

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

CASE NO: 1118/2016P

In the matter between:

ANTHONY BRINK

Applicant

and

THEMBILE MTATI N.O.
DEPUTY INFORMATION OFFICER
LEGAL AID SOUTH AFRICA

Respondent

RESPONDENT ANSWERING AFFIDAVIT

I, the undersigned,


THEMBILE VUYO MTATI

do hereby state under oath that:

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- 1.1 I am a major male and the Legal Executive of Legal Aid South Africa, a national public entity established in terms of section 2 of the Legal Aid South Africa Act, 39 of 2014 ("**Legal Aid Act**") with its national head office

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located at Legal Aid House, 29 De Beer Street, Braamfontein, Johannesburg ("**Legal Aid SA**").

- 1.2 I am appointed as the Deputy Information Officer of Legal Aid SA in terms of section 17 of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**").
 - 1.3 The contents of this affidavit fall within my personal knowledge except where otherwise indicated by the context, and are to the best of my knowledge and belief both true and correct.
 - 1.4 Where I make averments not directly within my knowledge, I do so on the basis of information made available to me or which has been ascertained from the persons whose names I disclose. I verily believe such information to be true and correct. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I believe to be true and correct.
- 2 Where I make use of headings in this affidavit, I do so for the purposes of convenience only and do not thereby intend to limit any facts stated under a particular heading but only to the topic covered by such heading.

INTRODUCTION

- 3 On 25 July 2016, the applicant applied in terms of PAIA to Legal Aid SA to access confidential, private and proprietary information relating to third parties and Legal

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Aid SA officials (“the PAIA request”). The PAIA request is the fourteenth that the applicant has made to Legal Aid SA in recent years.

- 4 On 1 August 2016, the applicant submitted a further request in which he sought 30 records. For the purpose of avoiding burdening this Court, I refer to **annexure B** to the applicant’s founding affidavit.
- 5 On 31 August 2016, Legal Aid SA dispatched a letter to the applicant notifying him of the extension in terms of section 26(2) by a further 30 days ending 30 September 2016. The reasons for the extension are ventilated in the letter which is attached as **annexure C** to the applicant’s founding affidavit.
- 6 On 16 September 2016, the applicant wrote a letter to the Chief Executive Officer of Legal Aid SA in which he sought to reduce and amend his two requests of 25 July 2016 and 1 August 2016. He further sought to amend the date in paragraph 4 of the PAIA request to read 8 September 2016 instead of 28 July 2016. I refer this Court to **annexure D** attached to the applicant’s founding affidavit.
- 7 In his letter, the applicant further retracted item 20 and 21 to **annexure B** to his founding affidavit, and further sought two documents, namely:

5. *Senior Counsel’s fee note for his opinion that Legal Aid SA should thwart Brink’s currently pending application in Eshowe Magistrate’s Court to compel compliance with Legal Aid SA’s undertaking at court on 11 February 2016 to comply with his PAIA requests made in 2013-15 by applying to the High Court to interdict him as a vexatious litigant.*
6. *Any and all email communications between Board chairperson Mlambo JP and CEO Vedalankar and/or CSE Mtati and/or any*

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other national office employee(s) in regard to Brink's PAIA applications in the Eshowe Magistrate's Court, and Brink's further application to compel full and proper compliance with the settlement agreement on 11 February 2016 to finally comply with Brink's said PAIA requests."

- 8 On 26 September 2016, in my capacity as the Deputy Information Officer, I took the decision. I responded to the two requests together with the amendment refusing to grant the records requested based on the provisions of section 45 of the PAIA. The said reply is attached as **annexure E** to the applicant's founding affidavit.
- 9 I informed the applicant that his requests relate to the matters and issues that have been fully ventilated in the Labour Court and Labour Appeal Court in his action that his non-appointment as a Senior Litigator was impermissible.
- 10 I pause to mention that the abortion of the recruitment process was as a result of the budget constraints and the applicant was fully advised of this reason.
- 11 The applicant's PAIA requests forms part of a larger, systematic pattern of substantially similar requests that impermissibly sought to re-litigate the applicant's non-appointment to a Senior Litigator position, which had been finally determined by the Labour Court and Labour Appeal Court. It follows therefore that the PAIA requests which are the subject of this application are manifestly frivolous and vexatious and the work involved would substantially and unreasonably divert Legal Aid SA's resources. Section 45 of PAIA accordingly proscribes access to these records and accordingly my decision to refuse access to the records is not reviewable and should be sustained.

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12 I oppose application in my official capacity and I have been duly authorised by Legal Aid SA on the basis that:


12.1 First, the relief sought by the applicant is moot. Subsequent to the PAIA request and the decision, on 30 October 2017, the applicant made a fifteenth PAIA request (**"the fifteenth PAIA request"**) that, short of verbiage, sought the same information in the PAIA request. On 28 November 2017, I refused this PAIA request (**"the second decision"**). On 14 December 2017, the applicant launched an application to review and set aside this decision in this Court under case number 14224/17. These events have accordingly overtaken the present application such that any review relief sought by the applicant would be abstract, academic and have no practical effect.

12.2 Second, Legal Aid SA is entitled to refuse the PAIA request in terms of sections 7, 34, 36, 37 and 45 of PAIA. This is because:

12.2.1. The records the applicant seeks to access are the subject of ongoing litigation between the parties and access to them is accordingly proscribed in terms of section 7 of PAIA.

