IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 1118/16P

In the matter between:

ANTHONY BRINK Applicant

and

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

BRINK'S NOTES (IN ARIAL BOLD TYPEFACE) REBUTTING THE RESPONDENT'S CONCISE HEADS OF ARGUMENT

OVERVIEW

1 The applicant ("**Brink**") has, since August 2010, filed sixteen requests for information in terms of the Promotion of Access to Information Act, 2 of 2000 ("**PAIA**" or "**the Act**") with the respondent ("**Legal Aid SA**"), requesting more than 270 records.[1]

So what? The number of PAIA requests I've made since 2010 doesn't make them ipso facto 'frivolous or vexatious' under section 45.

Other requesters have made incomparably more requests for incomparably more records. And this court has approved.

None of my first three requests in 2010 and 2011 were refused on this basis (section 45); they were refused on other grounds later abandoned.

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[1] AA pp 178-186 paras 23-55.

The real point is that right from the start, virtually all my requests have been illegally and unconstitutionally refused on shifting bogus grounds, before eventually being released under legal pressure: *first*, by dint of round after round of discovery procedure in the Labour Court to disgorge refused records originally requested under PAIA in 2010 and 2011 but refused before my labour action was launched and refused again at the first pre-trial conference; and *second*, after trial, and then after judgment, by dint of five applications to the Eshowe Magistrate's Court to compel the surrender of illegally refused records, and then a sixth to compel full and proper compliance with the settlement agreement promising them all.

2 The requests all relate to the 2009 recruitment process for the senior litigator post in the Pietermaritzburg offices of Legal Aid SA, which Brink interviewed for but Legal Aid SA subsequently abandoned the filling of the post due to budgetary constraints.[2] Brink unsuccessfully challenged Legal Aid SA's decision to not fill the post in the Labour Court, Durban.[3] His application to that Court, and subsequent petition to the Labour Appeal Court ("**LAC**"), for leave to appeal were also dismissed.[4]

This unqualified characterization of my requests is untrue, because although a few items of my *second request* indeed related to the '2009 recruitment process for the senior litigator post', the majority of my requests, including the whole of my *first request* didn't.

To the extent that a few items of my *second request* related to the '2009 recruitment process for the senior litigator post', this was irrelevant to the decision of my request for those records, because, as I stated at the time, I intend using those records in support of a rescission application based on fraud – an entirely legitimate purpose already approved by this court when reiterating it on the record during the debate of LASA's vexatious application (12124/16P).

My other purposes in making my requests, also stated at the time, albeit irrelevant under section 11(3) to the decision of the my requests, were, inter

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2 AA p 178 para 23.
3 AA p 178 para 24.
4 AA p 179 para 25.

alia, to prove perjury committed in the Labour Court; ongoing illegal capital contraventions of the PFMA running into many millions of rands annually; other recruitment corruption extending to other posts; and massive irregular, fruitless and wasteful expenditure on meritless litigation – the first ultimately abandoned at the Magistrate's Court on the point of argument; and the second quickly dismissed by this court – to prevent me exercising my fundamental right to public body information, guaranteed by section 32(1)(a) of the Bill of Rights and given effect by PAIA, so as to obstruct my access to LASA's records for these and other extraordinarily serious purposes; in other words, public funds squandered on LASA's violation of the Constitution to perpetuate a corruption cover-up.

I wasn't merely 'interviewed' for the top post. In its crooked habit, LASA deceptively obscures the disagreeable fact that I was *selected and recommended* for it, and that my rival applicants, especially LASA Board chairperson Mlambo JP's long-time former judicial colleague Ngcamu, whom he'd repeatedly got appointed to act on the labour bench over about six-and-a-half years before the interviews, were disqualified and rejected.

No 'budgetary constraints' prevented my appointment; and as LASA's own records show, the still vacant post has always been and remains budgeted by LASA and funded by the Treasury via the Justice Department.

LASA's own records further show that some transient financial uncertainty arising in March 2010 (several months after my successful interview in November 2009) had zero effect on recruitment besides a brief *two-month freeze* very many months later in August and September 2010 of lower criminal court public defender recruitment, proposed to and approved by the Board in July.

'Budgetary constraints' is the *original basic lie* that LASA eventually told me eleven months after my successful interview to justify not completing its successful recruitment and appointing me. Trouble is, LASA's Board was later told totally different lies. The Labour Court was told both the old and new lies together. The SAHRC was told different lies still. Etc.

