abortion of the Pietermaritzburg, Durban and Mthatha Senior Litigator appointments, (iii) her concealment from the applicant in October 2010 of her information to the Portfolio Committee a week earlier that the respondent's budgetary uncertainty had passed, but which the full record anyway shows never had any bearing on Senior Litigator recruitment, and her repeated lies to the applicant in her January 2011 letter that the respondent was still under financial pressure and faced a deficit, when, after the December 2010 OSD payment, it wasn't and didn't. Quite the contrary, the respondent reported a huge budgetary surplus in 2010/11, and in 2011/12 too. And (iv) her faking of Mlambo JP's letter on her own computer, pasting in a scanned image of his signature at the end of it (admitted in the pleadings), tersely dismissing the applicant's complaint to the Board about her illegal refusal to comply with his PAIA requests and the indications that the abortion of his recruitment had been illegally motivated.

323. The applicant respectfully craves directives that:

(a) this application not be disposed of in chambers in the ordinary course, but that the applicant be afforded an oral hearing in open court on the record at which to argue it; and,

(b) the respondent be ordered to hand over to the applicant the transcript of the trial record it has printed for him, so to enable him to argue his appeal application on level ground with the respondent, where necessary precisely reciting the evidence with reference to the transcript page and line numbers.

Signed at Eshowe on 3 October 2014.



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