IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 11187/2016

In the matter between:

ANTHONY BRINK APPLICANT

and

INFORMATION OFFICER
LEGAL AID SOUTH AFRICA RESPONDENT

JUDGMENT

Delivered on 6 March 2020

Poyo Dlwati J:

[1] This is an application to review and set aside the respondent's decision refusing the applicant's request for access to Legal Aid South Africa's public records specified in the applicant's requests made under the provisions of the Promotion of Access to Information Act 2 of 2000 (the Act). Other orders ancillary to the granting of this order including personal costs orders against the respondent's officials that dealt with the applicant's requests were also sought by the applicant.

[2] There is a long history of litigation between the applicant and the Legal Aid South Africa (the Legal Aid). The applicant, an advocate of this court by profession, applied for a post as a senior litigator with the Legal Aid during 2009. The applicant was recommended for appointment to this post but due to budgetary constraints the recruitment process was aborted. The applicant was not happy with this decision and launched proceedings in the Labour Court challenging that decision. The applicant was not successful with that challenge both, in the Labour and Labour Appeal Courts as they both found against him.

[3] Against that brief background, on 25 July and on 1 August 2019 the applicant delivered his requests for access to specified records from the Legal Aid. He complied with all the formalities relating to that request. He advised the Legal Aid that he required the records so that he could pass them on to the Minister and Deputy Minister of Justice and Constitutional Development, the Portfolio Committee on Justice, the Auditor General and various transparency and national media organisations. He averred that he required an enquiry to be undertaken on massive irregular, fruitless and wasteful expenditure incurred by the Legal Aid in contravention of s 38(1)*(c)*(ii) of the Public Finance Management Act 1 of 1999 (the PFMA). According to him, this would lead to the unveiling of corruption and other criminal activities undertaken at the Legal Aid's various offices.

[4] Mr Brink further averred in his letter that all this evidence would be handed over to the National Prosecuting Authority (the NPA) for prosecution of the individuals involved. The information requested included, but was not limited to: (a) counsel's invoices reflecting their charges in the applicant's several requests for access to records made in October 2013;

(b) all charges relating to the PAIA litigation between the Legal Aid and the applicant in the Eshowe Magistrates' Court, including costs of WE White Attorneys;
(c) various information relating to the senior litigator post arising, either from correspondence between the applicant and Ms Vedalankar (the Chief Executive Officer of the Legal Aid), or to the Justice Portfolio Committee or communication or record of the decision taken to terminate the recruitment of the senior litigator post;
(d) and internal memos relating to the whole recruitment process from commencement of the senior litigator post to the end when a decision not to appoint was taken. All the information he required was listed in annexures 'A' & 'B' annexed to his founding affidavit.

[5] According to the applicant, his requests were directed to Mr Thembile Mtati (Mr Mtati) who at the time acted as the Deputy Information Officer of the Legal Aid. According to the applicant, Mr Mtati refused to furnish him with the records he requested and relied on s 45 of the Act. Mr Mtati advised him that his requests were manifestly frivolous, and vexatious, and substantially and unreasonably diverted the most needed resources of the Legal Aid. Aggrieved by this decision, the applicant launched this application and relied on the provisions of s 78 of the Act. He averred that Mr Mtati had the onus to establish the basis of why he referred to his requests as frivolous. He further averred that he was entitled to make as many requests as he liked and that it did not matter that he already had some of the information.

[6] The applicant denied that he had improperly bombarded officials of the Legal Aid with various communication and requests relating to the senior litigator post. He further denied that his requests were frivolous and were diverting the resources of the Legal Aid. In his view, the gathering of the information he

requested was not too time consuming. He contended that he did not exhaust all available alternative remedies as such an exercise had proved futile in the past. This was also the case to the South African Human Rights Commission (the SAHRC) and the Office of the Public Protector (the PP). The applicant also sought a costs order against all the Legal Aid officials who were party to the refusal of his requests as he deemed their refusal unconstitutional.