There's no record whatsoever that 'Legal Aid SA subsequently abandoned the filling of the post'. This is *the other basic lie*.

My unfair discrimination claim in the Labour Court was *correctly dismissed*.

LASA had concealed from me the pivotal information, recorded in the selection panel's recommendation report, which I only succeeded in disgorging years after my labour case by suing for it under PAIA, that Mlambo JP and my rival applicant Ngcamu had enjoyed a long professional relationship, explaining why the recruitment went strangely silently dead when I was unexpectedly selected and recommended and Ngcamu was disqualified and rejected.

It wasn't that LASA's head office didn't like me specifically for my political unpopularity or ethnicity, as I'd surmised – deliberately kept ignorant of this key information at the time; it's just Mlambo JP preferred judicial friend Ngcamu (it's common cause that (as a *non-executive* Board director) he (illegally) interviews and picks and chooses Senior Litigator appointees irrespective of selection panel recommendations – so NOE Nair truthfully testified stupidly in the Labour Court). Misdirected by the illegal suppression of this information, I went to court on the wrong cause of action: unfair discrimination instead of cronyism.

My petition for leave to appeal to the Labour Appeal Court was perverted by a top LASA officer with the necessary influence and connections with the Judge President to bypass the registrar and get a prejudicial note against me (the 'memorandum') directly to him – the real evidence of which crime of defeating the ends of justice in this way was inadvertently left in the court file for me to discover later on. My complaint against Waglay JP about this, for succumbing to improper influence, is currently pending before the JSC.

Why my recruitment was aborted off the record under cover of multiple different lies anyway has zero relevance to my entitlement to the records I've duly requested.

The point of raising this irrelevant matter is clearly to portray my requests as a waste of time, and my application to compel them likewise.

3 PAIA establishes procedures to give effect to the constitutional right of access to information held by the State. While doing so, PAIA recognises that the right is subject to justifiable limitations.[5] Thus a balance is struck by creating general principles which apply to all records, ensuring that in all cases the adjudication of a request for information weighs 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.[6]

In conflating the totally different tests for entitlement to public and private body information, this is very wrong, because the 'rights and interests of the requester' have no place in and are no lawful criterion for deciding a request for access to public body records, as opposed to private body ones.

As the Constitutional Court observed in paragraph 44 of its judgment in Helen Suzman Foundation v Judicial Service Commission [2018] ZACC (24 April 2018):

> **PAIA affords any person the right of access to any information held by the state.[50] The person seeking the information need not give any explanation whatsoever as to why she or he requires the information. The person could be the classic busybody who wants access to information held by the state for the sake of it.**
>
> **[50] Section 9(a)(i) of PAIA. ...**

4 It is clear on Brink's version that the purpose for requesting the records is to re-litigate his non-appointment to the senior litigator post,[7] which we submit is contrary to objects of PAIA. Not only is Brink's request excluded by the provisions of PAIA, but principles of public policy dictate against such misuse of the Act.

For a start, that particular expressly stated purpose – among my other several stated purposes – was irrelevant under section 11(3) to the decision of my requests.

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5 Section 9.
6 AA p 188 para 60.
7 AA p 193 para 79.

Although future intended litigation is indeed my ultimate purpose in seeking some of the records, it's not my only one, nor is it my immediate one.

Indeed I intend bringing an application to the Labour Court under common law for rescission of its judgment against me on the grounds that it was based on perjured evidence, clearly shown by documents forced out of LASA after trial.

Since the application hasn't been launched, this contemplated litigation isn't pending, and consequently the records I've requested to use in this future litigation aren't hit by section 7.

Using PAIA for the purpose of gathering documents for future intended litigation is entirely proper and lawful under PAIA. See *Claase v Information Officer of South African Airways* [2006] SCA 163 (RSA), paragraph 3.

The SAHRC's PAIA Unit and the Cape Town-based information transparency advocacy NGO Open Democracy Advice Centre (ODAC) specifically tried teaching this to LASA's head office lawyers on 6 October 2011– all utterly clueless about PAIA as they repeatedly confessed to them, and as the SAHRC repeatedly observed and recorded – at the special emergency remedial lesson in how PAIA works given to them, after my early requests in 2010 and 2011, also made to gather documents for use in my intended labour action, were repeatedly illegally and unconstitutionally refused.

As LASA's answering papers and its arguments before this court dismally show, the lesson proved unsuccessful.

The submission that my use of PAIA to collect documentary evidence for future intended litigation – among other serious stated purposes LASA doesn't mention – 'is contrary to objects of PAIA' is baseless sheer nonsense.

