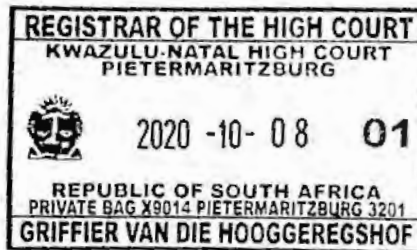


IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE No: 11187/16P

In the matter between:

ANTHONY BRINK



Appellant

and

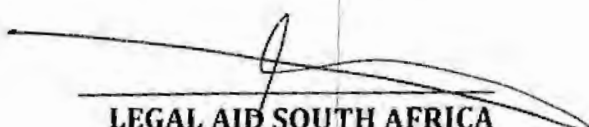
**THE INFORMATION OFFICER
LEGAL AID SOUTH AFRICA**

Respondent

NOTICE OF FILING

**DOCUMENT TO BE FILED: RESPONDENT ANSWERING IN RESPECT OF THE
APPELLANT'S APPLICATION TO WAIVE SECURITY OF COSTS OF APPEAL**

DATED at PIETERMARITZBURG on this the 8 day of **OCTOBER**
2020.


LEGAL AID SOUTH AFRICA
Applicant

LEGAL AID HOUSE
29 DE BEER STREET

BRAAMFONTEIN
PRIVATE BAG X76
BRAAMFONTEIN, 2017
TEL: 011 877 2000
FAX: 011 877 2222
**C/O: PIETERMARITZBURG
LOCAL OFFICE**
187 BERG STREET
PIETERMARITZBURG, 3201
TEL: 033 3942190
REF: ASHOK/S SEKGOTA

TO:
**THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PIETERMARITZBURG**

AND TO:
AND TO: ANTHONY ROBIN BRINK

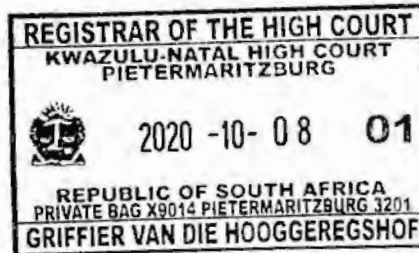
RESPONDENT
23 BAKER ROAD
PRESTBURY
PIETERMARITZBURG
CEL: 083 676 0884

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

CASE NO: 1118/16P

In the matter between:

ANTHONY BRINK



Appellant

and

THE INFORMATION OFFICER
LEGAL AID SOUTH AFRICA

Respondent

RESPONDENT'S ANSWERING AFFIDAVIT IN
RULE 49(13) APPLICATION TO WAIVE SECURITY FOR APPEAL

I, the undersigned,

PATRICK ROBERT HUNDERMARK

do hereby state under oath that:

1 I am a major male and the Chief Legal Executive of Legal Aid South Africa, a national public entity established in terms of section 2 of the Legal Aid

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South Africa Act, 39 of 2014 ("**Legal Aid Act**") with its national head office located at Legal Aid House, 29 De Beer Street, Braamfontein, Johannesburg ("**Legal Aid SA**"). I am duly authorised to depose this affidavit.

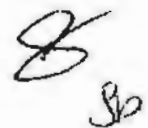
2 I am appointed as the the Deputy Information Officer of Legal Aid in terms of section 17 of the Promotion of Access to Information Act, 2 of 2000 ("**PAIA**"). I am duly authorised to depose to this affidavit on behalf of the respondent.

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. Where I make legal submissions, I do so on the advice of the respondent's legal representatives, which advice I believe to be true and correct.

4 Where I make legal submissions, I do so on the advice of my legal representatives, which advice I believe to be true and correct.

INTRODUCTION

5 The appellant applies in terms of Rule 49(13) of the Uniform Rules of Court to waive his obligation to file security of the respondent's costs for the appeal to the full bench of this Honourable Court under case number 11187/16P.

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6 Apart from objecting to the application as it has not been filed in accordance with the rules of the Court and is very late, and in addition that no condonation application has been made to this Honourable Court, the respondent opposes the application based on the substantive grounds set out below.

7 I structure this affidavit as follows:


7.1 First, I provide a brief background of the matter.

7.2 Second, I deal with the judgment against the appellant.

7.3 Third, I deal with the appeal and the appellant's prospects of success.

7.4 Fourth, I deal with the prejudice to the respondent and its reasons for opposing the application.

7.5 Finally, I respond to the application *ad seriatim*.

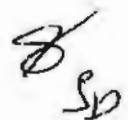

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BACKGROUND

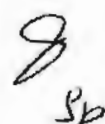
- 8 The appellant has instituted a litany of litigation against the respondent and has gone as far as making defamatory allegations against the respondent's senior executives, the former Chairperson of Legal Aid SA's board, Mlambo JP and some Honourable Judges of the Labour Court.
- 9 The appellant has been unsuccessful in almost all of the matters against the respondent. For the sake of context, I summarise some of the matters below.
- 10 The appellant has, since August 2010, filed sixteen requests for information in terms of PAIA with the appellant requesting more than 270 records from the respondent. Details of all the PAIA requests made by the appellant can be found in the judgement handed down by Madam Justice Poyo-Dlwati which is currently being appealed and in respect of which security for costs is sought by the respondent in this application. A copy of the judgement is annexed hereto as "AA1".
- 11 The requests all relate to the 2009 recruitment process for the senior litigator post in the Pietermaritzburg offices of the respondent, which the appellant interviewed for but the respondent subsequently abandoned the filling of the post due to budgetary constraints.


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- 12 The appellant unsuccessfully challenged the respondent's decision to not fill the post in July 2011 at the Labour Court, Durban. His application to that Court, and subsequent petition to the Labour Appeal Court ("LAC"), for leave to appeal was also dismissed in February 2015.
- 13 In October 2015, the appellant brought an urgent interdict in this Court to prevent the respondent from taxing its bill of costs relating to the Labour Court action, which was dismissed with costs on an attorney client scale. In his application, the appellant attacked the integrity of Waglay JP, one of the LAC judges that dismissed his petition for leave to appeal, claiming, *inter alia*, that Waglay JP had "*issue[d] a counterfeit order*" and had "*intentionally violated [the appellant's] fundamental right to due process*".
- 14 The respondents' costs in the Labour Court matter and the urgent application were taxed in the amounts of R1,493,729.62 and R154,085.03 respectively. The respondent issued a writ of execution for the taxed costs of the Labour Court matter but received a *nulla bana* return of service from the sheriff based on his failure to pay these costs. A copy of the return is attached as "AA2". I will deal with this in further detail later in this affidavit.
- 15 The appellant's PAIA requests form part of a larger, systematic pattern of substantially similar requests that impermissibly sought to re-litigate the appellant's non-appointment to a senior litigator position, which had been finally determined by the Labour Court and the LAC.

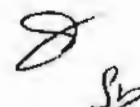


- 16 In 2016 the appellant brought a review application to review and set aside the respondent's decision refusing the appellant's request made in terms of PAIA for access to the respondent's public records, under the above cited case number.
- 17 Judgment in that matter was handed down by Madam Justice Poyo-Dlwati on 6 March 2020. The learned Judge dismissed the application with costs.
- 18 On 27 March 2020 the appellant filed an application for leave to appeal. This application was opposed by the respondent. I will deal with this in further detail later in this affidavit.
- 19 On 11 June 2020, leave to appeal to the full bench of this Honourable Court was granted by Madam Justice Poyo-Dlwati, having heard the application on the papers in light of the then lock-down necessitated by the prevailing COVID-19 pandemic. A copy of the judgment in the application for leave to appeal is attached as "AA3".
- 20 The appellant in the appeal now brings this application to exonerate himself from providing security of costs to the respondent.

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JUDGMENT GRANTED AGAINST THE APPELLANT

- 21 It is important that I start of by discussing the judgement granted against the appellant by Madam Justice Poyo-Dlwati. I will not deal with the details of the judgement, as for the purposes of this application that may be irrelevant; but I will deal with some of the Court's key findings against the appellant which will be used to demonstrate why this application ought to be dismissed.
- 22 The judgement notes and outlines the long history of litigation between the parties and the cause of the many years of litigation; namely the appellant not being appointed to the position of senior litigator at the respondent.
- 23 The learned Judge found that a number of the appellant's submissions were irrelevant and defamatory and had the potential to cause irreparable harm to the integrity and reputation of individuals. Some of the averments made by the appellant have been stated as though they were proven facts, yet no determination had been made about them and they were not proven.
- 24 The Court found that the averments made in the appellant's affidavits were scandalous, vexatious and irrelevant.
- 25 The appellant conceded that the purpose behind the PAIA applications were to allow him to launch a rescission application of the Labour Court's

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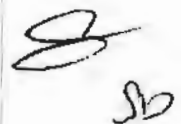
judgement against him. He believed that his claim was fraudulently dismissed due to perjury committed by some officials of the respondent.

26 The Court further found that there was no compelling public interest to be served by the disclosure of such information as sought in the application. It found that the appellant was going on a fishing expedition which was not in the public interest.

27 The Court found that the application had no merit and it accordingly dismissed the application.

28 The Court also held that the scandalous and vexatious averments contained in the appellant's affidavits were to be struck out. I note that despite this finding, the appellant continues to repeat these allegations with impunity, both in his notice of application for leave to appeal, a copy of which is attached marked "AA4", and his founding affidavit in this application. As will be addressed, the learned Judge noted the appellant's use of offensive and defamatory language in her judgment in the application for leave to appeal.

29 I submit that this judgement is telling of the behaviour of, and frivolous litigation brought by, the appellant.

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30 The fact that a sitting Judge has made the above statement shows that the appellant is accustomed to bringing frivolous applications to Court which end up costing the respondent, a public entity with limited resources, unnecessary legal expenses.

LEAVE TO APPEAL AND PROSPECTS OF SUCCESS

31 On 27 March 2020 the appellant filed a voluminous 54 page application for leave to appeal.

32 As I have indicated in the application, appellant attacks the Court and levels wide-sweeping allegations of wrongdoing against it, including accusing the Court of falsifying evidence, displaying manifestly defective legal reasoning and personally attacks the learned Madam Justice Poyo-Diwati accusing her of bias and incompetence.

33 The language employed by the appellant is palpably disrespectful, utterly inappropriate and unbecoming of an officer of the Court. The applicant's language not only brings the administration of justice into disrepute but is defamatory, scandalous and totally unjustified. It is further indicative of how the appellant litigates with impunity and without regard for the dignity and processes of court.

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34 The appellant's application for leave to appeal adopts a shotgun approach taking wholesale issue with the judgment *a quo* and complains about each and every finding of fact and law without specifying why these complaints justify the full bench coming to a different decision.

35 However, the mere listing or description of the Court *a quo*'s findings sought to be impugned and allegations that the Court erred in making such findings is insufficient to set out a case before the Full Bench.

36 At the minimum, the appellant ought to have clearly and succinctly in concise and unambiguous terms set out his case on appeal in accordance with the requirements of the Superior Courts Act 10 of 2013 ("the Act"). The appellant, however, simply failed to do so.

37 It remains uncertain what the appellant's case is in the appeal and the respondent is prejudiced in having to dedicate significant resources in discerning in which respects the judgment *a quo* is incorrect. The respondent cannot be expected to answer each and every one of the unfounded and vague allegations levelled in the appellant's application for leave to appeal.

38 Given that all the respondent seeks at this stage is an order directing the appellant provide security for its costs in the appeal, I only briefly address


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the merits of the appellant's appeal in light of the court *a quo* having granted the appellant leave to appeal.

39 It is my submission that despite leave to appeal being granted, it is highly unlikely that the appellant will be successful in the appeal.

39.1 The appellant's laundry list of complaints against the judgment *a quo* fails to establish why another court would be able to reach another decision.