12.2.2. The records the applicant seeks to access relates to the private affairs of third parties and releasing that information would cause prejudice to the third parties' rights – particularly the constitutionally enshrined right to privacy.

12.2.3. The records the applicant seeks to access would involve the unreasonable disclosure of personal information about a third

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party. Particularly, the information contains financial and commercial information, the disclosure of which would be likely to cause harm to the commercial or financial interest of that party.

12.2.4. The PAIA request is the fourteenth that the applicant has delivered, and is manifestly frivolous and/or vexatious.

12.2.5. Processing the PAIA request would substantially unreasonably divert Legal Aid SA's resources.

13. In my submission, the applicant's PAIA request has been processed in accordance with the provisions of PAIA. The PAIA request was manifestly impermissible. The decision to refuse access to the records sought was eminently sensible and accords with the legal principles applicable to PAIA. In the premises, the application must be dismissed with costs.

14. The structure of this affidavit is as follows:

14.1. First, I address the point *in limine*; namely, that the present application is moot in view of the applicant's fifteenth PAIA request, Legal Aid SA's subsequent refusal and the applicant's review thereof.

14.2. Second, I set out the facts relevant to the present application.

14.3. Third, I describe why the PAIA request was correctly refused.

14.4. Finally, I respond to the founding affidavit *ad seriatim*.

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POINT IN LIMINE

15. On 25 July 2016, the applicant made the fourteenth PAIA request. These records requested are set out in **annexure A** to the founding affidavit as:

- “1. All Counsels’ invoices reflecting their charges for professional services rendered to Legal Aid SA in the matter of Adv Anthony Brink’s several requests to specified records made since October 2013 under the Promotion of Access to Information Act 2 of 2000 (PAIA) and his several applications to the Eshowe Magistrate’s Court for order compelling [Legal Aid SA’s] compliance with his requests.*
- 2. All records reflecting Legal Aid SA’s Corporate Services attorneys’ charges for time spent on the said PAIA matters.*
- 3. All records reflecting travel, accommodation and meal costs to Legal Aid SA, both for Counsel and Corporate Services Executive, Thembile Mtati [me], incurred for their several court appearances in Brink’s said applications.*
- 4. All invoices by WE White Attorneys in Eshowe, reflecting their charges for representing Legal Aid SA as local correspondent in Brink’s said applications.*


The invoices and disbursement vouchers, and Legal Aid SA Corporate Services attorneys’ charges, must include and reflect all costs to Legal Aid SA of the further court appearance on 28 July 2016.”

16. On 26 September 2016, I took the decision. On 10 October 2016, the applicant instituted the present review application.

17. Then, on 30 October 2017, the applicant made a further, fifteenth PAIA request.

The records requested were described as:

- “1. All fee-notes by LASA’s senior counsel Bokaba SC and junior counsel Carelse reflecting their charges for their professional services, including for their appearance to argue the meritless application on the said date. If any other counsel were briefed in the matter before them, their fee-notes are also required.*
- 2. The time-sheets kept by LASA’s:*
 - (a) lead in-house attorneys, Hundermark and Mtati;*

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- (b) *Corporate Services attorneys; and,*
- (c) *Pietermaritzburg Justice Centre correspondents,*
reflecting the professional time they spent on the application and the legal work they performed on it.
3. *LASA's attorneys' hourly charge rate(s) for professional services, applicable at the material time, which would have been applied to compute LASA's fees in a bill of costs drawn and presented to Brink to pay, had the application been granted against him with costs as between attorney and client, as prayed.*
4. *All vouchers reflecting LASA's disbursements on travel, accommodation and meals for Hundermark and Mtati, who attended the hearing, and for their two counsel Bokaba SC and Carelse, or disbursed by the said two counsel themselves and thereafter charged to LASA.*
5. *The Pietermaritzburg sheriff's invoice for serving the application on Brink."*
18. On 28 November 2017, I took the second decision. On 14 December 2017, the applicant instituted an application to review and set aside the second decision in this Court under case number 14224/17.
19. It is clear that the two PAIA requests concern the same subject matter. Accordingly, the effect of the fifteenth PAIA request including the same subject matter as the PAIA request was that the applicant called on Legal Aid SA to take a fresh administrative decision in respect of that subject matter in the form of the second decision. The applicant has since sought to review and set aside the second decision in this Court in a separate review application.
20. I am advised and submit that this Court will not grant relief in instances where doing so would be abstract, academic and have no practical effect. Any decision taken by this Court to review and set aside the decision will have no practical effect in that access to the records that form the target of the present application


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will still be proscribed by the second decision, which the applicant has challenged in a separate review application.

21. When the applicant elected to bring the fifteenth PAIA request, which prompted the second decision, he rendered the decision and the present review application moot. The proper course is for this Court adjudicate the application to review the second decision.
22. To the extent that there is any variation between the subject matter of the two PAIA requests, then section 28(1) of PAIA caters for severability and it is submitted that only those portions of the PAIA application that fall outside of the scope of the fifteenth PAIA application should be adjudicated in the present application.


FACTUAL BACKGROUND

23. On 12 November 2009, the applicant was interviewed and shortlisted as a candidate for the Senior Litigator post at the Durban and Pietermaritzburg offices of Legal Aid SA. But, Legal Aid SA subsequently abandoned the filling of remaining vacant senior litigator posts due to budgetary constraints.
24. Dissatisfied, the applicant challenged Legal Aid SA's decision not to fill the post in the Labour Court, Durban. His application to the Labour Court was dismissed. The decision is reported as *Brink v Legal Aid South Africa* (2015) 36 ILJ 1020 (LC).