POINTS IN LIMINE

The relief sought by Brink is moot

5 The fifteenth PAIA request made by Brink on 30 October 2017 sought the same information that forms the subject matter of this application, his fourteenth

request made in August 2016. Brink's fifteenth request was refused on 28 November 2017, and Brink launched an application to review and set aside that decision in this Court under case number 14224/17, on 14 December 2017.

This is wrong. The cost records requested in August 2016 (sued for in case 11187/16P) and those requested in October 2017 (sued for in case 14224/17P) are different cost records in respect of different litigations in different courts between different parties at different times. I've pointed this out repeatedly in my replying affidavits, but it fails to penetrate, and LASA's counsel persist with the obvious factual mistake.

6 These latter events have accordingly overtaken the present application such that any review relief sought by Brink would be abstract, academic and have no practical effect.

Wrong, for the above reason.

What about my *second request*, having nothing to do with cost records?

Striking out

7 Brink's founding affidavit is replete with unwarranted abusive personal attacks and defamatory material against various Legal Aid SA officials, Chapter 9 institutions, and members of the judiciary. Legal Aid SA will, at the hearing of this application, apply for Brink's founding affidavit to be struck out, alternatively that certain portions of the affidavit be struck out. The application to strike out those portions of Brink's affidavit is proof of Brink's ongoing desire to vex Legal Aid SA.

So because LASA wants my whole case thrown out before it's heard and debated, this means I'm vexatious person. The logic is pathetic.

I've made the most serious imaginable charges against LASA's top officers, including and especially against Board chairperson Mlambo JP. My recent affidavit opposing LASA's adjournment application records the JSC's information to me that its Judicial Conduct Committee has resolved to prosecute my first eight complaints against him. Which means both that the JSC is satisfied that my complaints against him are well-founded and serious,

and that his response to them has been found unconvincing and unsatisfactory.

I've shown that among LASA's top officers, committing perjury, lying and false reporting to the Minister and to Parliament, false annual reporting, illegal financial misconduct, and perversion of judicial proceedings through improper influence is a way of life.

It's only natural that LASA wants all this suppressed.

LASA tried the same trick on the same grounds in its vexatious application (12124/16P), and this court briskly rejected it.

THE RELIEF SOUGHT BY BRINK IS INCOMPETENT

8 We submit that the relief sought by Brink is not only incompetent but also vexatious for the reasons that follow.

9 First, the PAIA request of 1 August 2016, as amended on 16 September 2016, was correctly refused in terms of section 7 of the Act, which provides that PAIA does not apply to the records requested for criminal or civil proceedings after commencement of those proceedings.

Even a railway shunter with a Standard Six can see section 7 doesn't afford an information officer a ground for refusing a record request. It precludes the use in legal proceedings of any document obtained via PAIA after the commencement of those proceedings unless the court admits it in the interests of justice. My rescission application hasn't even been drawn yet, let alone launched.

10 Brink could have exercised the remedies available to him in terms of PAIA prior to instituting his claim against Legal Aid SA in the Labour Court. He elected not to. Instead, he chose to prosecute his claim through a full trial before the Labour Court and the LAC and is not entitled now to rely on PAIA to access the records requested insofar as they relate to his non-appointment to the senior litigator post.

The argument is nonsense. Under PAIA I can request whatever public records in LASA's possession I like, whenever I like; and unless hit by one of the grounds for refusal provided in Chapter 4 of Part 2 of the Act they must be turned over to me.

Likewise I can 'exercise... the remedies available to [me] in terms of PAIA', i.e. sue for them when illegally refused, whenever I like, as long as it's within 180 days of the refusal.

Whether *some* of the records listed in my *second request* 'relate to [my] non-appointment to the senior litigator post' is immaterial under the Act; more especially because I have *multiple stated purposes* in making my requests, besides wanting to use them in intended future litigation – itself a perfectly proper purpose, as the SAHRC unsuccessfully tried teaching LASA in 2011.

LASA doesn't dispute the propriety of my other serious purposes in requesting the records, such as to use the records in support of perjury complaints, and for (further) complaints to the JSC about Board chairperson Mlambo JP's lawless corruption of Senior Litigator recruitment at LASA.

Nor does LASA dispute the propriety of my stated intention of exposing to the Auditor General, to other named authorities, and to other interested parties how much public money it squandered on protracted, insupportable, meritless, ultimately abandoned PAIA litigation in the Magistrate's Court – which is to say on abusing public funds and the legal system to continue violating for as long as possible my fundamental right to information, so as to obstruct my access to its records and frustrate my corruption and criminal perjury investigation.