39.2 In her appeal judgement, Madam Justice Poyo-Dlwati finds that the appeal is centred on the interpretation of the provisions of the PAIA and *if* another court interprets the provisions differently, the appellant would have **reasonable** prospects of success.

39.3 It is respectfully submitted that no other court will interpret the provisions differently. Such will be further argued before this Honourable Court with reference to the respondents' heads of argument before the court *a quo*. In light of the above submissions it is my genuine belief that the appellant has no prospects of success.


40 However, as I have indicated, the inquiry is not whether leave to appeal has been granted but rather the respondent's position if security for its costs

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were not to be granted. The respondent would be placed in the unenviable position of being unable to recover its legal costs even if it is successful in opposing the appeal, and an unsuccessful appeal would not discourage the appellant's endless slew of vexatious, abusive and unjustified litigation against the respondent. I deal with this below.

PREJUDICE SUFFERED BY THE RESPONDENT AND REASONS FOR OPPOSING THIS APPLICATION

- 41 The respondent has been severely prejudiced by the appellant over the years as the respondent has had to defend a number of matters brought against it by the appellant. The appellant has been consistently unsuccessful with his matters against the respondent. The appellant is impecunious and fails to meet the respondent's costs orders against him, instead proliferating further litigation against the respondent.
- 42 Legal Aid SA is an organ of State entrusted with public funds to secure access to justice. It has a Corporate Legal Division consisting of four legal practitioners (two of which are on temporary employment for specific project) and two candidate attorneys. Its main function includes prosecuting litigation by and against it, and to provide legal support to all business units of Legal Aid SA, including six provinces, sixty four Local Offices and sixty four Satellite Offices. In 2019/20 the Corporate Legal Division issued 405 debt collection summons including exchange of

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pleadings, handled 45 other general litigation matters which includes motion proceedings, reviewed 7 policies, provided 91 legal opinions/advice and drafted/vetted 97 contracts.

43 It is clear that the institution has limited capacity, yet the appellant has instituted a plethora of proceedings against the respondent, including extra-judicial legal processes. There is a large degree of similarity between the various different proceedings brought by the appellant. Each and every PAIA request submitted or litigated on relates to the appellant's non-appointment as a senior litigator of Legal Aid SA, which the LAC finally determined against the appellant.

44 Notwithstanding these proceedings being finalised, the appellant has litigated with impunity against the respondent for almost ten years now. He continues to use PAIA requests and litigation to harass Legal Aid SA and force it to commit scarce public resources to dealing with his requests and the litigation brought as a result thereof. Due to the nature of the litigation and the relief sought by the appellant, the respondent has no choice but to oppose and defend these matters. His conduct compels the respondent to unnecessarily divert its already constrained resources to attend to vexatious requests and litigation, compromising the delivery of legal services as mandated to Legal Aid SA.

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45 The respondent has repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation at the hands of the appellant. This impedes the performance of its core public functions and undermines the public interest that the functioning of the courts and the administration of justice should proceed unimpeded by the clog of groundless proceedings.

46 It is submitted that any legal matter which runs for this period comes at a huge cost, a cost which the appellant does not have to bear as he is representing himself. The respondent, a publicly funded entity, must incur legal fees to defend itself from an endless battery of attacks from the appellant. The respondent has suffered severe prejudice due to the vexatious litigation of the appellant.

47 As stated above, the appellant admits that the purpose of the present review application and the subsequent appeal is to allow the appellant to re-litigate the senior litigator appointment which has already been judicially determined. This matter is *res judicata* and therefore there is little or no prospect of success if the matter is brought before the Courts again. This will again cost the respondent. This, I submit, is unfair to the respondent.

48 Moreover, the appellant freely resorts to abusive, defamatory and untoward language in his litigation, and freely criticises sitting Judges. Despite these allegations being objected to and struck out, the appellant

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simply persists in repeating these unproven and defamatory allegations as if they were fact with impunity.

49 The appellant is impecunious and unable to satisfy two cost orders amounting to about R1.6 million but seems determined to proceed with further litigation against the respondent. The appellant, by his own admission, states that he is "*only 'factually insolvent' to the extent that [he] can't pay LASA's legal bills, the big one obtained by fraud on the court*".

50 Due to the *nulla bona* returns, the respondent has been unable to recover the cost orders which were duly taxed by the taxing master. This means to date, the appellant is currently indehted to the respondent.

51 The appellant further states, by his own admission, that he is unemployed and therefore has no income to service his current debt and potential future debts. Indeed, the appellant admits that he has not pursued paid work so that he is "*under zero financial pressure while working virtually full-time on blowing this massive criminal corruption case*". This further demonstrates the appellant's nonchalant attitude towards litigation and the effect that cost orders have against him.

52 In fact, the appellant brought an urgent application seeking to interdict the taxing master from taxing the respondent's costs, which application was



dismissed with costs on an attorney and client scale, these costs are yet to be paid.

53 If this is the *modus operandi* of the appellant, there is no justifiable reason which is fair and equitable as to why the appellant should not provide security.

54 If the appellant is allowed to continue without providing security and becomes unsuccessful on appeal, the respondent will find itself in the same precarious position as before. The appellant will simply be unable to satisfy a cost order which may be granted against him and will continue to pursue vexatious and ill-founded litigation against it freely with impunity.

55 Once again the respondent will find itself facing difficulties as legal fees will have to be paid to legal practitioners from scarce public funds yet the costs will not be recoverable from the appellant. This causes the respondent out of pocket loss for legal fees. This is not fair or equitable especially if the respondent is forced into a situation where it is well known that if the appellant loses, he will simply continue litigating without satisfying a further costs order.

56 The appellant is constantly forcing the respondent to divert much needed resources to attend to the appellant's vexatious litigation, correspondence and PAIA requests, which compromise the respondent's ability to discharge

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its statutory mandate. The respondent is under severe financial and resource constraints as it is, this sort of litigation puts the respondent under further strain.

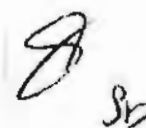
57 The appellant has requested a total of at least 249 records from the respondent relating to the senior litigator position and sought to compel their production in the Eshowe Magistrates' Court. This in itself is excessive and time consuming and demonstrates the appellant's attitude of litigating indefinitely. The five PAIA applications were all:

57.1 before the same court, being the Eshowe Magistrates' Court, before agreement was reached to transfer these matters to this Honourable Court;

57.2 substantially similar in nature and scope; and

57.3 related to the appellant's non-appointment to the senior litigator position, which has been finally determined.

58 Notwithstanding that the five PAIA applications were settled *inter partes*, the appellant persists with prosecuting them. In fact, the appellant set down the applications in the Eshowe Magistrates' Court in which he seeks to subpoena 13 witnesses to testify, the majority being senior managers or former senior managers of Legal Aid SA based at its national office.

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- 59 The settlement agreement entered into by the parties was always entered into in good faith and without an admission of wrongdoing on the part of the respondent in an attempt to quell the endless requests and litigation brought by the appellant. Notwithstanding Legal Aid SA providing the appellant with an extensive amount of documentation it was never enough and the appellant proliferated further litigation by claiming Legal Aid SA failed to comply with the settlement agreement.
- 60 In addition to the Eshowe litigation, there are three review applications that the appellant has brought against the respondent before this Court (including the application that is the subject of this appeal). All three applications relate to the appellant seeking to enforce unjustified and vexatious PAIA requests that the appellant made to Legal Aid SA concerning the appellant's non-appointment as a senior litigator.
- 61 In the circumstances, Legal Aid SA is not prepared to waive its right to security for the costs of the appeal in terms of Rule 49(13). I submit that this Court should similarly decline the appellant's application and the appellant should be required to provide security to Legal Aid SA as is the default position contemplated by Rule 49(13). I attach a notice marked "AA5" in terms of which the respondent will seek security for costs from the appellant in the sum of R300,000.


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AD SERIATIM RESPONSE

- 62 I set out below the answer to the individual averments made by the appellant. In order to avoid undue repetition, everything which I have already said above should be understood as forming an answer to the contentions advanced.
- 63 However, I first note that the appellant 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 members of the judiciary. Yet, no relief is sought against these individuals 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 factual disputes not capable of resolution on the papers in this application.
- 64 The accusations are manifestly scurrilous and scandalous and their introduction is therefore impermissible. The publication of these unfounded allegations may reasonably cause injury to the professional reputation of the parties they are directed at. If these parties were properly cited and joined as parties and relief was claimed against them, they would have been entitled to apply for the striking-out of such offending passages.

72 **Ad Paragraphs 14 to 16**

72.1 Legal Aid SA has received unqualified audit opinions from the Auditor-General for 19 consecutive years.

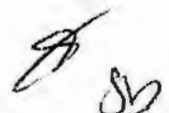
72.2 These allegations merely serve to illustrate that the appellant has resorted to every conceivable avenue in his quest to intimidate and besmirch Legal Aid SA, its officials and anyone the appellant has a gripe against. They are irrelevant, unsubstantiated and vexatious and should be struck out.

73 **Ad Paragraph 17**

73.1 These allegations are denied.

73.2 For reasons as set out above I do not agree with the appellant's averments made in this paragraph.

73.3 It is factually inaccurate to state that by granting leave to appeal, the Judge appreciated that a Full Bench will certainly reverse the decision of the *court a quo*. In her leave to appeal judgement, Madam Justice Poyo-Dlwati states that only if there is a different interpretation of the provisions of the PAIA would the appellant



have a **reasonable** prospect of success. There is never any mention about certainty in the appeal.

73.4 I respectfully submit that these allegations amount to a deliberate attempt to mislead this Court and distract it from the real issue at hand.

74 **Ad Paragraphs 18 and 19**

74.1 The contents of these paragraphs are denied for reasons outlined above in this affidavit.

74.2 This is not an attempt to deny the appellant his right of access to justice however the appellant seeks to access the courts for a matter which has already been dealt with and finalised. He has continued to litigate for ten years and despite being indebted to the respondent, he continues to do so without any worry or distress of the possibility of an adverse cost order being granted against him. The appellant is abusing Court processes.

74.3 The appellant has prematurely litigated matters in the past. Even when a settlement agreement had existed between the parties, he acted *mala fide* and decided to litigate on the very same agreement anyway.



75 **Ad Paragraph 20**

- 75.1 The contents of this paragraph are denied.
- 75.2 The submissions made in this paragraph are unsubstantiated claims which cannot be proved or validated and must therefore be discounted in their entirety and stand to be struck out.
- 75.3 It is the appellant who is constantly bringing legal proceedings against the respondent and for reasons advanced above, the respondent has no choice but to defend the proceedings as the remedy sought by the applicant is simply unsustainable. The respondent is simply not in a position to appoint the appellant as senior litigator or any other senior litigator.

76 **Ad Paragraph 21**

- 76.1 I admit that Legal Aid SA unsuccessfully applied in November 2017 to have the appellant declared a vexatious litigant. The appellant has since instituted three further review applications before this Court (including the application that is the subject of this appeal).


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76.2 The matter was not abandoned but rather a settlement agreement was entered into between the parties. The respondent entered into this agreement in good faith and without an admission of wrongdoing on its part.

76.3 Save as aforesaid, the contents of this paragraph is denied.

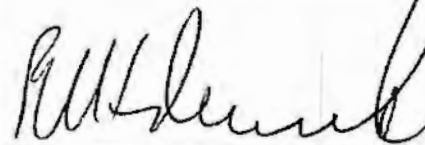
77 **Ad Paragraphs 22 to 23**

77.1 The appellant has presented no facts in support of these allegations. His allegations in this regard are unsubstantiated, scandalous and vexatious and should be struck out.

77.2 Save as aforesaid, these allegations are denied for the reasons as set out above in this affidavit.

78 **Ad Paragraph 24**

I deny that the applicant is entitled to the relief sought and seek an order dismissing the application with costs, including the costs of two counsel.