[7] The Legal Aid opposed the application. Mr Mtati, its deputy information officer then, averred that the applicant's application made on 25 July 2016 was his fourteenth PAIA request to the Legal Aid. He further averred that the applicant was impermissibly seeking to re-litigate his non-appointment to the senior litigator post even though that issue had been finally determined by both the Labour and Labour Appeal Courts. His contention was that the applicant's requests were frivolous and vexatious; and the work involved in compiling the information would, substantially and unreasonably, divert the Legal Aid's resources. Relying on the provisions of s 45 of the Act, he believed that his decision ought to be sustained as it was not reviewable.

[8] Mr Mtati further averred that the records, which the applicant requested, were the subject of an ongoing litigation between the parties and therefore the Legal Aid was entitled to refuse the request as prescribed by s 7 of the Act. Furthermore, so went the averment, some of the records required by the applicant related to the private affairs of third parties and the release of that information would prejudice those parties' rights to privacy. In Mr Mtati's view this application ought to be dismissed as the applicant had launched another review application subsequent to the refusal of his fifteenth PAIA request which was launched after this application had been filed. He submitted that the relief sought in this application would be academic and would have no practical effect.

[9] Mr Mtati further averred that during 2015 the applicant launched five applications to compel against the Legal Aid in the Eshowe Magistrates' Court. During February 2016, a decision was reached by the Legal Aid to furnish the applicant with various information in order to bring to an end the litigation between the parties. This resulted in a settlement agreement being concluded between the parties and was made an order of court. This, according to Mr Mtati, was not in any way an admission of wrongdoing by the Legal Aid but was a way of trying to reach finality to the ongoing litigation between the parties.

[10] Subsequent to the conclusion of the settlement agreement, the applicant accused the Legal Aid of being in breach of that settlement agreement. This led to Mr Mtati deposing to an affidavit in terms of s 23 of the Act in which he explained that some of the records required by the applicant in terms of that settlement agreement either did not exist or could not be found. This resulted in the applications in the Eshowe Magistrates' Court being re-enrolled and were still pending as at the time when Mr Mtati filed his answering affidavit. In Mr Mtati's view, based on the history of the matter between the parties, no other decision maker could have reached a different conclusion than the one he had made as his refusal was premised on the provisions of s 36, 37 and 45 of the Act.

[11] Mr Mtati further averred that the disclosure of counsel's fee notes would harm their financial and commercial interests as this would be tantamount to informing other industry participants about their finances. According to Mr Mtati, this would also unjustifiably infringe the counsel's constitutionally protected rights to privacy as their business, trade operations and financials would become public knowledge. In any event, so went the contention, the counsels whose fee notes were subject of the requests had not given permission for the disclosure of their information. For all these reasons, Mr Mtati prayed for the dismissal of the application with costs. He further submitted that the applicant had failed to make

out a case for any personal cost orders as no *mala fides* by him had been shown or by any other Legal Aid official.

[12] In reply, the applicant reiterated that he believed that there was serious corruption at the offices of the Legal Aid. He conceded that he was intent on ensuring that this corruption was revealed hence he was bitterly aggrieved by the Legal Aid's stance of refusing his requests. He contended that Mr Mtati had not initially mentioned the reasons for refusing his PAIA application as reflected in paragraphs 69 to 74 of his answering affidavit. In his view, these reasons were an afterthought, manufactured subsequent to the launch of this application. Furthermore, so went the contention, as the Legal Aid had included the counsel's fee notes in the Labour Court case's bill of costs, which it wanted him to pay, he saw no reason why it was now refusing to furnish him these further bills. In his view, counsel's fee notes were not protected by the attorney client privilege and therefore s 40 of the Act was not applicable.

[13] The applicant further averred that the Legal Aid was contemptuous to his constitutional rights to information and s 195(1)*(g)* of the Constitution which required state organs to foster transparency by providing the public with timely, accessible and accurate information. With regard to the Legal Aid's reason that the information was required for issues that had been fully ventilated in the Labour Court, his response was that this reason for refusal had not been stated initially in the letter from the Legal Aid. Secondly, he intended returning to the Labour Court with an application for rescission of that judgment on the grounds that the judgment was obtained by fraudulent means as the evidence given at the trial was perjured. Furthermore, he contended that some of the information required had nothing to do with the non-appointment in the senior litigator post but more about the funds that the Legal Aid had spent defending his PAIA applications.

