

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

Case No: 11187/16P

In the matter between:

ANTHONY BRINK

Applicant

and

THEMBILE MTATI N.O.

DEPUTY INFORMATION OFFICER

LEGAL AID SOUTH AFRICA

Respondent

APPLICANT'S HEADS OF ARGUMENT-

*I'm a document hound. If I've got your documents, I know all about you ...
You just find some disgraceful, disgustingly corrupt people and you work
on it ... Our job is to investigate, acquire evidence.*

Andrew Jennings, investigative journalist, on exposing the FIFA scandal
Washington Post, 3 June 2015

1. The masses of basic factual mistakes, false claims, misrepresentation, distortion, false generalisation, and obfuscation in both the refusal notice and the answering affidavit are too many to address in these heads¹ and are comprehensively treated in my founding and replying affidavits. None of it gives rise to any genuine factual disputes preventing the disposal of this application on

¹ Per Practice Direction 9.4.1. In view of the profusion of spurious legal issues and contentions raised in the respondent's refusal and answering affidavit, my treatment of them in these concise heads unavoidably exceeds the prescribed five-page maximum. I've opted not to file optional 'fuller, more comprehensive heads' allowed by the Practice Direction, because these would merely repeat my case thoroughly made in my application papers, which, in the nature of the case, contain my full argument on the core facts that are common ground.

argument alone. These heads are accordingly confined to a summary of my legal argument.

2. The essential issue for decision by this court is whether the refusal of my two record requests made under the Promotion of Access to Information Act 2 of 2000 ('PAIA') was justified under the Act, or whether it violated my constitutional right to public body information. The respondent ('Mtati')² doesn't dispute that in making my requests I duly complied with all the formalities prescribed by section 18;³ and he accepts⁴ that under section 81(3)(a)⁵ he bears the onus of satisfying this court that his refusal was justified.

3. Expressly stated in my covering letter,⁶ my *first request*⁷ for legal cost records was made for the purpose of reporting to 'the Justice Minister, Deputy Minister, Portfolio Committee, Auditor General, information transparency organisations, and all print media'⁸ how much public money Legal Aid South Africa ('LASA') irregularly, fruitlessly, wastefully, and therefore unlawfully squandered on filibustering, meritless, defensive litigation in the Eshowe Magistrate's Court, abandoned in court at the point of argument, to corruptly obstruct my lawful claims to access to previously requested records, which, as in this case, had also been illegally and unconstitutionally refused as a waste of time.⁹ Having regard to my serious stated purpose – and Mtati nowhere suggested I'm bluffing, nor was there any reason to think my declared intentions weren't genuine (and see paragraph 9 below) – my request clearly wasn't 'manifestly frivolous or vexatious' as envisaged by section 45, and none of Mtati's several claims in his refusal notice¹⁰ – some true, some false, all irrelevant – have any bearing on my right to see the legal cost records I requested. His

² For the purposes of this summary argument, I'll maintain the fiction that Mtati made the decision to refuse my requests and authored his answering affidavit, treated and exposed in my replying affidavit at pp 215–6 para 2.4–5.

³ P 6 para 7; p 7 para 10; and p 195 paras 87–8.

⁴ P 197 para 95.1.

⁵ Quoted at p 17 para 46.

⁶ P 31.

⁷ Pp 31–40, particularly at p 36.

⁸ P 31 first para.

⁹ In LASA's usual routine, described at pp 66–146, and further in my following applications, cases 14224/17P and 5239/18P.

¹⁰ Pp 64–5 para 2.

claims, purporting to underpin his refusal under section 45, are comprehensively treated and disposed of in my founding affidavit.¹¹

4. Nor is there anything ‘manifestly frivolous or vexatious’ about my request for the internal email records specified in my amendment¹² of my *second request*, and none of the hot air blown in Mtati’s refusal notice makes it so.