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25. The applicant filed an appeal application to that Court. That application, too, failed. The applicant petitioned the Labour Appeal Court for leave to appeal. That application, too, failed.
26. This is how it began. On 26 August 2010, the applicant filed his first PAIA request with Legal Aid SA seeking 51 records relating to the recruitment process for the Senior Litigator Post ("**First Request**"). On 18 October 2010, the First Request was refused. The Chief Executive Officer of Legal Aid SA addressed a letter to the applicant explaining why the recruitment process was discontinued.
27. Thereafter, the applicant addressed a letter dated 30 November 2010 to the chairperson of the Legal Aid SA Board of Directors, Judge President Dunstan Mlambo, and the South African Human Rights Commission challenging the refusal of his First Request. The applicant's letter was responded to on 9 December 2010, incorrectly dated 9 November 2010.
28. The applicant then filed a PAIA request for 18 records relating to the decision of Legal Aid SA to discontinue the recruitment process for the Senior Litigator position ("**Second Request**").
29. On 24 January 2011, the applicant addressed the letter to the Judge President Mlambo and all members of the Board accusing the Chief Executive Officer of illegally and unlawfully refusing his first request and asking the Board to intervene in ensuring that the Chief Executive Officer provides records in respect of his second request. Judge President Mlambo responded to the letter on 24 January 2011.

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30. Then on 28 January 2011, the Chief Executive Officer of Legal Aid SA partially complied with the applicant's Second Request. She provided 12 of the 18 requested records.
31. Additionally, the Chief Executive Officer gave a detailed explanation and reasons once again for the abandonment of the recruitment process and decision not to fill the post he applied for. In all instances where records were refused the reasons thereof were provided by the Chief Executive Officer.
32. On 9 March 2011, the applicant filed a PAIA request for 15 records relating to once again the decision of Legal Aid SA to abort the recruitment process for the Senior Litigator position ("**Third Request**"). Mr Brian Nair, on behalf of Legal Aid SA, responded to the applicant's Third Request. By then, between August 2010 and March 2011, the applicant had requested some 69 records under PAIA relating to the Senior Litigator position from Legal Aid SA.
33. On 1 October 2013, the applicant sent a PAIA request to Legal Aid SA's Eastern Cape Regional Operations Executive (now referred to as Provincial Executive) for 7 records ("**Fourth Request**"). This was refused on 6 November 2013. Legal Aid SA refused the applicant's Fourth Request on the grounds covered by PAIA and on the ground that the requested documents were already provided to the applicant at discovery stage of the matter before the Labour Court.
34. On 1 October 2013, the applicant sent a PAIA request to Legal Aid SA's Chief Executive Officer for 41 records relating to either the filling of the Senior Litigator position or were requested to refute the evidence already led during the Labour

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Court trial, which matter was dismissed as already outlined above (“**Fifth Request**”). On 6 November 2013, Legal Aid SA partially complied with the applicant’s Fifth Request and refused some records or request on the grounds covered by PAIA.

35. On the very same day of 1 October 2013, the applicant sent a further PAIA request to Legal Aid SA’s Free State North West Provincial Executive for 4 records relating to either the filling of the Senior Litigator position or were requested to refute the evidence already led during the Labour Court trial (“**Sixth Request**”). On 18 November 2013, Legal Aid SA refused the Sixth Request.
36. On 17 October 2013, the applicant sent a PAIA request to Legal Aid SA’s Chief Executive Officer for one additional record relating to either the filling of the Senior Litigator position or were requested to refute the evidence already led during the Labour Court trial (“**Seventh Request**”).
37. I pause to point out that in October 2013 alone, the applicant requested 53 records under PAIA from three different Deputy Information Officers of Legal Aid SA to test the veracity of the evidence adduced during legal proceedings before the Labour Court.
38. In April 2014, the applicant launched three applications in the Eshowe Magistrate Court to compel Legal Aid SA to provide records he requested from the Fourth Request, Fifth Request and the Sixth Request. These proceedings are currently pending.

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39. On 10 November 2014, the applicant sent a PAIA request to Mr Patrick Hundermark who was then Legal Aid SA's Legal Development Executive (and now appointed as Chief Legal Executive) and one of its Deputy Information Officers, for 23 records relating to appointment of Mzochithwayo Ngcamu as Children's Court Practitioner and once again to the applicant's unsuccessful application for appointment to the Senior Litigator Position ("**Eighth Request**").
40. On 17 November 2014, the applicant sent another PAIA request to Patrick Hundermark for 4 records aimed at testing the veracity of the NOE's testimony during the Labour Court trial relating to the Senior Litigator Post ("**Ninth Request**").
41. On the same day, the applicant filed a further PAIA request to Brian Nair (NOE) for 14 records which relate directly or indirectly to the Senior Litigator Position or evidence which he led in the Labour Court ("**Tenth Request**"). On 13 February 2015, the request was refused.
42. On 25 November 2014, the applicant sent a PAIA request to the Chief Executive Officer. The applicant wanted records mostly relating to the Senior Litigator Position ("**Eleventh Request**").
43. I pause to point out that in November 2014 alone, the applicant requested 97 further records relating to the Senior Litigator position to test the veracity of the evidence adduced during legal proceedings before the Labour Court. At this stage the determination of the applicant's application for leave to appeal to the Labour Appeal Court was still pending.