My request for those legal cost records has nothing to do with the illegal backroom abortion of my appointment to the fully funded, still vacant Senior Litigator post at Pietermaritzburg – unlawful per se under the PFMA according to the Constitutional Court's judgment in *Zungu* in January 2018.

I could hardly have 'exercised the remedies available to [me] in terms of PAIA prior to instituting [my] claim against Legal Aid SA in the Labour Court' in

regard to the cost records listed in my *first request*, seeing as they were generated in the Magistrate's Court PAIA litigation long after my labour case.

In relying on one of my several stated reasons for making my requests – to use some of the documents them in future intended litigation (anyway unobjectionable) as a basis for refusing them, LASA diametrically transgresses section 11(3) prohibiting an information officer from having regard to such reasons in deciding a request.

> 11 Second, the PAIA request of 1 August 2016, as amended on 16 September 2016, was correctly refused in terms of section 45 of the Act, which allows a public body to refuse a request for access to a record if the request is manifestly frivolous or vexatious. Brink's request is both frivolous and vexatious, as evidenced through his behaviour over the past 10 years.[8]

LASA refers only to my *second request* here; my *first request* for cost records goes unmentioned.

My 'behaviour over the past ten years' in trying to access LASA's records via duly made PAIA requests is comprehensively detailed in my Special Report (annexure 'F' to my founding affidavit in case 11187/16P) and further in my three PAIA applications before court; and nothing about this 'behaviour' 'evidence[s]' that my instant PAIA requests, made for exceptionally serious stated purposes, are 'both frivolous and vexatious'.

Au contraire, it's LASA's 'behaviour' in repeatedly and persistently, illegally and unconstitutionally refusing my requests on the most patently indefensible grounds, and then its repeated and persistent false reporting to the SAHRC for the misinformation of the National Assembly and frustration of its constitutional oversight mandate over LASA, as well as its special 'confidential' reporting to pervert the Justice Portfolio Committee's enquiry into this, all described in my Special Report and application papers, that beggars belief.

That my stated purposes in requesting the records are extraordinarily serious and are indubitably genuine, shown by my first eight complaints made

[8] AA p 181 para 38; p 183 para 46; p 184 paras 50-51; FA p 16 paras 41-42; p 23 paras 65-67.

against Mlambo JP to the JSC – and indeed my serious purposes are undisputed – precludes any bona fide reliance on section 45 to reject my requests as 'manifestly frivolous or vexatious'.

Section 46(a) over-rides section 45 where 'the disclosure of the record would reveal evidence of (i) a substantial contravention of, or failure to comply with, the law'. Which many of the requested records will do.

12 Legal Aid SA is entitled to refuse the request, under section 45, where the work involved in processing the request would substantially and unreasonably divert its resources. More than 180 hours have already been spent on processing Brink's various PAIA requests.[9] Brink's vexatious requests compromise the delivery of legal services as mandated to Legal Aid SA and it was entitled to refuse to provide the information on this basis.

No record exists to vouch that all this time was spent on LASA's *point blank refusals* of my requests as waste of time (my requests after the trial of, and then judgment in, my labour claim). The claim is patently untrue.

In any event, how much time LASA claims to have spent in the past on refusing previous requests of mine has no bearing on my entitlement under PAIA to the instant records requested.

As I show in my founding affidavit, all extant records requested are in LASA's national office, and easy to gather and deliver to me.

Had compliance with my requests been unduly time-consuming, LASA could have charged me search fees under section 22. It didn't.

13 Third, Brink's requests for information fall within the mandatory exclusionary provisions under PAIA that protect third party information,[10] the disclosure of which would affect a person other than the body from which it is requested.

LASA appears to be referring to counsels' fee-notes among the legal cost records specified in my *first request*.

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9 AA p 189 para 64.
10 Section 34, 36 and 37 of the Act.

To read sections 34, 36 and 37 – also the definition of 'personal information' in section 1 – is to appreciate at a glance that none of these sections have any relevance to counsels' fee-notes for their services against me, and none of them bar their disclosure to me.

LASA was only too happy to give me counsels' fee-notes when it wanted me to pay them, with no such anxious concern to hide so-called 'third party information' from me under 'Sections 34, 36 and 37 of the Act' (per footnote 10).