5. In my said amendment¹³ I expressly stated my several exceptionally serious purposes in seeking access to all the documents specified in my *second request*,¹⁴ namely for use in support of complaints to be made variously to ‘the Minister and the Portfolio Committee’ and to ‘the National Director of Prosecutions, Judicial Service Commission, General Council of the Bar, and Law Society for the Northern Provinces’ about ‘(i) gross maladministration at LASA involving millions of rands and directly affecting service delivery; (ii) the wholesale breakdown of the rule of law and due process at LASA, involving, inter alia, the routine illegal flouting of LASA’s internal regulations by Board chairperson Mlambo JP and national management executives; (iii) pervasive systemic corruption in the conduct of LASA’s recruitment operations; and (iv) a criminal cover-up of the same involving perjury, conflicting sworn statements, and lying to the Portfolio Committee, on multiple scores.’¹⁵ And I stated my further intention to use some of the requested documents in support of a rescission application to the Labour Court, showing it was defrauded by perjury.¹⁶ A request for access to records for such exceedingly grave purposes can hardly be ‘manifestly frivolous or vexatious’ as Mtati dishonestly dissembles; and again, nothing he says in his refusal notice makes it such.

6. Section 46 anyway required Mtati’s compliance with my requests; it provides: ‘Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section ... 45, if – (a) the disclosure of the record would reveal evidence of –

¹¹ Pp 11–22 paras 28–63.

¹² P 59 item 6 in boldface.

¹³ Pp 58–62.

¹⁴ Pp 41–55.

¹⁵ P 59. See further my letter to a Deputy Director of Public Prosecutions: pp 153–60.

¹⁶ *Ibid.*

(i) a substantial contravention of, or failure to comply with, the law’ – such as I mentioned in my amendment.

7. In truth, on his own showing Mtati didn’t actually think my requests ‘manifestly frivolous or vexatious’ when he refused them:

- First, because my final request in the matter of Senior Litigator posts (i.e. much of my *second request*) was specifically contemplated in the settlement agreement¹⁷ he made with me at the Eshowe Magistrate’s Court upon LASA’s total capitulation to five earlier PAIA applications I’d brought there. That is, by agreement, Mtati was expecting a final request from me in the subject, and had implicitly agreed to treat it as seriously made and to respond to it as such, and not just reject it as an obvious waste of time again – reviving the same dishonest line, contemptuous of my constitutional right to information, just abandoned in the Magistrate’s Court.
- Second, because after claiming to have spent ‘a lot of my time’¹⁸ studying my two requests and all the ‘cross-references made in your footnotes [to my *second request*] to clearly understand your requests’,¹⁹ Mtati then extended the ordinary thirty days allowed to respond to them, claiming for various reasons that he needed an extra month to do so.²⁰ Clearly my requests didn’t then strike Mtati as ‘manifestly frivolous or vexatious’, i.e. a waste of time on their face, and fit to be rejected out of hand.

In short, Mtati’s reliance on section 45 to refuse to comply with my requests was mala fide, which is to say dishonest.

8. When I sued for access to the refused records, Mtati persisted with his section 45 justification in his answering affidavit and piled on several more, citing other sections of PAIA, variously having no application to the records I requested, or to the decision of a PAIA request at all, and making claims about

¹⁷ P 163 para 7.

¹⁸ Ibid.

¹⁹ P 57.

²⁰ P 56–7.

my request that were both false and irrelevant under PAIA. I treat all this below.

9. As anticipated in my amendment of my *second request*.²¹ on 16 September 2016,²² I went on to file my first eight capital complaints to the Judicial Service Commission ('JSC') against Board chairperson Mlambo JP in mid-2017,²³ objectively vouching the bona fides of my stated intentions in making my *second request*, announced in my amendment, namely to use the requested records in support of the complaints of top-level malfeasance at LASA, including criminality.²⁴ And I put these complaints up with my answering papers in LASA's abortive counter-strike against me (Mtati signed its papers) to try blowing me out of court as a vexatious litigant (case 12124/16P).²⁵ So there can be no question, on the evidence, that my intentions in making my second request were entirely serious, and moreover that Mtati appreciated this full well at the time he dishonestly persisted in repeating in his subsequently made answering affidavit signed on 6 August 2018 his lying slur that my request was 'manifestly frivolous and²⁶ vexatious'.²⁷