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44. On 15 December 2014, the applicant sent an amended PAIA request to the Chief Operating Officer of Legal Aid SA for records mostly relating to the Senior Litigator Position ("**Twelfth Request**").
45. On 20 March 2015, the applicant sent a PAIA request to Patrick Hundermark for records in relation to Carmague and records vouching for the time he and the Chief Operating Officer spent in relation to their section 22 demands for search fees ("**Thirteenth Request**").
46. On 16 August 2015, the applicant launched an application to compel compliance with his PAIA request against NOE at Eshowe Magistrate Court under case number 1005/15. Later, on 18 November 2015, the applicant launched a further application at Eshowe Magistrate Court under case number 1432/15 to compel compliance with his PAIA request. The Chief Executive Officer was cited as the respondent. By this stage Legal Aid SA and its officials were facing five separate applications to compel compliance that had been brought by the applicant.
47. On 11 February 2016, all PAIA applications at Eshowe Magistrate Court were settled during a pre-trial conference and a settlement agreement was made an order of court ("**Settlement Agreement**"). The applicant provided Legal Aid SA with a consolidated list of all requested documents as envisaged on clause 2 of Settlement Agreement. On 15 April 2016, Legal Aid SA provided the applicant with all the available records and provided a section 23 records in respect of all records that he could not find or did not exist. Presently, there are five applications to compel brought by the applicant against Legal Aid SA or its officials pending before the Eshowe Magistrate Court.

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48. I pause to mention that settlement agreement was made without admitting any wrong doing and without admitting that all previous refusals were illegal as alleged by the applicant. The settlement agreement was reached on advice of Counsel suggesting that I look at all requested information and provide same where it is available to close the matter once and for all only to find that it was never to be. The Honourable Court is referred to paragraph 6 of the agreement.
49. On 29 April 2016, the applicant wrote a letter to Legal Aid SA complaining that it has failed to comply with the terms of the Settlement Agreement. Legal Aid SA responded to applicant by email on 9 May 2016. It advised the applicant that it did not agree that it was in breach of the Settlement Agreement. Legal Aid SA provided the applicant with a supplementary section 23 affidavit deposed to by me to deal with records I could not find or which did not exist and which I did not cover on my earlier section 23 affidavit.
50. On 6 June 2016, the applicant addressed a letter to Legal Aid SA and dealt with the supplementary section 23 affidavit and advised further that he was re-enrolling the PAIA applications at Eshowe Magistrate Court and was allocated 28 July 2016 for that purpose. These proceedings are still pending.
51. On 28 July 2016, despite settling the PAIA applications in the Eshowe Magistrates' Court with Legal Aid SA, the applicant set down the applications in that Court claiming that Legal Aid SA did not perform in terms of the settlement and seeking to subpoena various senior Legal Aid SA officials. That application is also currently pending.

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52. On 4 November 2016, Legal Aid SA brought an application against the applicant seeking to:

52.1. declare the applicant's conduct towards Legal Aid SA as vexatious and frivolous;

52.2. stay the various applications instituted by the applicant pending payment of all previous cost orders granted against him in favour of Legal Aid SA; alternatively, requiring the applicant to provide security for costs;

52.3. interdict the applicant from instituting further proceedings against Legal Aid SA relating to his non-appointment to a Senior Litigator post without first obtaining leave from the relevant High Court or lower court; alternatively, upon providing security for costs;

52.4. interdict the applicant from requesting any further records from Legal Aid SA in terms of PAIA, which relate to his non-appointment to the Senior Litigator post;

52.5. declare that the applicant's non-appointment as a Senior Litigator with Legal Aid SA was fully and finally determined by the Labour Court and Labour Appeal Court under cases number D529/11 and DA21/14, respectively;

52.6. excuse Legal Aid SA from responding to any pending PAIA requests that the applicant may have directed;

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- 52.7. interdict and restrain the applicant from in any way harassing and interfering with the duties and functions of Legal Aid SA, its officials and Board members by making frivolous requests for information or threats;
- 52.8. interdict and restrain the applicant from publishing false and derogatory remarks and allegations against Legal Aid SA, its officials or Board members and any judicial officer; and
- 52.9. costs of suit.
53. On 27 October 2017, the application was argued in this Court before Vahed J. The application was dismissed without providing reasons. On 10 November 2017, Legal Aid SA indicated that it wished to appeal the dismissal of the application, and, accordingly, requested that the learned judge provide reasons for his decision to dismiss the application.
54. On 30 October 2017, the applicant applied to Legal Aid SA to access confidential, private and proprietary information relating to third parties and Legal Aid SA officials, as well as correspondence relating to an ongoing investigation into the complaints of the applicant's misconduct ("**the Fifteenth PAIA request**").
55. On 26 June 2018, Legal Aid SA received the reasons and have since decided not to pursue the appeal.