PATRICK ROBERT HUNDERMARK

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 Pretoria on this the 8th day of **OCTOBER 2020**, 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.

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COMMISSIONER OF OATHS

So

Pretoria on 2020-10-08 at 10:30

[Handwritten signature]

(HANDTEKENING) KOMMISKAARIE VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

Johan Duvens Maronah

VOLLE VOORNAME EN VAN IN DRUKSKRIJF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

77 Dumbare Avenue Pretoria

DESIJDE ADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)

Pretoria

SA

SA POLISIEDIENST

SOUTH AFRICAN POLICE SERVICE

STATION COMMANDER

2020 -10- 08

CLIENT SERVICE CENTRE
PARKVIEW

SOUTH AFRICAN POLICE SERVICE

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'AA4'

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

Case No: 11187/16P

In the matter between:

ANTHONY BRINK

Appellant

and

THE INFORMATION OFFICER

LEGAL AID SOUTH AFRICA

Respondent

NOTICE OF APPEAL

TAKE NOTICE that, leave to appeal to the full bench of this court having been granted on 11 June 2020, the appellant appeals the whole of the judgment of the Honourable Madam Justice Portia Poyo Dlwati in the above matter, delivered on 6 March 2020, on the grounds that it's riddled with pivotal, fundamental, reversible errors; to wit: it repeatedly and persistently falsifies the appellant's evidence and contentions on critical points; falsifies even the original respondent Mtati's evidence and the substituted respondent's contentions; falsifies the undisputed facts; falsifies the record; relies on entirely irrelevant facts; fails to treat and consider crucially relevant facts objectively vouched by supporting documents; relies on incomplete and thereby distorted quotation of provisions of the Promotion of Access to Information Act 2 of 2000 ('PAIA', 'the Act') corrupting its purport; relies on incomplete and thereby distorted paraphrase of provisions of the Act likewise corrupting its purport; misstates, misinterprets, and misapplies the Act; fails to properly apply the Act; states her opinion of the



law, diametrically opposite to what it actually is; imputes to the appellant her own basic confusion as to the law; invents and applies irrelevant tests for constitutional entitlement to access public body records not found in the Act and at odds with it; disregards, contradicts, and deviates from judgments of the Constitutional Court, Supreme Court of Appeal, and other divisions of this court, i.e. fails to observe *stare decisis*; misapplies and relies on wholly irrelevant case authority in a matter involving incomparably dissimilar, fundamentally distinguishable facts; relies on unsound factual and legal premises stacked on each other to arrive at findings that are both wrong in fact and bad in law; makes factual findings that contradict each other; makes legal rulings that contradict each other; makes up facts unsupported and contradicted by the record; makes rulings contradicted by facts she expressly accepted and relied upon; employs broken logic; displays manifestly defective legal reasoning; evinces palpable bias in favour of the original respondent Mtati with whom she served as a fellow member of the Rules Board;¹ wantonly impugns the appellant's integrity on a point where the record, correctly quoted in her judgment elsewhere, contradicts and refutes her false charge against him; repeatedly displays her unfamiliarity with the record, i.e. with the evidence before her; unjustifiably excludes critically relevant evidence from consideration; and generally exhibits her profound incomprehension of and consequent inability to apply first principles of constitutional information law² – and that all these gross errors by the learned judge stand to be corrected by the full bench on appeal as her judgment is set aside; the law is properly applied to the undisputed facts; and the appellant's constitutionally entrenched right to access the public body records he duly requested is vindicated and upheld at last.

¹ The learned judge stated this professional connection with Mtati before argument, stating also that she knew LASA Chief Legal Executive Patrick Hundermark, but discounted this to the appellant as irrelevant and no reason to apprehend prejudice against him in LASA's and her former colleague's favour.

² Fairly described as 'very technical' by the director of the PAIA Unit of the South African Human Rights Commission, for which reason it's 'necessary to ensure that judicial officers had the skills to apply it'. Record, p 208.

Because the appeal ultimately turns on the applicability of the sections of PAIA relied on by then deputy information officer Mtati³ to justify totally refusing the appellant's first and second record requests as amended,⁴ and then the further sections he raised and relied on in his answering affidavit when the appellant sued for access to the record he'd totally refused, plus a novel justification advanced for the first time by LASA's counsel during argument,⁵ all upheld by the learned judge, which is to say the case finally resolves on crisp legal questions, it's convenient to deal with these several justifications directly. Their irrelevance to the records requested by the appellant will be addressed in Part One of this notice, itself divided into two separate treatments of the justifications advanced and upheld for refusing the appellant's amended⁶ first⁷ and then second⁸ requests, in paragraphs 1-91 and paragraphs 92-152. Where not already treated, the learned judge's persistent falsification of the evidence and arguments, and her many other radical factual mistakes misdirecting her judgment, will be identified in Part Two in paragraphs 153-91. Her strike-out ruling and costs order will be treated in Part Three in paragraphs 192-200. All statutory sections mentioned herein are those of PAIA, unless otherwise indicated. All ellipses in quotation are the appellant's for relevance.

³ The original respondent, who was substituted after his resignation from LASA with 'The Information Officer'. Judgment, para 16. As noted in the appellant's replying affidavit, Hundermark refused the appellant's PAIA requests in Mtati's name (Record, pp 215-6, paras 2.4-5); but for the purposes of this appeal, the appellant will maintain the fiction that Mtati refused them.

⁴ Record, pp 35-7; 42-52; and 58-62.

⁵ The 'taxation' story, mentioned in paragraph 27 of the judgment, and addressed below.

⁶ Record, pp 58-62.

⁷ Record, pp 31-41.

⁸ Record, pp 42-55.

PART ONE

THE FIRST REQUEST

1. In her paragraph 16, the learned judge defined the issues for decision as being whether Mtati:⁹

erred in refusing the applicant's requests for information on the basis that:

- (a) the information was requested for criminal or civil proceedings after the commencement of those proceedings;
- (b) the appellant's requests were manifestly frivolous or vexatious;
- (c) the work involved in processing the requests would substantially and unreasonably divert the Legal Aid's resources;
- (d) the requests fell within the exclusionary provisions under the Act that protect third party information, the disclosure of which would affect a person other than the body from which it was requested.

The learned judge's crudely inaccurate and wrong definition of issue (d) will be addressed below.

2. 'The starting point perhaps is the Act',¹⁰ the learned judge began, and stated – implicitly regarding the appellant's first request for (*inter alia*) LASA's legal cost records in relation to (i) the appellant's PAIA litigation in the Magistrate's Court conceded by LASA at court, settled and thereby finalised; (ii) the appellant's subsequent, still pending application to compel LASA's full and proper compliance with its settlement agreement made with him; and (iii) LASA's

⁹ The learned judge incorrectly refers to him as 'the respondent' – which he was originally – but, as noted in footnote 3 above, by the time the case was argued he'd resigned from LASA and been substituted as respondent with 'The Information Officer'. In her paragraph 15, the learned judge wrongly talks of a 'second respondent'; there never was one.

¹⁰ Judgment, para 24.

senior counsel's fee-note for his (alleged) advice to stop the latter application to compel by applying to this court have the appellant declared a vexatious litigant¹¹ – that 'some of the information related to the litigation that was pending in the Eshowe Magistrate's Court.'¹²

3. The learned judge's statement was formally correct but substantially false, inasmuch as it implied that the documents requested were either (a) the subject of the pending litigation in that court – absolutely false, or (b) required for use in that pending litigation – again absolutely false. LASA's cost records for indefensibly opposing the appellant's PAIA litigation (conceded), then indefensibly opposing his application to compel compliance with the settlement agreement (partially conceded, by incremental release of further pledged records), and senior counsel's invoice for allegedly advising LASA as said, were manifestly neither the subject of the pending application to compel nor requested for use in support of it.¹³

4. Stating 'The proceedings in Eshowe Magistrate's Court have commenced and not concluded',¹⁴ the learned judge cited *PFE International*¹⁵ as decided case authority for the basic principle laid down in section 7 of PAIA, headed 'Act not applying to records requested for criminal or civil proceedings after commencement of proceedings'.

5. 'First' as the learned judge put it:

access to information must be sought for civil or criminal proceedings. Second, the request must be made after the commencement of civil proceedings. And third, access to the record

¹¹ Brought in October 2016, argued a year later, and quickly dismissed by this court (Vahed J), without requiring the appellant (the respondent in that case) to argue. Record, pp 209–10, paras 1.1–2.

¹² Judgment, para 24.

¹³ See further paragraph 7 below.

¹⁴ Judgment, para 26.

¹⁵ Judgment, para 27.

or information must be provided for in another law. All three conditions have been met in my view. *In casu*, the discovery procedures and taxation constitute the laws contemplated in section 7 (1) (c) of the Act. I, therefore, agree that the Legal Aid is protected by section 7 (1) (c) in refusing the records.

6. The learned judge erred on multiple counts.

7. None of the cost records and email correspondence specified in the first request as amended were 'sought for civil or criminal proceedings'; and the learned judge herself acknowledged, accepted, and indeed relied on the appellant's quite different express purpose in seeking these records, announced in his request amendment:

I intend referring to the Minister, to the Portfolio Committee, and to the Auditor General the massive "irregular and fruitless and wasteful expenditure"¹⁶ ... that LASA unlawfully incurred with the corrupt object of obstructing my access to LASA's public records.¹⁷

8. As the learned judge put it, accepting this:

He advised the Legal Aid that he required the records so that he could pass them on to the Minister and Deputy Minister of Justice and Constitutional Development, the Portfolio Committee on Justice, the Auditor General and various transparency and media organisations.¹⁸

And again, now positively relying on the appellant's stated intentions:

¹⁶ In the language of section 53 of the Public Finance Management Act 1 of 1999.

¹⁷ Record, pp 58-9.

¹⁸ Judgment, para 3.

The refusal is justified especially in light of the fact that the appellant made it plain in his affidavits that the information sought [i.e. the legal cost records, including counsels' fee-notes] would be widely circulated to various persons and institutions ...¹⁹

9. In short, contrary to the learned judge's wrong 'view' of this, contradicted by her own repeated correct finding as to why the appellant sought access to the cost and email records specified in his first request, which he'd openly announced,²⁰ the first 'condition' for the applicability of section 7 to the appellant's first request manifestly wasn't met, so the request can't be and isn't hit by section 7, and the learned judge was wrong to hold otherwise.

10. In light of the learned judge's obvious fatal radical mistake about this, it seems superfluous to deal with her many others. Nonetheless:

11. The learned judge found "The proceedings in Eshowe Magistrate's Court have commenced and not concluded."²¹ This imprecise statement obscured the fact that the appellant's five PAIA applications brought in that court indeed concluded upon written settlement on 11 February 2016 when at court LASA agreed to hand over all records the appellant had requested and then sued for, or duly certify under section 23 those that don't exist.²²

12. Since no costs order was made against the appellant on settlement of his litigation upon LASA's capitulation at court,²³ 'taxation',²⁴ wasn't available to him to ascertain what LASA spent opposing him to obstruct his access to its records for reporting to the authorities he indicated.

¹⁹ Judgment, para 32.

²⁰ Record, pp 58-9.

²¹ Judgment, para 26.

²² Record, pp 162-4. The final handwritten rider about obtaining the consent of the owner of any requested records, inserted at Hundermark's instance in his ignorance of the definition of 'record' in section 1, is manifestly irrelevant and *pro non scripto*. Record, p 219, para 11.

²³ Record, p 18, para 48; and p 227, para 40.1.2.

²⁴ Judgment, para 27.

13. Nor after LASA conceded the appellant's five PAIA applications at court on 11 February 2016 and the litigation was finalised by settlement, were there any 'discovery procedures'²⁶ available to him to obtain the cost and email records specified in his first request.