10. Mtati's first new story in his answering affidavit is that the records I requested comprise 'confidential, private and proprietary information relating to third parties and Legal Aid SA officials'.²⁸ It's plain from elsewhere in his

²¹ P 61: '[T]he many lies told to the Portfolio Committee will be reported to ... the Judicial Service Commission' – and they subsequently were, in my Seventh and Eighth Complaints to the JSC against Board chairperson Mlambo JP filed in mid-2017, summarised in the descriptive index at p 92–5 of the papers in the second application, 14224/17P, and put up in full (all eight complaints) as annexure 'C' to my supplementary affidavit in case 12124/16P. Implicitly finding I'd made an answerable, prima facie case, the Judicial Conduct Committee required him to respond: p 212 para 1.11. *On 11 February 2019, the JSC secretary informed me by telephone that it had resolved to institute disciplinary proceedings against him.*

²² Pp 58 and 63.

²³ P 212 para 1.11.

²⁴ P 61 part 4. As promised in the amendment, once the documents specified in my *second request* have been surrendered, some will be used in support of further complaints to the JSC regarding the 'routine illegal flouting of LASA's internal regulations by Board chairperson Mlambo JP' in contravention of the Code of Judicial Conduct, which requires that he should conduct himself lawfully even off the bench.

²⁵ LASA's opposed application was quickly dismissed on 27 October 2017, without my even being called on to argue against it: p 210 para 1.2.

²⁶ Sic: section 45 stipulates 'or' not 'and'.

²⁷ P173 para 11.

²⁸ P 171–2 para 3.

affidavit²⁹ that in talking this way Mtati had in mind my *first request* for litigation cost records,³⁰ and particularly my request for sight of LASA's counsels' fee-notes in the meritless lower court litigation that LASA ultimately abandoned – as well as some internal email correspondence.³¹ Clearly none of these records meet Mtati's just-quoted false description of them.

11. For manifold reasons, it was incompetent and unlawful for Mtati to seize on one of my stated reasons for making my *second request*, namely to use some of the records in a future application to be brought to the Labour Court for rescission of its dismissal of my labour claim on the grounds that it was successfully defrauded,³² and to make this a basis for refusing my request as 'manifestly frivolous, vexatious',³³ and again in his answering affidavit: 'manifestly frivolous and vexatious'.³⁴ Mtati's wilfully ignorant assertion that this particular stated reason for making my request is improper and unlawful³⁵ is at odds with any litigant's right under common law to show a trial court by way of subsequently surfaced documents that it was successfully lied to by the winning party and deceived into making wrong findings of fact – an elementary principle of civil procedure reiterated by this court³⁶ during the argument of LASA's failed attempt to prevent me accessing its records and suing to compel my requests for them, by trying to have me banned as an alleged vexatious litigant (for suing to compel compliance with the settlement agreement).³⁷

12. Furthermore, by asserting one of my purposes, namely to use some of the requested documents in future litigation, as a ground for refusing all of them, Mtati illegally stepped foul of section 11(3), which explicitly prohibits an

²⁹ P 190–2 paras 69–75.

³⁰ Pp 36 and 59 item 5.

³¹ P 59 item 6.

³² During argument of LASA's failed application to prevent my enforcement of its settlement agreement with me and my access to its records, this court pertinently observed that witnesses sometimes lie and that judgments are occasionally won by perjury. Such as the 'pack of lies' National Operations Executive Brian Nair told under oath at the trial of my labour claim, as I showed in my answering affidavit in that case; mentioned in my replying affidavit in the instant application at p 239 para 74.

³³ P 65 para 3.

³⁴ P173 para 11.

³⁵ P 173 para 11.

³⁶ P 233 para 61.

³⁷ Pp 209–10 para 1.1.

information officer from having regard to a requester's reasons for making his request when deciding it.