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THE PAIA REQUESTS WERE CORRECTLY REFUSED***Summary of Legal Aid SA's Case***

56. Having read the applicant's founding affidavit, the applicant makes it clear that:
- 56.1. At the gist of the PAIA request, is his denial of the outcome of the legal action that he brought at the Labour Court regarding his non-appointment to the Pietermaritzburg Senior Litigator position. This action was dismissed at the Labour Court and his petition to appeal further dismissed by the Labour Appeal Court.
 - 56.2. His request for the records are substantially sought to re-litigate the applicant's non-appointment to a Senior Litigator position. The applicant will be applying for an order that the dismissal of his Labour Court action matter be alerted to absolution from the instance.
 - 56.3. The applicant intends to use the records requested to lay criminal charges against all of the officials that he alleges were involved in illegally refusing him access to records or otherwise colluded in suppressing records or connived in the unlawful decision to abort his appointment as a Senior Litigator.
 - 56.4. The applicant further contends that section 45 of the PAIA, which I have cited as the reason for refusing access to the records, is not applicable.
57. In a review application, the legal principle developed in our law is whether a decision maker had materially misdirected himself when he came to the decision

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and that no other reasonable decision maker could have made such as a decision. In other words, based on the facts and the law, another decision maker could have come to a different conclusion. If the answer is in the affirmative, then such decision will have to be reviewed and set aside.

58. The test this Court will apply to determine whether my decision is subject to review and setting aside is therefore whether another reasonable decision maker could have reach a different decision based on the facts, the history outlined above and the law. I submit that the factual background read with the reasons set out in the letter of 26 September 2016 and section 45 of PAIA demonstrates that the decision was correctly taken and the present application must be dismissed with costs.

PAIA

59. PAIA is quite properly premised on the importance of ensuring that people have an effective means of accessing information and records to which they are entitled. But at the same time, PAIA clearly recognises that the right of access to information is never untrammelled, and is not an inflexible imperative.
60. PAIA thus strikes a balance by creating general principles which apply to all records, ensuring that in all cases the adjudication of a request for information weighs (at least) the rights and interests of the requester, the body to whom the request is made, any third parties whose details may be divulged, and the larger society. This is evident from the objects of PAIA, as stated in section 9.

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61. To achieve its objects the PAIA contains limitations on right of access to information; namely, grounds upon which access to records of public bodies must or may be refused. In my submission, these grounds permit Legal Aid SA to refuse the applicant's PAIA request.


Section 45 of PAIA

62. In refusing the applicant's request, I relied on the provisions of section 45 of PAIA.

63. I have set out the history of the PAIA requests levied against Legal Aid SA by the applicant. The present request is the fourteenth of its kind.

64. I, and various officials of Legal Aid SA had spent valuable time (in excess of 180 hours) attending to the various requests from the applicant. As indicated above Legal Aid SA agreed to settle with the applicant in order to avoid any further requests from the applicant. This was done without an admission that the previous refusals were wrong as the applicant would like to suggest to this Honourable Court.

65. Legal Aid SA has a Corporate Legal Division consisting of four legal practitioners and two candidate attorneys. Its main function includes prosecuting litigation by and against Legal Aid SA, and to provide legal support to all business units of Legal Aid SA, including six provincial offices, sixty-four Local Offices and sixty-four Satellite Offices. In 2015/16 the division handled eighty-six litigation matters, reviewed 13 policies, provided 60 legal opinions and drafted 113 contracts.

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66. It is accordingly clear that the division has limited capacity, yet the applicant's conduct forces Legal Aid SA to unnecessarily divert its already constrained resources to attend to vexatious requests, compromising the delivery of legal services as mandated to Legal Aid SA. The applicant's unending requests which are manifestly frivolous and vexatious, are substantially and unreasonably diverting Legal Aid SA's limited resources.
67. Given the history of the requests as outlined above, all these requests relates to the applicant's non appointment for the position of Senior Litigator position. Further argument will be presented at the hearing of the application.
68. This a matter of legal argument, and will be addressed in detail in Legal Aid SA's written and oral submissions.

Sections 36 and 37 of PAIA

69. In terms of section 34 of PAIA, an information officer of a public body must refuse a request for access to a record of that public body, if the disclosure would involve the unreasonable disclosure of personal information about a third party.
70. In the present case, the PAIA request seeks personal and proprietary information relating to third-party advocates, including counsel's earnings, rate, fee narratives, VAT numbers, bank account details, and business operations if they give discounts by writing time off. Counsel are not employees or members of Legal Aid SA, but independent contractors that assist on a once-off, as needed

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basis. In the premises, I am advised and submit that this information clearly amounts to "*personal information*".

71. Additionally, sections 36 and 37 of PAIA specifically provide for the mandatory protection of commercial information of a third party. Where these provisions are applicable, the DIO does not have a discretion to refuse the applicant's request – it must refuse the applicant's request.

72. In terms of section 36(1) the information officer of a public body is obliged to refuse a request for access to a record of the body (here, information relating to the counsel's fees) if the record contains "*(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 interest of that party*"; or "*(c) information supplied in confidence by a third party the disclosure of which would be reasonably expected*" – "*(c)(i) to place that party at a commercial disadvantage in contractual or other negotiations*"; or "*(c)(ii) to prejudice that party in commercial competition*".

73. In section 37(1)(a), a public body is obliged to refuse a request for access to a record of the body if such disclosure would constitute an action for breach of a duty of confidence owed to a third party. Disclosure of counsel's earnings, rate, fee narratives, VAT numbers, bank account details, and business operations will self-evidently harm their commercial and financial interests. It will reduce their ability to compete, affect their rate going forward, and potentially their reputation in the broader market. In this particular case, counsel have to ensure that they price competitively to receive work from state entities.