14. Even had such 'discovery procedures' been available to access the cost and email records, the documents wouldn't have been compellable because they were in no wise relevant to the appellant's PAIA claims to access the records he'd sued for in his original five PAIA applications or to his application to compel compliance with the settlement agreement; and unlike claims to access public body records under PAIA, to which records the Supreme Court of Appeal has held requesters like the appellant enjoy 'a general and unqualified right',²⁶ it's trite that only documents probably relevant to the issues in civil litigation may properly be requested and compelled if necessary.

15. In sum, contrary to the learned judge's radical mistake about this, '*In casu*, the discovery procedures and taxation'²⁷ were *not* 'laws contemplated in s 7 (1) (c) in refusing the records'.²⁸

16. So to quote the language used in section 7(1)(c), 'the production of or access to that record for the purpose referred to in paragraph (a) [i.e. for use in 'criminal or civil proceedings', after 'commencement'] is [*not*] provided for in any other law.' That is, the learned judge was clearly wrong to have found that 'any other law' was available to the appellant to access the cost and email records specified in his first request.

²⁶ *Ibid*

²⁶ *MEC for Roads and Public Works, EC v Intertrade Two (Pty) Ltd 2006(5) SA 1 (SCA)*, para 8: 'Section 32 of the Constitution confers upon every person a general and unqualified right of access to any information held by the State and its organs.'

²⁷ Judgment, para 27.

²⁸ *Ibid*.

17. It's so that the appellant's subsequent application to compel LASA's full and proper compliance with its constitutional information transparency obligations finally undertaken in its settlement agreement has indeed not been concluded,²⁹ but as the learned judge accepted, and said so, the costs records requested in that regard were not 'sought for civil or criminal proceedings' either; they were sought for use in support of complaints to the Minister, the Portfolio Committee and the Auditor-General about LASA's illegal, corruptly motivated squandering of public revenue on insupportable dilatory defensive litigation to obstruct the appellant's exercise of his fundamental right of access to public records, in service of an extensive corruption cover-up involving, inter alia, the commission of multiple crimes.

18. Not having been concluded, and no costs order having been made yet, 'taxation' obviously wasn't available to the appellant to ascertain what LASA had spent to date on opposing his application to compel full and proper compliance with the settlement agreement in the Magistrate's Court, and the learned judge's different view of the matter was plainly wrong.

19. Contrary to the learned judge's suggestion otherwise, it's obviously no justification recognised and allowed by PAIA for an information officer to respond to a request for costs records with, *You can have all the cost records you want, but not now, only later on, after they've been taxed.* When no costs order against the requester was made.

20. As regards Mtati's reliance on section 45 to refuse the appellant's first request for cost and email records, although the learned judge repeatedly insinuated it in her judgment, and especially at the end, she didn't explicitly uphold Mtati's specific charge in his refusal notice that the appellant made his request with 'frivolous intentions', with 'the deliberate desire to vex and annoy

²⁹ Due to a multiplicity of manoeuvres by LASA to delay it since it was launched in mid-2016. Record, pp 209-13, para 1.

the officials of Legal Aid South Africa' and 'divert... [LASA's] resources',³⁰ in other words to harass LASA.

21. Instead, the learned judge based her finding that the first request was properly refused under section 45(a) because in her view, 'the Legal Aid is protected by s 7(1)(c) in refusing the records'³¹ and so 'In light of the finding that the Legal Aid was protected by the provisions of s 7 (1) (c) of the Act in refusing the request [sic], the requests therefore become frivolous and vexatious in the circumstances.'³²

22. That is, the learned judge squarely and exclusively based her finding that the appellant's first request was 'manifestly frivolous or vexatious' and justifiably refused under section 45(a)³³ on her wrong premise that the Act doesn't apply³⁴ to the requested records because they're 'protected by the provisions of s 7 (1) (c)'.

23. Since section 7 had no application to the appellant's first request, section 45(a) (according to the learned judge's particular legal reasoning) didn't either, more especially in light of the appellant's serious stated intentions in making his first request, which intentions the learned judge accepted and relied on, namely to refer the cost records to the several high authorities mentioned above.

24. The learned judge also upheld Mtati's additional justification under section 45(b) that 'due to its volumes' 'the processing of the information would substantially and unreasonably divert the Legal Aid's resources',³⁵ having regard to Mtati's:

³⁰ Record, pp 64-65.

³¹ Judgment, para 27.

³² Judgment, para 28.

³³ Judgment, para 28.

³⁴ The heading of section 7 reads: 'Act not applying to records requested for criminal or civil proceedings after commencement of proceedings.'

³⁵ Judgment, para 29.

account of the staff component in his department and how its capacity was limited to the delivery mandate of providing legal services to the Legal Aid. In the absence of any explanation to the contrary I must accept Mr Mtati's version that the processing of the information would substantially and unreasonably divert the Legal Aid's resources.³⁶

25. In making this finding, the learned judge inexplicably and irrationally totally disregarded and failed to consider the appellant's contrary 'explanation' indeed provided in his founding³⁷ and replying³⁸ affidavits, in which he comprehensively addressed and refuted this limp justification for Mtati's grossly illegal refusal to comply with LASA's constitutional information transparency obligations -- boiling down to, *We're just too busy over here to worry about respecting the Constitution.*

26. Not only that, the learned judge also falsely claimed such 'explanation to the contrary' by the appellant didn't even exist ('In the absence of'), thus falsifying the record.

27. In sum, the 'detailed' multipart 'explanation to the contrary'³⁹ provided by the appellant, which the learned judge ignored -- indeed falsely positively claimed didn't even exist -- was that: *First*, the requested legal cost records are within easy reach in a case file or two in LASA's corporate services department in the national office,⁴⁰ and Mtati didn't deny it in his answering affidavit. *Second*, LASA had a whole 60 days⁴¹ to locate, copy and furnish the records to

³⁶ Judgment, para 29.

³⁷ Record, p 8, paras 14-15.

³⁸ Record, pp 263-4, paras 153-5.

³⁹ Judgment, para 29.

⁴⁰ The email records, if they exist, can obviously be easily located by running an electronic search of LASA's email server on key search terms.

⁴¹ Extended by Mtati by a further 30 days from the prescribed maximum 30 days. Record, pp 8-9, paras 14-18.

the appellant, i.e. ample time. *Third*, if the 'staff component in [Mtati's] department' was small and 'its capacity' to handle PAIA requests 'was limited', the culpable reason for this (treated in the appellant's replying affidavit) is that LASA dishonoured its recorded undertaking to the PAIA Unit of the South African Human Rights Commission to create dedicated PAIA request handling capacity, after it conceded that it had repeatedly illegally and unconstitutionally refused to comply with the appellant's early PAIA requests in 2010-11 on manifestly spurious shifting grounds, all later abandoned.⁴²

28. Besides ignoring the appellant's extensive evidence rebutting Mtati's feeble insufficient capacity excuse, the learned judge furthermore misdirected herself in failing to consider section 22(2), which would have allowed Mtati to charge the appellant an 'access fee', 'where', in the language of that section, 'searching for records and preparing them for disclosure ... would, in the opinion of the information officer of the body, require more than the hours prescribed for this purpose for requesters'.

29. The learned judge moreover failed to consider that incomparably greater, indeed truly massive 'volumes' of records were held by other divisions of this court to have been duly requested, and that as compared with them the 'volume' of the appellant's requests - both his first and second - was miniscule.⁴³

30. Concerning the appellant's particular request for access to LASA's counsels' invoices for opposing the appellant's PAIA litigation in the Magistrate's Court⁴⁴ (as opposed to the other cost and email records also sought by the appellant)⁴⁵ - also senior counsel's fee-note for his (alleged) opinion delivered that the appellant should be declared a vexatious litigant for returning to court to

⁴² Record, pp 263-4, paras 154-5.

⁴³ Record, pp 224-6, paras 38-39; and pp 229-30, paras 45-6.

⁴⁴ Record, p 36, item 1.

⁴⁵ Record, p 36, items 2-4; p 59, items 5 and 6.

demand full and proper compliance with the settlement agreement,⁴⁶ which record the learned judge neglected to mention in her paragraph 4 claiming to summarise his requests – the learned judge totally misstated Mtati's 'third reason furnished ... for refusing the appellant's requests', namely 'the unreasonable disclosure of personal information about third parties. In this regard, [LASA] relied on the provisions of s 36 and 37 of the Act.'

31. *First*, sections 36 and 37 have nothing whatsoever to do with protecting 'personal information', as section 1 precisely and closely defines it. It's section 34 that protects the 'privacy of a third party who is [a] natural person'.

32. *Second*, (as the transcript of the appellant's oral argument will vouch) the learned judge's claim that 'The appellant submitted ... that those invoices [submitted by counsel for their services in opposing the appellant's PAIA litigation in the Magistrate's Court] now belong to the Legal Aid as they had been presented to it for payment' is absolutely false. Contrary to the learned judge's falsification of his argument, the appellant 'submitted' no such thing, and obviously not, being completely inconsistent with his papers.

33. Quite the contrary, as the appellant pertinently pointed out to her in his replying affidavit,⁴⁷ under the definition of 'record' in section 1 of PAIA, ownership of a record is completely irrelevant to a requester's constitutional entitlement to it; and access to a record requested under section 18 must be granted if it's 'in the possession or under the control of that public ... body' (*per* the definition) 'whether or not it was created by' it.

34. Here, in falsifying the applicant's actual, totally opposite submission, the learned judge projected her own utter confusion, her own very wrong notion,

⁴⁶ Record, p 59, item 5.

⁴⁷ Record, pp 218–21, paras 5–20.

shared with LASA and showing up elsewhere in her judgment, that a public body must own a record for it to be accessible under PAIA.⁴⁸

35. The judge's grave confusion and ignorance of the law about this derives from LASA's misdirection of her on the point, which she avidly followed, and her failure to have read and/or understood the appellant's correction of LASA's basic mistake about this in his replying affidavit.⁴⁹

36. Mixing herself up again, the learned judge proceeded to falsify the appellant's actual point, claiming it to be that 'those [counsels'] invoices now belong to the Legal Aid as they had been presented for payment.'⁵⁰ Again, this is totally at odds with the appellant's case in his papers that ownership of a record is irrelevant under the definition of 'record' in section 1 of PAIA.⁵¹ (And again, the transcript of the appellant's oral argument will vouch that the appellant said no such thing, and that the learned judge's allegation that he did is absolutely false.)

37. Yet again falsifying the appellant's actual point made in his papers, the learned judge claimed that 'some of the invoices had been made available to him during taxation in the Labour Court.' In truth and in fact, quite different from the hopelessly mixed up point falsely imputed to him by the learned judge, the appellant's actual point was that LASA had in the past repeatedly provided him with copies of its counsels' invoices *in other matters*, including for their services in advising LASA in regard to the handling of the appellant's first three PAIA requests of 2010-11, and later in defending his labour claim.⁵²

38. Contrary to the judge's falsification of it, the appellant's actual further point was that one of the former and all the latter invoices had been made available to

⁴⁸ Judgment, para 30.

⁴⁹ Record, p 271, paras 184-5.

⁵⁰ Judgment, para 30.

⁵¹ Record, p 219, para 11.

⁵² Record, p 221, para 18.

the appellant without any cavilling by LASA about whose property they were (anyway irrelevant), and whether they allegedly contained any personal and/or commercial and/or confidential information envisaged by sections 36 and 37.

39. Contrary to the learned judge's falsification of both the appellant's evidence and his oral argument about this, it was never his case that any of the invoices he sued for had already been provided to him. Clearly LASA's counsels' invoices sued for in the instant case are completely different from its counsels' invoices for previous services, including for services prior to and in the labour litigation. The invoices sued for in the instant case are for different services, namely those provided in the Magistrate's Court PAIA litigation.