None of the other records specified in my *first* and *second requests* are hit by sections 34, 36 and 37 either.

> 14 Further, principles of public policy dictate against the misuse of the Act in circumstances where there is a definitive decision on the merits of the dispute between the parties, despite Brink's continued attempts to re-litigate the matter, puts an end to the dispute.

As stated to LASA when I made my requests, my purposes are several and varied, and future intended litigation is only one of them. Only some of the requested records are for this. There's nothing improper in gathering evidence via PAIA for future intended litigation. Contemplated litigation not yet begun is obviously not yet pending, and records requested for it can't, after the litigation is commenced, be hit by section 7.

My complaint referred to the Labour Court under section 50 of the Employment Equity Act has been definitively decided against me, and correctly so: Years after trial I discovered via PAIA litigation in the Magistrate's Court that the Labour Court had been absolutely right in finding that LASA did not unfairly discriminate against me in the manner I complained of.

The real reason that my recruitment was cancelled off the record turned out to be everyday jobs-for-pals – which I very annoyingly frustrated by pursuing my appointment when the recruitment process for the top post went strangely silently dead after my interview.

I intend applying under common law for rescission of judgment against me and for leave to reopen the case on fresh pleadings, now based on simple recruitment corruption uncovered since the trial.

Stated in my answering affidavit in LASA's vexatious application against me (12124/16P), this court has already considered my intentions in this regard, and it reiterated them with approval on the record during LASA's argument in the case.

Using PAIA to gather documentary evidence for future intended litigation is not a 'misuse of the Act' and ignorantly disparaging this perfectly proper purpose in this way doesn't make it so.

And 'principles of public policy dictate against' perjury being allowed to succeed in perverting the true and just determination of legal disputes, which is why the common law has always allowed rescission applications showing a trial court was defrauded, even many years afterwards. Like in the Archer case in England. Like in the Currie Road illegal building case correctly decided by this very court, and wrongly upset by the Supreme Court of Appeal, in which a rescission application looks certain.

15 Brink is also not entitled to the relief sought in paragraphs 2, 4 and 6 of the notice of motion, being extraordinary and without any basis in law. Brink has simply failed to make out a case to sustain such relief.

Quite the contrary, my papers make my case for these orders sought under section 82 very extensively.

16 Finally, no factual basis has been laid for a personal costs order *de bonis* propriis against Mtati. Costs orders *de bonis propriis* are only awarded in exceptional circumstances,[11] and the general rule in relation to public officers is that costs should not be awarded against an officer who carried out his duties mistakenly, but in good faith.[12] We submit that Mtati has acted in accordance with the law

11 *Lushaba v Member of the Executive Council for Health, Gauteng* 2015 (3) SA 616 (GJ) at para 69-70.

12 *Omnia Fertilizer Ltd v Competition Commission; Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd*[2008] ZACT 45 (20 June 2008), with reference to *Coetzeestroom Estate & GM Co v Registrar of Deeds* 1902 TS 216.

and that there is no basis for the relief claimed by Brink. We submit that in the circumstances Brink is not entitled to a costs order.

Quite the contrary, with reference to recent case precedent, including judgments of the Constitutional Court, my papers make my case on the facts for the special costs order I seek very extensively.

The contemptuous blanket refusal of my requests as 'manifestly frivolous and vexatious' (sic) in the teeth of my exceptionally serious *and undisputed* stated purposes, was hardly 'in accordance with the law' and the Constitution, and it clearly excludes 'good faith'.

Now the game is up and LASA's corrupt top officers have been brought to law, and finally, after so many years, face being held to account, it's useless crying that 'Mtati has acted in accordance with the law', also, totally contrariwise, that he 'carried out his duties mistakenly, but in good faith', to escape personal sanctions, supported by judgments of the Constitutional Court, for the contempt repeatedly and persistently shown for the Constitution in concealing documents I've duly requested under PAIA to share with the highest authorities, further revealing massive pervasive systemic corruption, illegal financial maladministration, the commission of serious crimes, and the wholesale breakdown of lawful governance at LASA.

At all events, Mtati didn't actually decide and refuse my requests as I've shown; and the particular manner in which I framed my costs prayer allows for him to name on oath the person(s) lurking behind the scenes who did.

ANTHONY BRINK
APPLICANT

TJB BOKABA SC
T SCOTT
11 March 2019
Counsel for the Respondents
Chambers, Sandton

For easy quotation by copying and pasting, these notes are accessible in a Dropbox folder online at https://goo.gl/KKjMB7.