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74. In my submission, it is reasonably probable that the disclosure of the counsel's fees will harm their financial and commercial interests by informing other industry participants. Disclosure of the counsel's individual invoices would also unjustifiably infringe their constitutionally protected right to privacy. Knowledge of their business and trade operations and financials. Presumably, it is for these very reasons that counsel have not consented to the disclosure of the information sought.
75. Moreover, based on the applicant's heavy-handed and brusque manner of litigating against Legal Aid SA, I submit that if this private and proprietary information is provided to the applicant it is easy to foresee that the possibility of it falling into wrong hands. In the premises, I correctly refused to provide the applicant with this information.
76. This a matter of legal argument, and will be addressed in detail in Legal Aid SA's written and oral submissions.

Section 7 of PAIA

77. Section 7(1) of PAIA provides that:

"7 Act not applying to records requested for criminal or civil proceedings after commencement of proceedings:

(1) This Act does not apply to a record of a public body or a private body if—

(a) that record is requested for the purpose of criminal or civil proceedings;

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

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(c) *the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."*

78. Our courts have held that the purpose of section 7 is to prevent PAIA from having any impact on the law relating to discovery or compulsion of evidence in legal proceedings. After litigation has commenced requests for access to records should be regulated by the Rules of Court. That an applicant may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the Legislature's intention to protect the processes of the court. *"Once proceedings are instituted then the parties should be governed by the applicable rules of court."*

79. In his founding affidavit and PAIA request, the applicant makes clear that the purpose for requesting the records is to re-litigate his non-appointment to the Pietermaritzburg senior litigator post.

80. Legal Aid SA will submit that this is impermissible. Once the applicant commenced proceedings against Legal Aid SA relating to the applicant's non-appointment to the Pietermaritzburg senior litigator post, he was no longer entitled to request records related thereto in terms of section 7 of PAIA.

81. Accordingly, it is no longer open to the applicant to rely on PAIA for the purpose of requesting records related to the Pietermaritzburg senior litigator post. This a matter of legal argument, and will be addressed in detail in Legal Aid SA's written and oral submissions.

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AD SERIATIM

82. I set out below the answer to the individual averments made by the applicant. I do not intend to deal with each and every allegation as doing so will be unjust to both myself and this Court to burden it with unnecessary and irrelevant information. Accordingly, in order to avoid undue repetition, everything which I have already said above should be understood as forming an answer to the contentions advanced and my failure to deal with any of the allegations *ad seriatim* should not be construed as an admission but as a denial.
83. However, I first note the trend that the applicant has devoted a substantial portion of his application to levelling all sorts of scurrilous and unsubstantiated and scandalous accusations against senior personnel at the Legal Aid SA and the chairperson of its Board. Yet, no relief is sought against these individuals, except myself, and this Court is not enjoined to decide the merits of such accusations. The inclusion of these accusations is entirely irrelevant to the relief sought by the applicant in his notice of motion and result in a factual-disputes not capable of resolution on the papers in this application.
84. The accusations are manifestly scurrilous and scandalous and their introduction in PAIA proceedings, where the applicant claims the law is trite, is therefore impermissible. I also note the concerning trend of the overwhelming number of the allegations in the applicant's founding affidavit being wholly unsubstantiated. The applicant bears the onus of proving what he asserts. This Court will not grant relief based on a factual foundation of baseless speculation.

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85. Ad paragraphs 1 to 5

Except to state the correct abbreviation of Legal Aid South Africa is "**Legal Aid SA**" and that my correct position description is Legal Executive, the remainder of the contents of these paragraphs are admitted.

86. Ad paragraph 6

I note the contents of this paragraph but deny same in so far as they are in contrast with my affidavit.

87. Ad paragraph 7


I admit the contents of this paragraph.

88. Ad paragraphs 8 to 10

Except to deny that the applicant is entitled to access of the records as submitted, the remainder of the contents of these paragraphs are admitted.

89. Ad paragraphs 11 to 12

I deny the contents of these paragraphs and aver that the applicant is misdirecting himself on the interpretation of section 11(3) of PAIA. This section must be interpreted in the context of aim and object of the PAIA and not in

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isolation with other provisions of PAIA. Further submissions will be made at the hearing of the application.

90. Ad paragraphs 13 to 14

I admit the contents of these paragraphs and further aver that the applicant accepted the extension.

91. Ad paragraph 15

I deny the contents of this paragraph and further aver that the records relating to invoices belonged to third parties in which event I was required to source their consent, which consent was not granted.

92. Ad paragraphs 16 to 18

I deny the contents of these paragraphs and aver that the applicant accepted the extension. There are no contradictions as alleged. The applicant in his second request of 1 August 2016, attached as **annexure B** to his founding affidavit, requested 30 documents with footnotes. In order for me to consider his requests, I needed to search and consult with the relevant responsible officials.

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93. Ad paragraphs 19 to 21

Except to deny that Legal Aid SA Deputy Information Officers and I had since 2013 routinely been raising section 45 of PAIA, the remainder of the contents of these paragraphs are admitted.

94. Ad paragraph 22 to 26

Save to state that the amendment on 16 September 2016 was included in my letter refusing the records, the remainder of the contents of these paragraphs are admitted.

95. Ad paragraphs 27 to 28

95.1. I admit that the burden of establishing that the refusal of a request for access complies with the provisions of the PAIA rests with me.

95.2. I acknowledge and respect that the applicant has a right to request records in terms of PAIA but such right is limited within the confines and objects of the PAIA and more specifically in terms of sections 7, 34, 36, 37 and 45 of PAIA.