[14] The applicant further contended that the Legal Aid had agreed, in terms of the settlement agreement, that he would be entitled to one final request for information relating to the senior litigator post and therefore it was obliged to give him such information. He further averred that he knew that some of the records did not exist but required them as the Legal Aid purported to rely on them during the senior litigator post trial in the Labour court. This, according to him, was a perjury committed by the officials of the Legal Aid and he would use this to lay a complaint with the NPA.

[15] According to the applicant, the main aim of his application was to reveal to the public and various persons and institutions, mentioned in paragraph 3 above, how public bodies such as the Legal Aid used so much money to defend his applications, which amounted to fruitless and wasteful expenditure. Those, in summary, were the versions of the parties. The applicant, prior to the hearing of the matter, applied for an amendment of his notice of motion by substituting the second respondent for the respondent, being the information officer, Legal Aid South Africa. This was so as the applicant became aware that Mr Mtati no longer worked for the Legal Aid. The application was not opposed by the respondent. There was no prejudice to be caused by such an amendment and as the case had been made out for such an amendment, I granted the order.

[16] The issues to be determined in this application are whether the respondent erred in refusing the applicant's requests for information on the basis that:
(a) the information was requested for criminal or civil proceedings after the commencement of those proceedings;
(b) the applicant's requests were manifestly frivolous or vexatious;
(c) the work involved in processing the requests would substantially and unreasonably divert the Legal Aid's resources;

(d) the requests fell within the mandatory exclusionary provisions under the Act that protect third party information, the disclosure of which would affect a person other than the body from which it was requested.

[17] Prior to the hearing of the matter the respondent filed an application to strike out various paragraphs in the applicant's founding affidavit on the basis that they were either: -

(a) inadmissible hearsay and irrelevant to the matter at hand; or

(b) abusive, unwarranted personal attacks and defamatory material against various officials of the Legal Aid and its Chairman, Judge President Mlambo of the Gauteng Division of the High Court;

This application related to paragraphs 29-34, paragraphs 38-42, paragraphs 44-47, paragraphs 55, 64-78 as well as annexure 'F' to the founding affidavit.

[18] Mr Brink opposed this application on the basis that he had already challenged Mlambo JP's integrity in several complaints that he made to the Judicial Services Commission (the JSC). In his view the JSC had not regarded his complaints as frivolous or lacking in substance as Mlambo JP was required to answer to those complaints. Furthermore, the allegations were not irrelevant either as some of the averments were a part of the necessary factual background to expose the Legal Aid's persistence on illegal and unconstitutional refusal of his requests since 2010. He believed that these facts were also relevant for the orders he sought to publish and notify the Minister of Justice and Correctional Service, the Portfolio Committee and the SAHRC. Furthermore, he contended that there was no prejudice arising from the fact that he had attached annexure 'F' as this was to confirm to the court that he had indeed delivered that report to SAHRC.

[19] Rule 6(15) of the Uniform Rules provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted. The courts have held that the:

'test for irrelevance is whether the allegations do not apply to the matter in hand or do not contribute one way or another to a decision of that matter'.[1]

They have also held that inadmissible evidence is by its very nature irrelevant.[2] Furthermore, the

'test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation'.[3]

[20] I agree with the respondent's submissions that paragraphs 29, 30, 32, 33, 34, 38, 40, 41, 42, 45, 47, 55, 65, 66, 75 as well as annexure 'F' are irrelevant to the merits of this application. They do not in any way, contribute to the determination of the issues between the parties in *casu*. Some of the averments are defamatory, have the potential to cause irreparable harm to the integrity and reputation of individuals and institutions who are not parties to this application and they have no opportunity to respond to them. Some of the averments have been stated as though they are proven facts yet no determination had been made about them. As held in *University of the Free State v Afriforum & Another*[4], allegations that are immaterial and irrelevant should be struck out, especially when they advance damaging, vague and unsubstantiated allegations regarding a party's conduct. In my view, the averments complained of in the applicant's

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[1] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 (SCA) para 23.
[2] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) 336F-G.
[3] *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) para 28.
[4] University of the Free State v Afriforum & Another [2017] ZASCA 32 para 40 and footnote 22

affidavit are scandalous, vexatious and irrelevant and ought to be struck out with costs.