40. Leaning over backwards to support LASA's suppression of its counsels' fee-notes, the learned judge then contrived to find 'there is no evidence that the requested invoices have been settled by the Legal Aid and thus making them its property'.⁵³ Not even LASA – whose head office lawyers the PAIA Unit of the SAHRC repeatedly found and reported to be completely clueless about PAIA,⁵⁴ as they themselves repeatedly admitted⁵⁵ – made any such obviously fatuous argument.

41. Whether an invoice has been paid by a public body or not is irrelevant to whether it's a 'record' within the definition of section 1, and therefore accessible under section 18. The question of whose 'property' a requested record might be is irrelevant under the said definition, and, besides to the learned judge and to LASA's self-confessed PAIA-ignorant lawyers, it's of zero legal interest. In other words, contrary to the learned judge's very wrong view in this regard, a requested record doesn't have to be a public body's 'property' to be accessible under the Act; it merely has to be 'in its possession or under its control', as all

⁵³ *Ibid.*

⁵⁴ Record, p285, para 239; and p 289, para 250.

⁵⁵ Record, pp 286-8, paras 238-41.

the requested advocates' invoices are. The learned judge evidently failed to read and/or understand the clear definition of 'record' in section 1.

42. The learned judge compounded her fatal muddle here by concluding her paragraph 30 with a stream of incoherent, obfuscatory legal-sounding jargon, mixing herself up yet further in doing so: 'In any event, this information is also protected by s 7 of the Act as it relates to information pertaining to the litigation in the Eshowe Magistrate's Court.'

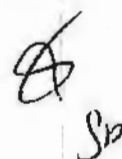
43. *First*, section 7 doesn't 'protect' anything; it ordinarily bars the use at trial of records obtained via PAIA after the commencement of a case instead of via civil and criminal discovery procedures,⁵⁶ *unless the court nevertheless allows their use at trial in the interests of justice.*⁵⁷

44. *Second*, section 7 doesn't contemplate cost vouchers requested to ascertain what public funds LASA irregularly, fruitlessly and wastefully squandered on violating the appellant's constitutional right to public information by indefensibly and insupportably opposing his applications in the Magistrate's Court to compel his access to duly requested but illegally and unconstitutionally refused records, and then finally pledged but still illegally and unconstitutionally withheld records – cost records requested for referral to the Minister, Portfolio Committee and Auditor-General in support of a complaint of irregular, fruitless and wasteful expenditure.

45. *Third*, the fact that requested 'information ... relates to information pertaining to the litigation in the Eshowe Magistrate's Court' in some manner – the cost of the litigation and some email communications about it – is no basis recognised by section 7 or any other section of PAIA for withholding it, and was

⁵⁶ Section 7(1).

⁵⁷ Section 7(2).

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consequently totally irrelevant to the decision of the request for it; and the learned judge was wrong to find otherwise.

46. Nowhere in her judgment does the learned judge specifically deal with the other legal cost vouchers duly requested by the appellant, enumerated in items 2, 3, and 4 of his first request, namely LASA's in-house and local corresponding attorneys' fees, and travel and accommodation expenses.⁵⁸ Or item 5, added in the amendment: senior counsel's invoice for (allegedly) advising LASA to obstruct the appellant's corruption investigation using PAIA by having him declared a vexatious litigant.⁵⁹ Nowhere in her judgment does the learned judge specifically deal with the appellant's constitutional entitlement or otherwise to access these other requested cost records. Or with the email records requested in the amendment.⁶⁰ She focuses only on LASA's counsels' invoices.

47. In her paragraphs 31 and 32, the learned judge clearly wrongly upheld Mtati's additional reliance – in his answering affidavit, not in his refusal notice⁶¹ – on sections 36 ('Mandatory protection of commercial information of third party') and 37 ('Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party') to refuse the appellant access to LASA's counsels' invoices, which she fairly called 'the information'.

48. In her paragraph 31, the learned judge accurately quoted section 36(1), which protects from disclosure various categories of third party commercial information, but she doesn't say what category counsels' invoices fall into, in her learned view, that is whether they contain, 'trade secrets' (*per* subsection (a)), 'other financial, commercial [...] information .. the disclosure of which would be

⁵⁸ Record, p 36.

⁵⁹ Record, p 59, item 5.

⁶⁰ Record, p 59, item 6.

⁶¹ Record, pp 64–5.

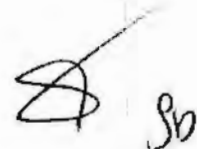
53. The learned judge incomprehensibly and irrationally failed to consider and appreciate the appellant's matter-of-fact point that counsels' invoices are routinely annexed to bills of costs for presentation to the losing party for taxation and payment. All the more incomprehensibly and irrationally, because the learned judge herself demonstrated her knowledge of this in holding (fallaciously) that the appellant was precluded by section 7 from accessing LASA's advocates' invoices, among the other cost records he requested, because he could get hold of them when LASA's bill of costs in the finalised Magistrate's Court PAIA litigation was taxed. In this regard she quoted upheld LASA's counsel's submission – sprung from the bar and featuring nowhere in Mtati's/the respondent's papers or heads of argument – that 'the appellant would in any event see those invoices when the bills of costs have been set down for taxation at the end of the litigation.'⁶³

54. Mtati's claims to privacy, confidentiality and so forth under sections 36 and 37 diametrically contradicted LASA's counsel's novel argument that the appellant wasn't entitled to the fee-notes under PAIA because he could get them later on at taxation; and impressed by this ludicrously contradictory bogus new argument, the learned judge adopted and upheld it, implying that the fee-notes are *not* private, confidential etc within the contemplation of sections 36 and 37, but at the same time diametrically contrarily upholding Mtati's claim that they *are* private, confidential etc within the contemplation of those sections.

55. The learned judge incomprehensibly and irrationally failed to consider the implications for LASA's spurious reliance on 36 the fact that LASA had no compunction about handing over to the appellant other fee-notes in the past, a representative sample collection of which the appellant put up with his replying affidavit⁶⁴ (to which earlier fee-notes, the transcript of the argument will vouch,

⁶³ Judgment, para 23.

⁶⁴ Record, pp 96-7; 363-6; and 367-8.

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he pertinently called the learned judge's attention during argument, citing the several page numbers at which they appear in the indexed papers).

56. After upholding Mtati's belated reliance on section 36 to justify his refusal of the appellant's access to LASA's counsels' fee-notes, the learned judge then upheld his additional belated reliance on section 37 to do so.

57. The learned judge didn't expressly state what subsection of section 37(1) she upheld, that is whether (a) or (b) – the first mandating, and the second allowing, the refusal of 'certain confidential information ... of [a] third party' without that third party's consent. But by paraphrasing section 37(1)(b)(i) – at the same time fatally leaving out and neglecting to consider the all-important qualification stipulated in subsection (ii) – the learned judge left no doubt that she was standing on subsection 37(1)(b) to deny the appellant his constitutional right of access to LASA's counsels' invoices for their services in indefensibly opposing his PAIA litigation in the Magistrate's Court, and thereby prevent him complaining to the Auditor-General, the Justice Minister, and the Justice Portfolio Committee about how much public money LASA (Hundermark) irregularly, fruitlessly and wastefully squandered on dilatory insupportable litigation to obstruct his access to its duly requested records in service of a criminal corruption cover-up.

58. Section 37 provides:

(1) Subject to subsection (2), the information officer of a public body –

...

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party –

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- (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 in the public interest that similar information, or information from the same source, should continue to be supplied.

59. The learned judge didn't say how and why she arrived at her view that an advocate's invoice for payment for his services is a 'record [that] consists of information that was supplied in confidence by a third party.'

60. The reason the learned judge didn't explain this view of hers is that an advocate's fees obviously aren't communicated in his or her invoices 'in confidence'. An advocate's invoice stating his or her charges for his or her services is presented to an attorney for payment like any other commercial or professional invoice – nothing secret about it.

61. But even if the fee-notes requested by the appellant were 'record[s] consist[ing] of information that [were] supplied in confidence', and they clearly aren't, the learned judge didn't deal with the 'public interest' requirement of subsection (ii), namely that that 'it [must be] in the public interest that similar information, or information from the same source, should continue to be supplied.'

62. The reason the learned judge didn't proceed to apply this essential test is because the 'public interest' doesn't come into it; it's purely in an advocate's private financial interest to keep providing LASA with 'similar information' about his fees for helping obstruct a PAIA requester's constitutional right of access to duly requested public records, in service of a criminal cover-up, and for similar or other such professional services.



63. The learned judge was clearly wrong in finding that under 's 37 of the Act' Mtati's 'refusal' of the appellant's request for LASA's counsels' fee-notes 'is justified especially in light of the fact that the appellant made it plain in his affidavits that the information sought [i.e. counsels' fee-notes among the other legal cost records requested] would be widely circulated to various persons and institutions'.⁶⁵

64. The learned judge's finding, in effect, that Mtati's reliance on section 37 was all the more justified by the appellant's open statement of his intention to use the requested records in support of complaints to 'the Minister, the Portfolio Committee and the Auditor General',⁶⁶ and for the information of potentially interested NGOs and investigative journalists, about LASA's abuse of public funds to indefensibly oppose his PAIA litigation, in service of a criminal corruption cover-up, was manifestly wrong and insupportable, and stands to be corrected and reversed on appeal.

65. What a requester says he intends to do with public body records, to which he enjoys 'an unqualified right'⁶⁷ of access, has zero bearing on whether section 37 justifies refusing them or not. Other than to LASA's lawyers⁶⁸ and to the learned judge, this is rudimentary.

66. Furthermore, the broad test invented by the learned judge and wrongly applied by her, namely whether granting access to the invoices would 'prejudice third parties' is not prescribed by section 37 and was irrelevant. The word 'prejudice' appears only in section 37(1)(b)(i), which prescribes *an entirely different test*. Section 37 allows that the 'information officer of a public body- ... (b) may refuse a request for access to a record of the body if the record consists of

⁶⁵ Judgment, para 32.

⁶⁶ Record, p 60, second paragraph.

⁶⁷ Footnote 26.

⁶⁸ Record, pp 191-2, paras 73-5.

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'.

67. Contrary to the learned judge's wrong view on this score, section 37 does not provide that a public body information officer may refuse a request for access to an advocate's fee-notes if complying with it would prejudice him as a third party. Even less if the so-called 'prejudice' the learned judge is concerned to protect LASA's advocates from is the appellant's communication to the Minister, to the Portfolio Committee, to the Auditor-General, to public interest organisations and the media what LASA spent on advocates to indefensibly oppose his PAIA litigation in the Magistrate's Court, and his application to compel compliance with its settlement agreement made with him, after it contemptuously reneged on it.

68. So the learned judge was clearly wrong in finding that sections 36 and 37 'justified' Mtati's 'refusal' of access to LASA's counsels' invoices because 'the appellant had made plain in his affidavits that the information sought would be widely circulated to various persons and institutions mentioned in paragraph 3 above which in my view would prejudice the third parties',⁶⁹ *semble* because 'the information' as to their fees 'was supplied in confidence' and if 'disclos[ed] ... could reasonably be expected to prejudice the future supply of similar information',⁷⁰ and also *semble* because:

Mr Mtati further averred that the disclosure of counsel's fee notes would harm their financial and commercial interests as this would be tantamount to informing other industry participants about their finances. According to Mr Mtati, this would also unjustifiably infringe the counsel's constitutionally protected rights to privacy as

⁶⁹ Judgment, para 32.

⁷⁰ *Ibid.*

their business, trade operations and financials would become public knowledge.⁷¹

69. *First*, the appellant's stated purpose in requesting LASA's counsels' fee-notes – to pass on to the said high authorities and other interested parties – was absolutely irrelevant under section 11(3), which prohibited Mtati from considering it as a criterion in deciding and refusing the request.

70. *Second*, the 'prejudice' test invented and applied by the learned judge is not provided for in the Act and was irrelevant.

71. *Third*, the fee-notes were not supplied in confidence but for payment.