96. Ad paragraphs 29 to 30

I submit that these averments do not relate to me in so far as the decision which the applicant seek to review and set aside, and are therefore irrelevant and an application will be made that same be struck out. I further take exception to the

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report attached as annexure F, which is clearly based on, and tainted by, the applicant's personal judgment.

97. Ad paragraph 31

I object to the applicant's form of pleading and will object to any introduction of new facts which do not form part of this application which will be prejudicial to my case. The information referred to is irrelevant for purposes of this application and an application will be made that same be struck out. I submit to this Court that this form of pleading should be frowned upon.

98. Ad paragraph 32

The covering letter referred to in this paragraph is admitted for what it purports to be. It is my submission that the contents thereof is irrelevant in the determination of this application, unnecessarily proliferates issues to be determined by the Court and falls to be strike out.

99. Ad paragraph 33

I deny that Legal Aid SA reversed its decision to refuse PAIA requests in 2015 as alleged by the applicant. The applicant is being disingenuous to this Court in that paragraph 6 of the settlement agreement specifically records that "*the agreement is made without any admission of wrong doing by the respondents*". I am not aware of the remainder of the contents of this paragraph, I was not privy to what happened between SAHRC and the

Applicant. This information is irrelevant for purposes of this application and again unnecessarily proliferates issues that this Court has to deal with and thereby falls to be struck out.

100. Ad paragraph 34

I have no knowledge of the contents of this paragraph. I do not always pay particular attention on who is copied by Applicant as he is prone to copy all and sundry. This information is irrelevant for the purpose of this application and an application will be made that it be struck out.

101. Ad paragraph 35

I deny the applicant's conclusions and aver that all these requests relates to the abortion of the Senior Litigator posts. Furthermore, the applicant like any member of the public is welcome to report to the National Treasury any perceived irregular expenditure incurred by Legal Aid SA instead of burdening the Court with an application to disclose third party information.

102. Ad paragraphs 36 to 42

102.1. I deny the contents of these paragraphs. The applicant was never recommended for appointment but to attend a second round of interviews which were aborted due to budgetary constraints.

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102.2. The Labour Court accepted the two pronged process of interviews but Applicant still insists that he was recommended for appointment clearly articulating his dissent to the Labour Court judgment.

102.3. The report prepared by the applicant annexed to his founding affidavit is not based on any factual finding but the applicant's personal conclusions. The allegations are scandalous and deliberately aimed at tarnishing the reputation of officials and persons referred, who are not cited in this application.

102.4. In the premises, the contents of these paragraphs are baseless, prejudicial and irrelevant to the issues to be determined by the Court and an application will be made that same be struck out.

103. Ad paragraph 43

103.1. I deny the contents of this paragraph and aver that the conclusions drawn by the applicant are incorrect and it is not what transpired. The Magistrate at Eshowe merely made an off the cuff suggestion that I clarify my section 23 affidavit.

103.2. The applicant owes Legal Aid SA an amount of R1.6 million which to date the applicant had failed to pay. During the proceedings, I was advised by Counsel, which advice I accepted that we should consider to proceed with the application to declare the applicant a vexatious litigant and seek an order that the applicant pay security for costs before he can proceed with the applications.

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103.3. As a result, I instructed the Counsel to seek a postponement to enable Legal Aid SA to bring such an application against the applicant. I attach hereto the letter dated 4 November 2016 which set out clearly what transpired marked as "TM1".

104. Ad paragraphs 44 to 47

I admit that I took an exception to the applicant's conduct as alleged. The applicant deliberately ignored my previous communication to him that I have been delegated to deal with the applicant's requests in terms of PAIA both in my capacity as Deputy Information Officer and Legal Executive responsible for litigation for and against Legal Aid SA. The contents of these paragraphs are irrelevant to the issues to be decided by the Honourable Court and fall to be strike out.

105. Ad paragraphs 48 to 51

105.1. I deny that the Information Officers and the two Deputy Information Officers abandoned reliance to section 45 of the PAIA. Once again, the applicant is disingenuous and intends to mislead this Court. I repeat my averments made above in relation to the settlement agreement and re-iterate that paragraph 6 of the settlement agreement specifically records that *"the agreement is made without any admission of wrong doing by the respondents"*.

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105.2. I submit that it is unacceptable for applicant to conclude that when I talk on the phone I am taking instructions from my superiors. I deny that I made use of my phone to obtain instructions as alleged.

106. Ad paragraph 52

I admit to the contents of this paragraph.

107. Ad paragraphs 53 to 54

I deny the contents of these paragraphs and aver that I respect the rule of law which include the applicant's right of access to information. However, the applicant's right is limited. Legal Aid SA has never abandoned its defences to refuse the applicant records in terms of section 45 of PAIA.

108. Ad paragraph 55

I deny the contents of this paragraph and find the allegations to be baseless and without facts. This is just another incidence where accusations are made without substance. The case referred to is handled by our insurers and I am nowhere involved in same except receiving progress reports. The contents of this paragraph are vexatious, irrelevant and without merit and an application will be made that same be struck out.

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109. Ad paragraphs 56 to 61

I deny the contents of these paragraphs and state that the applicant is arguing in the pleadings. I submit that section 45 finds application in his requests and further submissions will be made during the hearing of the application.