13. Even were Mtati correct that I may not request documents under PAIA for the purpose of using them in future litigation (of course I can, and the South African Human Rights Commission's PAIA Unit specifically taught LASA's head office lawyers that I can),³⁸ he doesn't claim that my other serious stated purposes bar my access to the requested records. He skips over those other serious stated reasons for making my requests, the propriety of which stands uncontroverted.

14. Mtati doesn't dispute my evidence that all the requested records are readily available in LASA's national office³⁹ – so finding and copying them can't truly 'substantially and unreasonably divert the most needed resources of Legal Aid South Africa'⁴⁰ as he meretriciously claims, dully parroting the Act again.

15. The total number of PAIA record requests that I've made since 2010 in my determined ongoing investigation of top-level recruitment corruption and its criminal cover-up at LASA – virtually all which records have been illegally and unconstitutionally refused, and necessarily crow-barred out of LASA by litigating for them⁴¹ – which number of requests Mtati stands on to justify refusing my instant requests as a waste of his time, is no justification under any section 45 or any other section of PAIA for refusing them. Other requesters have quite properly made incomparably more requests,⁴² and for incomparably more records.⁴³ Mtati tried the same idle argument in this court before, and this court rejected it.⁴⁴

³⁸ P 60–1 part 3.

³⁹ P 8 para 15; and p 196 para 91. To the extent that by his general denial, Mtati may also be denying that all requested records are readily accessible in LASA's national office, his denial, embellished with an irrelevant, legally false red herring, is palpably false. The records can't be anywhere else.

⁴⁰ P 65 para 3; and p 173 para 11.

⁴¹ Pp 66–146.

⁴² Pp 225–6 para 38.

⁴³ Ibid.

⁴⁴ Pp 224–5 paras 36–7.

16. Section 7, which Mtati also newly⁴⁵ and ignorantly grabs at in his answering affidavit to justify refusing my requests, has zero relevance to the decision of a PAIA request. Section 7(1) generally proscribes the use in legal proceedings of records obtained via PAIA after those proceedings have already commenced, where they could have been obtained via discovery procedure under the court's rules or under any other law. Section 7(2) governs judicial discretion to admit such records nonetheless. The section's got nothing to do with decision making by information officers. The only grounds PAIA permits for refusing a request for access to public body records are those enumerated in sections 34–45, and section 7 isn't among them.⁴⁶

17. In also invoking sections 34, 36, and 37 against me in his answering affidavit, it's clear that Mtati particularly has LASA's advocates' fee-notes in mind,⁴⁷ i.e. item 1 of my *first request*⁴⁸ and item 5 of my amendment⁴⁹ – records showing how much public revenue LASA wasted on hiring counsel to obstruct for as long as possible my access to its records and violate my constitutional rights.

18. None of the legal cost records, including counsels' fee-notes, nor the business email records⁵⁰ specified in my *first request*, nor any of the records specified in my *second request*, contain 'personal information' within the definition set out in section 1, so there's no question, no possibility that 'its disclosure would involve the unreasonable disclosure of personal information about a third party' as contemplated by section 34.

19. None of the legal cost records including counsels' fee-notes nor the business email records specified in my *first request*, nor any of the records specified in my *second request*, contain 'trade secrets of a third party'⁵¹ or 'financial, commercial,

⁴⁵ Section 7 was previously invoked to refuse my PAIA requests made in the period 2013–15: pp 371–80. But when in the Eshowe Magistrate's Court I sued for the records, and was on the point of arguing for the grant of orders compelling their production, this useless justification was dropped, along with LASA's reliance on section 45 and a couple of others: p 139 para 252.

⁴⁶ P 247 para 90.

⁴⁷ Pp 190–2 paras 69–75.

⁴⁸ P 36.

⁴⁹ P 59.

⁵⁰ P 59, item 6 in boldface.

⁵¹ Section 36(1)(a).

scientific or technical information ... the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party'⁵² or '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'⁵³ as contemplated by section 36. None of this applies to counsels' fee-notes or to any of the other records I requested.

20. Nor is there any question, any possibility that 'disclosure of the record[s] would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement';⁵⁴ or that any requested record 'consists of information that was supplied in confidence by a third party– (i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and (ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied',⁵⁵ as contemplated by section 37. None of this applies to counsels' fee-notes or to any of the other records I requested.