72. *Fourth*, disclosing the invoices would hardly daunt the advocates from continuing to present LASA with their invoices stating their fees for any future legal work done.

73. *Fifth*, Mtati's several general claims about his alleged solicitude for LASA's counsels' personal, commercial and financial interests, recited by the judge, seemingly with approval,⁷² were all quite irrelevant under PAIA to his decision of the appellant's request for access to their fee-notes, and provided no lawful criterion by which to refuse it.

74. *Sixth*, the learned judge's view that sections 36 and 37 justified Mtati's refusal of the appellant's request for access to the invoices – for the reason that the appellant had stated he intended referring them to the Minister, the Portfolio Committee and the Auditor-General, and seemingly also for the various above-quoted privacy and confidentiality reasons Mtati later advanced, which is to say, in the view of the learned judge, the invoices are protected from disclosure on privacy and confidentiality grounds – diametrically contradicts the learned

⁷¹ Judgment, para 11.

⁷² Judgment, paras 8 and 11.

judge's view that, in as many words, the appellant could and should have resorted to 'another law'⁷³ besides PAIA to access the invoices, namely 'discovery procedures and taxation' which 'constitute the laws contemplated in s 7 (1) (c) of the Act.'⁷⁴

75. Obviously if the fee-notes contained private, commercial and/or financial secrets protected by law, they wouldn't have been accessible to the appellant via 'discovery procedures and taxation'. And LASA wouldn't have gladly handed over other fee-notes for previous services rendered LASA for the appellant to pay.⁷⁵

76. In short, the learned judge expressed diametrically contradictory views.

77. In her paragraph 33, the learned judge stated irrelevantly – in relation only to LASA's counsels' invoices, which she held to be hit by both sections 36 and 37, that:

In any event, no case has been made out that this information on third parties would reveal evidence of a substantial contravention of law or an imminent and serious public safety [*sic*: 'safety or environmental risk'] as required by the Act

and specifically by section 46(a) thereof, to which she referred in a footnote.⁷⁶

78. The learned judge's several findings in her paragraph 33 are a legal and factual shambles.

79. *First*, 'information on third parties' is not an expression known to the Act, and the learned judge's use of it was pointless and irrelevant, and speaks to her misconception of discoverable records as the Act defines them.

⁷³ Judgment, para 27.

⁷⁴ *Ibid.*

⁷⁵ Record, pp 304–5, 363–5, and 367–8.

⁷⁶ Judgment, para 33.

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80. *Second*, to arrive at this manifestly wrong finding of hers, the learned judge falsified the language of the Act, and of section 46(a) in particular, and applied an irrelevant test of her own making for entitlement to access the relevant documents, i.e. LASA's counsels' invoices, which test of hers is found nowhere in the Act – not in section 46, nor anywhere else in it.

81. By stating 'In any event' – which is to say *whether or not* LASA counsels' consent was required for LASA's compliance with the appellant's request for access to their invoices, in other words *whether or not* sections 36 and/or 37 applied to them – the learned judge expressed her view that as a prerequisite to entitlement to access the invoices under PAIA the appellant needed to show that they 'would reveal evidence of a substantial contravention of law or an imminent and serious public safety [*sic*: safety or environmental risk].'

82. Contrary to the learned judge's very wrong understanding of this, 'the Act' does not 'require...' that a records requester must 'ma[k]e' 'a case ... that information on third parties would reveal evidence of a substantial contravention of law or an imminent and serious public safety' in order to access LASA's counsels' invoices under the Act.

83. *Third*, the Public Finance Management Act 1 of 1999 prohibits irregular, fruitless and wasteful expenditure,⁷⁷ such as hiring advocates to indefensibly oppose, all the way to the point of argument, the appellant's lawful and constitutional claim to copies of duly requested records, or else the provision of a section 23 affidavit certifying any specified records that don't exist; then totally capitulate to his claim at court at the point of argument; then oppose his application to compel full and proper compliance with the settlement agreement after reneging on it, after which, under sustained legal pressure, further pledged records that were still being withheld in contempt of the agreement are then

⁷⁷ Record, p 222-3, para 26.

disgorged in two successive batches, the key ones, formally promised in the agreement, still determinedly suppressed.

84. So, albeit irrelevant, the learned judge's finding that the appellant made no case that LASA contravened any law in squandering public revenue in this manner in contravention of the PFMA was wrong and insupportable and stands to be set aside. Wasting the state's money like this is certainly against the law.

85. *Fourth*, since none of sections 36, 37 or 45 either mandated or permitted Mtati's refusal to allow the appellant access to LASA's counsel's invoices in LASA's possession or under its control, section 46 had no application whatsoever to the appellant's constitutional claim to access them.

86. In her paragraph 33, the learned judge cited and quoted *Transnet Ltd* for its definition of 'third party, in respect to a public body' as 'any person other than the requester and the public body'. On this basis, the learned judge found, obviously completely fallaciously, 'It is therefore clear why the third party's consent [LASA's counsels' consent] is required for the disclosure of his/her information'.

87. In other words, according to the learned judge's peculiar logic and legal reasoning, because an advocate who has worked for LASA and has charged for his services is a third party (and he sure is), his invoice submitted to LASA for payment is 'his/her information', in the view of the learned judge, and, in her further learned view, 'it is clear' therefore that the advocate must consent to access to it by a PAIA requester before it can be disclosed.

88. But whose 'information' a public record is – i.e. who owns it – is irrelevant under the definition of 'record' by section 1. At odds with this definition of 'record', and evidently unfamiliar with it, the learned judge expressed her view that ownership of a record is relevant to an information officer's decision of a

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PAIA request for access to it; and if an advocate owns a record, namely the fee-note he's submitted for payment (but he suddenly stops owning it the moment it's been paid, in the learned judge's view)⁷⁸ he must consent to its release to a PAIA requester. This is obviously wrong.

89. The learned judge concluded, 'It has also not been shown that there is a compelling public interest to be served by the disclosure of such information.' She didn't specify the section she was referring to, but it's clear from her language that she's paraphrasing some of section 46(b), providing for a case where 'the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.' The relevant 'provision[s]' mentioned in section 46 are 'section ... 36(1), 37(1) ... (b) ... or 45'.

90. Yet again, the learned judge fabricated and applied a test not envisaged by the Act. Her crude paraphrase of section 46(b) produced an irrelevant, general test that she wrongly applied, which is quite different from the specific test provided in that subsection.

91. As said, however, clearly none of sections 36, 37 or 45 had any bearing on the appellant's first request, and none of them justified Mtati's refusal of it, so the question didn't properly arise whether section 46 applied to the request or not.

THE SECOND REQUEST

92. In her paragraphs 25 to 27, the learned judge upheld Mtati's justification founded on section 7 for refusing the appellant's second request for access to the variety of records it specified on the basis that 'it is clear from the appellant's version that he seeks to launch a rescission application in the Labour Court.'

93. Actually, stated and explained in his amendment of his requests, the appellant's second request was directed at:

⁷⁸ Judgment, para 30.

investigating ... (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^{79,80}

and to report this 'recruitment corruption' to 'the Minister and the Portfolio Committee', and the 'innumerable conflicting perjuries in my matter and the many lies told to the Portfolio Committee about it ... to the National Director of Prosecutions, Judicial Service Commission, General Council of the Bar, and Law Society for the Northern Provinces'.⁸¹

94. Unequivocally implying he intended using some of the requested records in future litigation, the appellant added:

I'll be applying for an order that the dismissal be altered to absolution from the instance, enabling me to return to court on fresh pleadings, in which I plead new facts emerged since trial and judgment. I've discovered I was barking up the wrong tree in protesting unfair discrimination, and that the real reason for the off-the-record, unauthorised, illegal abortion of my recruitment now appears to have been illegal cronyism.⁸²

⁷⁹ Record, p 61, last two paragraphs.

⁸⁰ Much of this already exposed, and canvassed in the appellant's founding and replying affidavits.

⁸¹ Record, p 61. Now the Legal Practice Council.

⁸² Record, p 61.

95. The learned judge summed all this up by seizing on and stating only the *last* of the appellant's many stated purposes (itself quite proper under PAIA), disregarding his *immediate* ones: 'The appellant made it clear in his affidavits that he required the information in order to launch an application for rescission of judgment in the Labour Court as he believed that court was defrauded hence it came to the conclusion that it did.'⁸³

96. The learned judge then disregarded section 11(3), asserted by the appellant, 'which [in the learned judge's correct paraphrase] provides that a requester's right of access to information is not affected by any reasons the requester gives for requesting access ...'⁸⁴ I do not agree with the appellant. Section 7 is clear on when the Act does not apply.'⁸⁵

97. Because, as the learned judge correctly puts it, 'Section 7 is clear on when the Act does not apply' (indeed it is), she takes 'the view that it is important to disclose why the record is sought'⁸⁶ – in doing so diametrically contradicting the Constitutional Court's statement in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8, paragraph 44 (*HSP*), precisely in line with section 11(3), that:

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. The other instance is where – in terms of section 9(a)(ii) – any person may access any information that is held by another person and that is required for

⁸³ Judgment, para 25.

⁸⁴ *Ibid.*

⁸⁵ Judgment, para 26.

⁸⁶ Judgment, para 26.

the exercise or protection of any rights. On the issue I [Madlanga J] am discussing now, I need not say anything further on this second instance.

98. The learned judge built on her most basic blunder here – that it's 'important to disclose why the record is sought', contradicting the Constitutional Court, and in the teeth of section 11(3) explicitly stipulating that a requester's reason(s) for seeking access to a public record is/are irrelevant to the decision of the request, whether the reason(s) be stated in the request or inferred by the information officer – by going on to paraphrase the Preamble to PAIA in an incomplete and distorted manner that entirely corrupted its meaning and disclosed the learned judge's ignorance of the fundamentally different constitutional requirements for access to public body- and private body information.

99. The 'preamble to the Act', the learned judge stated, 'specifies the purpose for which the information might be required; namely, for exercise of [sic] protection of any rights and to provide for matters connected therewith.' But here the learned judge unwittingly alluded to the test for entitlement to access *information held by non-state persons*,⁸⁷ whereas all that's required to access *public body information* is to comply with the formalities prescribed by section 18.

100. As the Labour Court has rightly put it:

Unlike access to information from another person, access to information from the state is manifestly not constrained by the requirement that [the] information should be for the exercise or protection of any rights.⁸⁸

101. Very contrary to the learned judge's gross misrepresentation of it here, the Preamble to PAIA states that the Act was enacted:

⁸⁷ Mentioned by the Constitutional Court in footnote 50 of *HSF* quoted above.

⁸⁸ *National Teachers Union v The Superintendent General: Department of Education & Culture, KwaZulu-Natal & Another* LC D38/08 (18/19 February 2008), para 32.

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

– precisely as the learned judge herself correctly quoted it in her paragraph 24, before fouling its purport in her evidently uncomprehending paraphrase just two paragraphs later.

102. The Preamble to the Act is consistent with section 32(1) of the Constitution, with which provision the learned judge demonstrated her unfamiliarity:⁸⁹

32 Access to information

- (1) Everyone has the right of access to–
- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

103. The learned judge's 'view that it is important to have regard to the purposes for which the information is sought', namely in the appellant's case *ultimately* 'to launch a rescission application in the Labour Court'⁹⁰ (among the appellant's many other stated *immediate* purposes, namely to use (some of) the records in support of complaints, including criminal and capital disciplinary complaints, 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'⁹¹ – all of which immediate purposes⁹² the

⁸⁹ As mentioned above, in her paragraph 21 the learned judge expressed her view that the constitutional right to information is guaranteed by section 34 of the Bill of Rights – falsely attributing her mistake to the appellant; in fact, quite differently, it guarantees *the right to approach the courts for the adjudication of legal disputes*.

⁹⁰ Judgment para 26.