110. Ad paragraph 62

110.1. I deny that Legal Aid SA dishonoured an undertaking made to SAHRC.

110.2. The applicant's statement is not factually correct and in fact is baseless.

110.3. There is no requirement to establish the PAIA units and neither is there a requirement for the training of the Information Officers and Deputy Information Officers.

111. Ad paragraph 63

I deny the contents of this paragraph and aver that the applicant's assertion that I acted mala fide and in contempt to his fundamental right seeks to mislead this Court. The applicant's right to access to information is not absolute and is limited by the provisions of PAIA have already identified in this application.

112. Ad paragraphs 64 to 74

I note the contents of these paragraphs and further state that the applicant had when approaching these institutions made scandalous and defamatory



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statements alleging various officials of Legal Aid SA to be involved in corruption, fraud and dishonesty. The contents of these paragraphs are irrelevant for the purpose of this application and an application will be made that they be struck out.

113. Ad paragraph 75

I deny the contents of this paragraph. I specifically repeat my denial of having uttered the words mentioned by the applicant as I have done before. The applicant makes statements that are based on assumptions rather than facts. I considered the requests and made the decision based on facts, the history of the requests and law.

114. Ad paragraphs 76 to 78

I admit that the Chief Executive Officer and Chief Legal Executive are aware of this application resulting from the decision I took. I, however deny any other allegations, conclusion and insinuations made by the applicant. Furthermore, the contents of these paragraphs are irrelevant for the purpose of this application and an application will be made that they be struck out.

115. Ad paragraphs 79 to 89

115.1. I deny the contents of these paragraphs and aver that there are no compelling and exceptional reasons that this Court should grant the order of costs de bonis propriis as sought by the applicant, including all the reliefs, directives and interdicts.

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115.2. Our courts will only award costs against a public official in the rarest of cases, and even then, only where that official has acted *mala fide*. I have not acted in such a fashion.

115.3. A court will almost never grant personal costs absent a constitutional failure on the part of a public official or where an official acted alone in persistently and frivolously pursuing a case on appeal that was "*bound to fail*". My opposition is not unreasonable. The defences advanced are not frivolous nor for the sole purpose of delay but are meritorious, made in good faith and in line with the prevailing law. I should not be punished for exercising a discretion conferred in law.

115.4. The applicant's case is based on personal conclusion, insinuations and my decision is one which no other decision maker could not have made.

115.5. Moreover, the applicant, not being represented by legal representatives is not entitled to costs. The purpose of a costs order is to compensate a litigant for out of pocket expenses, of which the applicant, representing himself, has not incurred.

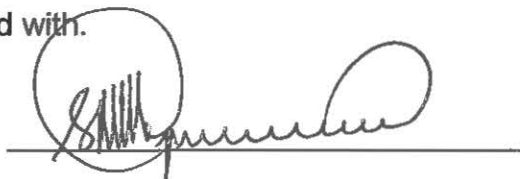
116. In the premises, I submit that my decision was correct and falls to be sustained, and cannot be reviewed and set aside. The applicant is not entitled to the relief he seeks. The application should be dismissed with costs, including those of two counsel.

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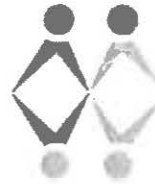
I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PARLTOWN on this the 06 day of **AUGUST 2018**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

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PARLTOWN

"TMI"



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Legal Aid
South Africa

4 November 2016

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Dear Advocate Brink,

ANTHONY BRINK / T MTATI NO, CASE NUMBER: 1118/16

1. The purpose of this letter is to seek your consent to stay the prosecution of the proceedings in the above stated case and suspend all the exchange of pleadings.
2. As you are aware, the proceedings in respect of the five applications at Eshowe Magistrate's Court were postponed on 8 September 2016 on condition that Legal Aid South Africa issue and serve an application seeking to pray amongst others, for an order to declare you a vexatious litigant and an order for payment of taxed costs or payment of security for costs before proceeding with the prosecution of the applications. This application was to be issued by the 31st October 2016.
3. The application was indeed issued by the Registrar of the High Court on 28 October 2016 under case number 12124/16.
4. In the aforesaid application, as undertaken, Legal Aid South Africa is seeking for orders amongst others, that proceedings in the Kwazulu-Natal Division of the High Court, Pietermaritzburg, against Mtati NO, under case number 1118/16 are stayed pending your payment of all previous costs orders granted against you in favour of Legal Aid South Africa, *alternatively*, payment of security for the legal costs in the above matters in a manner, amount and form as to be determined by the Registrar.

Your voice. For justice.


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5. It is worth recording that, at the time when the postponement was granted on 8 September 2016, you already had requested information in terms of PAIA which form the basis of the application under case number 1118/16.
6. This is raised to demonstrate that, when you issued and served this application to us on 10 October 2016, you already knew of the pending application that was to be brought by Legal Aid SA.
7. Despite this knowledge, you proceeded to issue and serve Legal Aid South Africa with the above application on 10 October 2016.
8. It is on this basis that we formally request your consent that pleadings in this matter be suspended until determination of our application as otherwise there will be duplication of effort from both parties leading to unnecessary incurring of costs and valuable time.
9. Accordingly, we request your consent to stay the proceedings in relation to your application, and suspend all the exchange of the pleadings under case number 1118/16 pending the finalisation of Legal Aid South Africa's application under case number 12124/16 and shall be appreciate to receive your reply hereto by Tuesday the 8th of November 2016.

Yours faithfully,



Thembile Mtati
Corporate Services Executive

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Your voice. For justice.