[21] I turn now to deal with the issues in this application. Mr Brink, who appeared in person, argued that his requests were not frivolous or vexatious and this could be gauged from the reasons he stated for seeking them. He submitted that this was borne out by the fact that Mr Mtati did not refer to his requests as frivolous and vexatious in his initial response to him prior to the launching of the application. He conceded that all his requests arose from his non-appointment to the senior litigator post by the Legal Aid, even though some pertain to costs incurred during the opposition of his PAIA applications. He submitted that it was untrue that he required the information in order to pursue the litigation against the Legal Aid but later conceded that his ultimate intention was to launch a rescission application in his Labour Court matter as he believed that his claim was fraudulently dismissed due to perjury committed by some Legal Aid officials. In any event, so went the submission, the purpose of why he sought the records was irrelevant if one had regard to s 11(3) of the Act. In his view, according to the Act, mere curiosity entitled him to the records and he was enforcing his constitutional right to information as provided for in s 34 of the Constitution.

[22] Mr Bokaba SC, on the other hand, on behalf of the respondent, submitted that the applicant did not have an absolute right of access to information as various balancing act of interests was required in considering an application for access to information. He submitted that as the applicant required the information in order to continue his litigation against the respondent, same was prohibited in terms of s 7 of the Act. Furthermore, so went the submission, as the applicant's requests for information were putting a strain on the Legal Aid's limited resources, the refusal under such circumstances was permissible in terms of s 45

of the Act. Furthermore, Mr Bokaba accused the applicant of acting frivolously and vexatiously as he copied all and sundry in all his dealings with the respondent.

[23] Mr Bokaba further submitted that the refusal to hand over counsel's invoices submitted to the Legal Aid was protected by the provisions of s 34, 36 and 37 of the Act and was therefore not reviewable. He submitted that the applicant would in any event see those invoices when the bills of costs have been set down for taxation at the end of the litigation. In his submission, the applicant was abusing the Act and had failed to make out a case for the relief sought. With regards to costs *de bonis propris,* he submitted that the applicant failed to show that Mr Mtati or any other official of the Legal Aid had acted *mala fides* and not in accordance with the law.

[24] The starting point perhaps is the Act. The preamble to the Act provides that the Act is to

'give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith'.

The first reason furnished by the respondent for refusing the applicant's requests was that the applicant sought to use the information to re-litigate his non-appointment in the senior litigator post whilst some of the information related to the litigation that was pending in the Eshowe Magistrates' Court.

[25] In this regard, section 7 of the Act provides that the Act does not apply to records requested for criminal or civil proceedings after commencement of those proceedings. The applicant made it clear in his affidavits that he required the information in order to launch an application for rescission of judgment in the Labour Court as he believed that that court was defrauded hence it came to the conclusion that it did. In this regard, the applicant submitted that he was protected

by s 11(3) in this regard which provides that a requester's right of access to information is not affected by any reasons the requester gives for requesting access or the information officer's belief as to what the requester's reasons are for requesting access.

[26] I do not agree with the applicant. Section 7 is clear on when the Act does not apply. It therefore becomes important to disclose why the record is sought and this is line with the preamble to the Act, which specifies the purposes for which the information might be required; namely, for exercise of protection of any rights and to provide for matters connected therewith. In light of s 7 of the Act, I am of the view that it is important to have regard to the purposes for which the information is sought for. Furthermore, it is clear from the applicant's version that he seeks to launch a rescission application in the Labour Court. Those proceedings had commenced and a decision reached hence a rescission application. The proceedings in Eshowe Magistrates' Court have commenced and have not concluded.

[27] As held in *PFE International Inc (BVI) & Others v Industrial Development Corporation of South Africa Ltd*[5] there are three conditions which must be met if the application for PAIA is to be denied. First, access to information must be sought for the purpose of civil or criminal proceedings. Second, the request must be made after the commencement of the proceedings. And third, access to the record or information must be provided for in another law. All three conditions have been met in my view. *In casu*, the discovery procedures and taxation constitute the laws contemplated in s 7 (1) (c) of the Act. I, therefore, agree that the Legal Aid is protected by s 7(1) *(c)* in refusing the records.