⁹¹ Record, p 61.

⁹² Stated by the appellant only to (unsuccessfully) pre-empt and counter LASA's usual waste of time justification under section 46 for persistently refusing his requests since 2013.

learned judge omitted to consider – reveals the learned judge's ignorance of the elementary distinction between the different constitutional bases for entitlement to public body records as opposed to records held by private bodies, and accounts for her consequent disregard for and failure to apply the law set out in section 11(3).

104. The learned judge was very correct in recording that, as the appellant stated in his letter to the information officer amending his requests,⁹³ and in his replying affidavit,⁹⁴ he intends on some future date, once he has obtained all the records he needs and has duly requested, to bring a rescission application to the Labour Court on the grounds that LASA's budgetary insufficiency defence for not hiring him after he was unanimously selected and recommended for LASA's top legal professional post in this province, its Senior Litigator post at Pietermaritzburg, was a brazen fraud on the court, categorically (i) contradicted and exposed by LASA's own financial records disgorged from it via PAIA after the trial, showing that in truth and in fact the long vacant critical post was and remains budgeted by LASA, and funded by the Treasury via the Justice Department; (ii) contradicted by the absence of any supporting record in LASA's national office or elsewhere that the substantially complete Senior Litigator recruitment process had been cancelled for budgetary reasons or for any other; (iii) contradicted by the totally different lies told by National Operations Executive Brian Nair in his 'Report to Board' of November 2011 unrelated to budgetary considerations; and (iv) contradicted by the similar totally different lie CEO Vedalankar told the Justice Portfolio Committee on 9 October 2012.

105. But as said above, *this was only one of the appellant's many stated purposes*, and this ultimate future intention to use some of the requested records in future litigation (anyway an entirely proper purpose for requesting them) cannot and

⁹³ Record, p 61.

⁹⁴ Record, p 243, para 79.

does not somehow negate the appellant's several other *immediate* stated purposes for requesting the records and disqualify him from accessing them for all these various purposes (including for use in support of perjury-, professional strike-off-, lying to Parliament-, and gross judicial misconduct complaints) – which stated purposes were in any event irrelevant under section 11(3) to the decision of his requests made in the exercise of his fundamental 'general and unqualified right'⁹⁵ to public body information, as the Supreme Court of Appeal has put it.

106. Moreover, not all of the appellant's requests were motivated by the same purposes. For instance, the last record specified in the second request⁹⁶ manifestly has nothing to do with the appellant's claim to his appointment to the Pietermaritzburg Senior Litigator post, and was requested for the purpose of supporting a further gross misconduct complaint to the Judicial Conduct Committee ('JCC') of the Judicial Service Commission ('JSC')⁹⁷ – several of which complaints already filed by the appellant are *currently under active investigation at the special instance of the Chief Justice*.⁹⁸ Likewise, having nothing whatsoever to do with the intended rescission application, the appellant requested the Charter of the Board Executive Committee; a record identifying LASA's chief IT officer; records regarding LASA's Regional Operations Executive recruitment procedure; records concerning the Empangeni civil practitioner recruitment; the written appointments of LASA's six incumbent Senior Litigators; etc.⁹⁹

⁹⁵ Footnote 26.

⁹⁶ Record, p 52, item 30.

⁹⁷ Record, p 61, fourth paragraph.

⁹⁸ In response to the appellant's letter to the Chief Justice delivered in December 2019, his office called after hours at 20.33 pm on 18 February 2020 to urgently request copies of the complaints for immediate submission and consideration, ascribing the long delay in disposing of them to the illness, incapacity and death of former JSC secretary Lynette Bios.

⁹⁹ Record, pp 45–52.

107. The learned judge was clearly wrong to seize on *one* of the appellant's *many serious stated purposes* (none of which the learned judge doubted) in seeking access to the records specified in his second request in order to bar his access to them, thus hampering him, to LASA's advantage, in reporting the full extent of the criminal and other serious corruption in the organisation's top ranks, much of it already uncovered and thoroughly canvassed in his affidavits – as well as in his complaints to the JSC's JCC against then Board chairperson Dunstan Mlambo JP, annexed to his supplementary affidavit admitted into the record by this court (Vahed J) in LASA's abortive vexatious application (case 12124/16).¹⁰⁰

108. The learned judge was clearly wrong in holding that section 7 of PAIA justified Mtati's refusal of the appellant's second request. The section had no application to it for the following reasons.

109. As the learned judge correctly put it, the section 'is clear'. It provides:

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

¹⁰⁰ Unsuccessfully brought to prevent the appellant from prosecuting the instant PAIA application and from continuing with his application to enforce the settlement agreement LASA made with him in the Magistrate's Court, in which it undertook to hand over all requested records sued for, or to duly certify under section 23 those that don't exist.

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(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.

110. *First*, as said, not all the requested records were 'requested for the purpose of ... civil proceedings' (*per* section 7(1)(a)). Some requested records concern other recruitment corruption at LASA;¹⁰¹ another one concerns grossly unethical, improper and inappropriate jobs-for-pals corruption in the hiring of a former top LASA officer's mistress to a JCC tribunal appointed to try Hlophe JP on ethics charges, right after she'd resigned from LASA on corruption charges herself, one step ahead of a disciplinary enquiry.¹⁰² All of this is for reporting to the high authorities mentioned in the notice of amendment and identified above. By no stretching and twisting can section 7 have any application to these records, and the judge was clearly wrong to find it did.

111. *Second*, the appellant's proposed rescission application hasn't been brought yet. As the learned judge herself put it very correctly, the appellant 'seeks to launch a rescission application in the Labour Court,'¹⁰³ and 'the appellant made it clear in his affidavits that he required the information in order to launch an application for rescission of judgment in the Labour Court,'¹⁰⁴ thus recognising that the application hasn't yet been launched – being, at this stage, no more than an intention in the appellant's head, an idea floating between his ears.

112. In other words, *there's no lis between the parties as regards the appellant's cause of action that the labour judge was defrauded by LASA's false pleading,*

¹⁰² Record, pp 248–9, paras 95–8.

¹⁰³ Judgment, para 26.

¹⁰⁴ Judgment, para 25.



supported by NOE Nair's blatant perjury supporting it, now easily objectively demonstrated. When the appellant's rescission application is eventually launched one day – after his PAIA litigation has been properly adjudicated and LASA has been judicially compelled to surrender all requested records and certify those that don't exist – the then *live application*, after its launch, will indeed become 'civil proceedings' between the appellant and LASA, as contemplated by section 7(1)(a) and (b). As far as the proposed future rescission application is concerned (as opposed to the several quite different, unrelated pending PAIA litigations), there are no 'civil proceedings' pending yet; they haven't yet 'commence[d]'; and the records requests weren't made 'after' such 'commencement', yet to occur (*per* section 7(1)(b)).

113. *Third*, no 'other law' 'provided for' 'the production of or access to' any of the requested records (*per* section 7(1)(c)), which the appellant stated he intends using in a future rescission application, after using some of them in support of complaints to the several high authorities mentioned in his notice of amendment.

114. For a start, the appellant intends bringing *an application*, as he must, comprising a notice of motion and a founding affidavit with supporting documents annexed to it. Proceedings in the Labour Court are governed by the Labour Court Rules, which differ in several respects from the Uniform Rules; and 'the discovery procedures'¹⁰⁵ they provide are stipulated in rule 4 governing the 'Pre-trial conference by parties' to be held within ten days of the delivery of a response to a statement of claim,¹⁰⁶ at which 'the parties must attempt to reach consensus on ... discovery and the exchange of documents'.¹⁰⁷

¹⁰⁵ Judgment, para 27.

¹⁰⁶ Equivalent to a plea to particulars of claim in a High Court action, called a 'referral' in the Labour Court.

¹⁰⁷ Rule 4(b)(vi).

115. These 'discovery procedures'¹⁰⁸ to be followed immediately after the close of pleadings in the Labour Court in 'referral' proceedings (*actions*) obviously have zero bearing on *an application* still to be prepared and launched there by being served on LASA after being issued by the registrar.

116. The *PFE International* case cited by the learned judge¹⁰⁹ concerned the availability of the subpoena provisions of rule 28 of the Uniform Rules, and particularly the use of a subpoena *duces tecum* to obtain documents from the other party to litigation pending between them. But *PFE International* was perfectly irrelevant to the decision of instant case, because unlike in the former, in which legal proceedings had commenced, the appellant's intended rescission application has not. In other words, when the appellant made his second PAIA request in August 2016, there was no live case between the appellant and LASA in the Labour Court, and there still isn't.

117. The appellant's finalised (wrongly founded, correctly dismissed) unfair discrimination claim in which he sued for his appointment is not the same as, and is quite distinct from, his intended claim for rescission of that judgment based upon fraud perpetrated on the court, as categorically and irrefragably proved by subsequently disgorged and otherwise surfaced documents. The appellant's causes of action in the two litigations – the one past and finally decided; the other in the future, still to be commenced, let alone decided – are completely different.

118. *Fourth*, as is 'clear' from a plain reading of section 7, it ordinarily, *but not absolutely*, bars a party to *pending* litigation from adducing into the evidence a record obtained via PAIA where it could and should have been obtained under the provisions of any other law – *unless under subsection 2 the court nevertheless allows the admission of that record in the interest of justice.*

¹⁰⁸ Judgment, para 27.

¹⁰⁹ *Ibid.*

119. That is, section 7(2) explicitly vests in the court the discretion to admit into the evidence a record obtained from an information officer via PAIA after the commencement of such legal proceedings. The learned judge very mistakenly overlooked this (despite being pertinently called to her attention by the appellant during argument, as the transcript will vouch).

120. Right after stating very correctly that the appellant 'seeks to launch a rescission application', and 'made it clear in his affidavits that he required the information in order to launch an application for rescission of judgment in the Labour Court', which is to say the case is still to commence, the learned judge doubled over to apply section 7 to the instant case, irrespective of this, by diametrically contradicting herself in incoherently, incomprehensibly and irrationally finding the reverse: 'Those proceedings had commenced and a decision reached hence a rescission application.'¹¹⁰

121. On a charitable reading, this syntactical jumble reveals the learned judge's failure to have appreciated and understood that after '*the proceedings*' in the Labour Court '*had commenced*' upon service on LASA of the appellant's statement of claim against it, and LASA had delivered its response, and the appellant's unfair discrimination claim was tried, the Labour Court's¹¹¹ '*decision*' to dismiss the claim finally settled the dispute between them¹¹² – all the more

¹¹⁰ Judgment, para 26.

¹¹¹ Years after the trial, PAIA litigation instituted by the appellant in the Magistrate's Court disgorged a critical all-explanatory key record showing that the reason the appellant wasn't appointed had nothing to do with unfair discrimination, as the appellant had wrongly surmised on the then available evidence; rather it was simple everyday jobs-for-pals cronyism by LASA Board chairperson Mlambo JP in favour of his long-time judicial colleague Ngcamu AJ (as he used to be), repeatedly appointed as an acting judge of that court over a period of about six years prior to his interview for the post that the appellant was recommended for.

¹¹² Correctly, to the extent that unfair discrimination, on which the appellant based his claim, was not the reason the appellant wasn't appointed.

after Labour Appeal Court dismissed the appellant's petition for leave to appeal.¹¹³ Upon that event – now many years ago – the case became *res judicata*.

122. Indeed, as the learned judge very correctly stated, the appellant's 'non-appointment to the senior litigator post ... had been finally determined by both the Labour and Labour Appeal Courts'¹¹⁴ and 'the Labour and Labour Appeal Courts ... both found against him.'¹¹⁵ Exactly.