21. Another of Mtati's new empty justifications advanced in his answering affidavit for refusing me access to LASA's counsels' fee-notes is that they 'belonged to third parties'⁵⁶ – both untrue and anyway irrelevant under PAIA. After counsel presented them to LASA for payment, they didn't 'belong' to them in any sense recognised by PAIA (in which Act the word nowhere appears); and the definition of a discoverable 'record' in section 1 is one 'in the possession or under the control of that public body ... whether or not it was created by that public ... body'. So whether or not the creators of the records, i.e. the advocates who drew and submitted them, consented to their release to me⁵⁷ is of no legal interest, because no provision of PAIA requires it.

⁵² Section 36(1)(b).

⁵³ Section 36(1)(c).

⁵⁴ Section 37(1)(a).

⁵⁵ Section 37(1)(b).

⁵⁶ P 196 para 91.

⁵⁷ Ibid.

22. Mtati's hollow talk of 'third party information'⁵⁸ in his answering affidavit to the same end, i.e. to try justifying his suppression of the documents I'm after, is likewise legally irrelevant. Neither the expression, nor anything like it, is found in the Act.

23. The deplorable disingenuity of all these bogus justifications for hiding its legal cost records from me, and from the authorities and other interested parties to whom I've said I intend referring them, is brightly evinced by the fact that LASA had no compunction about handing over such records, counsels' fee-notes included, when it wanted me to pay them.⁵⁹

24. Aggravating the case enormously – and this is really crucial – the history of LASA's ongoing illegal and unconstitutional refusals of my PAIA requests since 2010, to suppress evidence of top-level corruption and financial misconduct, its refusals always ultimately reversed under pressure of litigation, is comprehensively described in my Special Report to the SAHRC⁶⁰ – as is its repeated false reporting about this, both under section 32 and in special 'confidential' reporting (i) to conceal this consistent and repeated non-compliance with the Act, and (ii) to evade and stultify the National Assembly's constitutional oversight over LASA.⁶¹ And as my subsequent two PAIA applications 14224/17P and 5239/18P before this court show, LASA's top management executives continue flagrantly refusing to comply with LASA's constitutional information transparency obligations, in contempt of my fundamental right to public information entrenched and guaranteed by section 32(1)(a) of the Constitution. Indeed, LASA Chief Legal Executive Patrick Hundermark blithely tells me he intends refusing point blank any others I might make in the future.⁶²

25. In sum, this is an unprecedented, extreme, extraordinarily serious case of wilful constitutional delinquency by a prodigiously corrupt organ of state in the democratic era, eminently warranting the grant of the special orders claimed in

⁵⁸ P 199 para 101.

⁵⁹ Pp 217–34 paras 3–34.

⁶⁰ Pp 66–146.

⁶¹ P 292 para 260.

⁶² Case 5239/18P, p 102 para 4.

paragraph 4–6 of my notice of motion, supported by my case extensively made out in my affidavits.

Signed at Eshowe on 25 February 2019

ANTHONY BRINK

APPLICANT

AUTHORITIES RELIED ON:

Solidarity and Others v South African Broadcasting Corporation (J1343/16) [2016] ZALCJHB 273; 2016 (6) SA 73 (LC); (2016) 37 ILJ 2888 (LC); [2017] 1 BLLR 60 (LC) (26 July 2016)

Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government (620/2012) [2013] ZASCA 67; 2013 (5) SA 24 (SCA); [2013] 3 All SA 370 (SCA) (27 May 2013)

Buthelezi & another v Minister of Home Affairs & others (242/12) [2012] ZASCA 174 (29 November 2012)

Dlusha v King Sabata Dalindyebo Municipality and others (1494/09) [2011] ZAECMHC 23 (18 March 2011)

The President of RSA v M & G Media (570/10) [2010] ZASCA 177 (14 December 2010)

For easy quotation by copying and pasting, these heads and the application papers are accessible in a Dropbox folder online at <https://goo.gl/KKjMB7>.