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[5] *PFE International Inc (BVI) & Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 CC at para 20

[28] That, however, is not the end of the matter. The second reason for the refusal was that the Legal Aid was protected by s 45 of the Act. Section 45 provides that the information officer of a public body may refuse a request for access to a record of the body if: -

(a) the request is manifestly frivolous or vexatious; or

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

In light of the finding that the Legal Aid was protected by the provisions of s 7 (1) (c) of the Act in refusing the request, the requests therefore become frivolous and vexatious in the circumstances.

[29] Furthermore, Mr Mtati explained in great detail how the work involved in processing the applicant's requests would substantially and unreasonably divert the resources of the Legal Aid due to its volumes. He gave detailed account of the staff component in his department and how its capacity was limited to the service delivery mandate of providing legal services to the Legal Aid. In the absence of any explanation to the contrary I must accept Mr Mtati's version that the processing of the information would substantially and unreasonably divert the Legal Aid's resources.

[30] The third reason furnished by the Legal Aid for refusing the applicant's requests was that the disclosure of information would involve the unreasonable disclosure of personal information about third parties. In this regard, it relied on the provisions of s 36 and 37 of the Act. The applicant on the other hand submitted that those invoices now belong to the Legal Aid as they had been presented to it for payment. He further submitted that in any event, some of the invoices had been made available to him during the taxation in the Labour Court and saw no reason why they should not be handed to him. In my view, there is no evidence that the requested invoices have now been settled by the Legal Aid and thus

making them its property. In any event, this information is also protected by s 7 of the Act as it relates to information pertaining to the litigation in the Eshowe Magistrates' Court.

[31] Furthermore, in my view the information is protected by s 36 and 37 of the Act. Section 36(1) provides that

'[subject] to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains —

(*a*) trade secrets of a third party;

(*b*) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(*c*) information supplied in confidence by a third party the disclosure of which could reasonably be expected—

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition.'

[32] Furthermore, Mr Bokaba submitted that all of the counsels who had submitted their invoices to the Legal Aid had not consented to their invoices being disclosed in terms of the Act. This is also catered for in s 37 of the Act, which provides that a request for information may be refused if the record consists of information that was supplied in confidence by a third party the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source. This refusal is justified especially in light of the fact that the applicant made it plain in his affidavits that the information sought would be widely circulated to various persons and institutions mentioned in paragraph 3 above which in my view would prejudice the third parties.

[33] As held in *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd*[6] a third party, in respect to a public body, means 'any person other than the requester and the public body'. It is therefore clear why the third party's consent is required for the disclosure of his/her information as they are not ordinarily either of the parties, namely applicant or respondent. In any event, no case has been made that this information on third parties would reveal evidence of a substantial contravention of law or an imminent and serious public safety as required by the Act.[7] It has also not been shown that there is a compelling public interest to be served by the disclosure of such information.

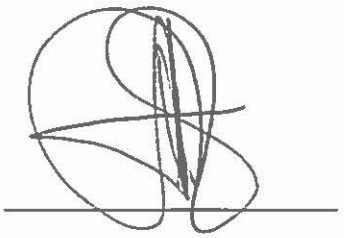
[34] It seems to me that even though the applicant has already received tons of information from the Legal Aid, he is still hopeful that he might find some wrong doing by or on behalf of the Legal Aid. That, to me, seems to be a fishing expedition which cannot be said to be in the public interest. I am therefore unable to find that the Legal Aid or Mr Mtati erred in any way in refusing the applicant's requests for records.

Order

[35] Accordingly, I grant the following order:

(a) the application to ~~struck~~ strike out is granted with costs.

(b) the main application is to review and set aside the respondent's decision is dismissed with costs.



POYO DLWATI J

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[6] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 All SA 352 (SCA) para 17.

[7] Section 46*(a)* of the Act.

APPEARANCES

Date of Hearing	: 30 August 2020
Date of Judgment	: 6 March 2020
Counsel for Applicant	: Mr Brink in person
Instructed by	:
Respondent	: Mr Bokaba SC with Mr Scott
Instructed by	: The Legal Aid, South Africa