123. There's consequently no pending *lis* between the appellant and LASA as regards the appellant's unfair discrimination claim to his appointment to the top post for which he was duly selected and recommended a decade ago, because it's been finally settled by judgment. There's no rescission application pending between the appellant and LASA as regards his claim that the Labour Court was defrauded by perjury, objectively demonstrable in light of financial records forced from LASA after the case was finalised, and other records since surfaced, because the rescission papers have yet to be drawn by the appellant and the 'commencement of such ... civil proceedings'¹¹⁶ by service on LASA has yet to take place. Which the learned judge herself recognised, as evinced by her correct note that the appellant 'seeks to launch a rescission application'.

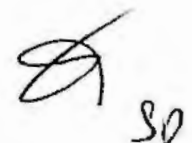
124. Again straining to misapply section 7 to justify rejecting the appellant's claim to his constitutional entitlement to access LASA's records for which he'd sued, the learned judge concluded her paragraph 26 with the statement that 'The proceedings in [the] Eshowe Magistrate's Court have commenced and have not concluded.'

¹¹³ Corruptly perverted by LASA through improper influence in the form of a note slipped to the judge and inadvertently left in the file, disparaging the appellant and lying about his case at trial and on appeal. Supported by a copy of the note, the appellant's gross misconduct complaint about this is currently pending before the JCC of the JSC (Record, p 212, para 1.11); and, as said above, the Chief Justice recently requested a copy of the complaint.

¹¹⁴ Judgment, para 7.

¹¹⁵ Judgment, para 2.

¹¹⁶ Per section 7(1)(c).

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125. *First*, contrary to the learned judge's half-true statement about this,¹¹⁷ 'The proceedings in [the] Eshowe Magistrate's Court have' indeed 'concluded', having 'concluded' on 11 February 2016, when at the point of argument in court LASA capitulated to the appellant's five PAIA applications set down together that day, abandoned all its justifications and defences, and in a total surrender treaty handed into court for the record undertook to turn over all requested documents the appellant had sued for, or to duly certify under section 23 any that don't exist.¹¹⁸

126. *Second*, the appellant's subsequent further application brought to compel full and proper compliance with this settlement agreement – in which the papers are complete, and all affidavits and their supporting documents have been filed – has no bearing whatsoever on his constitutional entitlement to access the completely different records specified in his two record requests for which he sued in this court.

127. *Third*, none of the records sued for in this court have any relevance to the appellant's pending application to compel full and proper compliance with the settlement agreement LASA made with him in the Magistrate's Court.

128. The PAIA litigation in the Magistrate's Court is no more relevant to the instant case than the appellant's other two PAIA applications pending in this court, which the learned judge could also have mentioned equally irrelevantly, but didn't.

129. The learned judge's reference to the appellant's PAIA litigation in the Magistrate's Court is utterly irrelevant, and her reliance on it in order to manufacture a basis under section 7 to dismiss the appellant's claim to the

¹¹⁷ See next paragraph

¹¹⁸ Record, pp 162–4.

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documents he sued for in the instant case before her is both specious and manifestly spurious.

130. Accordingly the learned judge was wrong in upholding Mtati's reliance on section 7 (in his answering affidavit, not in his refusal notice) to refuse the appellant's second request as amended, because the appellant's stated intention, among his several other stated intentions, to use some of the requested records in proposed *future* legal proceedings was irrelevant – a *future intended* application for rescission of judgment in the Labour Court on the basis that financial documents disgorged from LASA via PAIA subsequent to the dismissal of his wrongly founded, correctly dismissed unfair discrimination action¹¹⁹ prove that LASA's budgetary insufficiency defence for not appointing the appellant following his unanimous recommendation by the selection panel was a fraud on the court, and that, as other documents show, Senior Litigator recruitment at LASA is both procedurally and ethically corrupt.¹²⁰

131. As explained in detail above, the learned judge was clearly wrong to find, 'In light of the finding that the Legal Aid was protected by the provisions of s 7 (1) (c) of the Act in refusing the request[s], the requests therefore become frivolous and vexatious in the circumstances.'¹²¹ More especially in view of the appellant's many gravely serious immediate stated purposes in requesting the documents (anyway irrelevant to the decision of the request under section 11(3)).

132. And as also noted above, although she repeatedly implied it elsewhere in her judgment, especially at the end, the learned judge didn't uphold Mtati's charge levelled in his refusal notice that the appellant made his second request with 'frivolous intentions', 'the deliberate desire to vex and annoy the officials of

¹¹⁹ The selection panel's full uncensored recommendation report released after trial and judgment show that unfair discrimination was not the reason the appellant wasn't appointed; it was everyday jobs-for-pals cronyism. Record, p 27, para 79.

¹²⁰ Record, pp 241-3, para 78.4; and pp 277-80, paras 209-13.

¹²¹ Judgment, para 28.

Legal Aid South Africa' and 'divert... [LASA's] resources', in other words to unlawfully harass LASA and waste its time.

133. Not only are the appellant's requests *ipso facto* 'frivolous and vexatious', in the learned judge's view, because, in the learned judge's view, they're disqualified by section 7 and therefore hit by section 45(a), she found in addition, as a separate and independent justification advanced by Mtati for refusing the appellant access to any of the records he requested, that also 'the processing of the information would substantially and unreasonably divert the Legal Aid's resources' 'due to its volumes' – the justification envisaged by section 45(b). 'Mr Mtati explained [this] in great detail', the learned judge found, mentioning 'the staff component in his department and how its capacity was limited to the service delivery mandate of providing legal services to the Legal Aid.'

134. As said, the learned judge entirely failed to consider the appellant's answer rebutting 'in great detail' this risibly lame excuse for not providing the requested records in compliance with LASA's constitutional information transparency obligations, summed up above – advanced also to justify his refusal to provide the further records specified in a final request regarding LASA's Senior Litigator posts which Mtati and the appellant expressly agreed in the settlement made at the Magistrate's Court.¹²²

135. The learned judge's wholly unfounded, seriously prejudicial, thumb-sucked statement, 'It seems to me that the appellant has already received tons of information from the Legal Aid' is wholly unsupported by the evidence and seriously biased her decision to reject the appellant's claim.

136. In truth and in fact, the history of LASA's persistent illegal and unconstitutional refusals of the appellant's PAIA requests since 2010 on ever shifting grounds, invariably abandoned under SAHRC and legal pressure – a

¹²² Record, p 18–19, para 49.

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matter of early concern to the SAHRC's PAIA Unit, and cause for several interventions – is set out in the appellant's comprehensive 'Special Report' to the PAIA Unit of the South African Human Rights Commission in late 2016 (annexure 'F' to the founding affidavit), which the learned judge obliging struck out at LASA's motion, thus closing her eyes to this crucial, appalling background evidence in support of the appellant's claims for the special orders he sought.

137. Even had it been true that 'the appellant has already received tons of information from the Legal Aid', this would in any event have been irrelevant. The learned judge's false statement about this reveals her disregard for, her failure to consider and follow multiple precedent reported cases cited and quoted by the appellant in his replying affidavit, in which *tremendous numbers of prior record requests* and *massive volumes of public records previously supplied* were held by other divisions of this court to be irrelevant to a requester's constitutional right of access to more.¹²³

138. The learned judge failed to consider that Mtati agreed to the filing of a final request by the appellant in the matter of Senior Litigators,¹²⁴ following LASA's total capitulation on the morning of argument to the appellant's first five PAIA applications brought in the Magistrate's Court, and that in the circumstances, his refusal was, in the language of the Supreme Court of Appeal in *Claase*,¹²⁵ itself 'intentionally vexatious'.

139. The learned judge's assertion of her manifestly wrong and insupportable impression¹²⁶ that 'the tons of information' allegedly (by her) given to the appellant have revealed no evidence of 'wrong doing by or on behalf of the Legal

¹²³ Footnote 43.

¹²⁴ Footnote 122.

¹²⁵ *Claase v Information Officer of South African Airways* [2006] SCA 163 (RSA), para 11.

¹²⁶ Judgment, para 34: 'It seems to me'.

Aid' is flatly contradicted and refuted by the evidence set before her in the appellant's extensive founding and replying affidavits and their annexures.

140. Quite the contrary, on any impartial, open-minded assessment, the evidence and supporting documents placed before the learned judge show several of LASA's top past and current head office staff to be profoundly corrupt; that proper corporate governance and the rule of law have seriously broken down in the organisation's top ranks; that Senior Litigator recruitment is generally corrupt; that the Justice Portfolio Committee has been told contradictory criminal lies to cover this up; and that one of LASA's top officers even resorted to defeating the ends of justice (in the manner in which Hlophe JP currently stands charged by the Constitutional Court) by improperly influencing the Judge President of the Labour Appeal Court to dismiss the appellant's petition for leave to appeal the dismissal of his labour claim, by dint of a poisonously prejudicial note slipped directly to him under the registrar's counter or behind his back.¹²⁷ Such is the extraordinarily corrupt 'wrong doing' at LASA already exposed and canvassed in the appellant's affidavits, to which the learned judge amazingly turned a blind eye.

141. The learned judge's further false impression,¹²⁸ stated with a shocking deliberate disregard for the abundant evidence before her, that the appellant 'is still hopeful that he might find some wrong doing by or on behalf of the Legal Aid' reveals her failure to have read and comprehended the appellant's detailed evidence on affidavit about the extreme corruption he'd uncovered at LASA, including criminal corruption¹²⁹ and the perversion of judicial proceedings,¹³⁰ supported by masses of documents vouching it.

¹²⁷ Record, p 29, para 86.

¹²⁸ Judgment, para 34: 'It seems to me'.

¹²⁹ Record, pp 14-15, para 38.

¹³⁰ Record, p 29, para 86.

142. Again, clearly wrongly disregarding the law laid down in section 11(3) – a requester's reason(s) for seeking access to a public body record, whether stated or inferred, is irrelevant to his or her constitutional entitlement to access it – and further contradicting the Constitutional Court's statement of this principle in *HSF*:

PAIA affords any person the right of access to any information held by the state... 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.

– the learned judge illegitimately had regard to what she stated she believed to be the appellant's purpose in making his second request, namely to 'find some wrong doing by or on behalf of the Legal Aid', and on this further wrong basis upheld Mtati's refusal to comply with it.

143. The learned judge's view of what she reckoned the appellant's hopes are is completely irrelevant to his 'general and unqualified'¹³¹ constitutional entitlement to access the public body records he requested, and her irrelevant view, irreconcilable with the evidence, radically misdirected her judgment.

144. Finally, the learned judge falsely and perversely mischaracterised and disparaged the appellant's records requests before her as 'a fishing expedition which cannot be said to be in the public interest.' And because of this, 'I am therefore unable to find that the Legal Aid or Mr Mtati erred in any way in refusing the appellant's requests for records.'¹³²

145. Apropos of the first request: How the appellant's request for the legal cost vouchers of LASA's abandoned opposition to his PAIA applications in the

¹³¹ Footnote 26.

¹³² Judgment, para 34.

Magistrate's Court and then its opposed but incremental, partial concession of his application to enforce the settlement agreement is 'a fishing expedition' the learned judge didn't say, because indeed she can't. The learned judge's pejorative characterisation of this first request was patently false.

146. Apropos of the second request: Whereas probable relevance to the issues in pending litigation is the test for the compellability of requested documents during discovery proceedings in civil actions, the Supreme Court of Appeal has confirmed, in radical contradistinction, that a requester seeking access to public body records under PAIA has a 'general and unqualified right'¹³³ of access to them.

147. In other words, even the use of PAIA to go on 'a fishing expedition' for (further) evidence of malfeasance, corruption, and criminality (including perjury) by LASA's top officers is entirely proper, and a perfectly legitimate exercise of the record requester's fundamental right to public body information.

148. Indeed, as the Constitutional Court has held, even 'a busybody'¹³⁴ wanting public body information 'just for the sake of it'¹³⁵ is constitutionally entitled to fish for it with PAIA.

149. The learned judge found that the appellant's 'fishing expedition' as she falsely and derisively aspersed it 'cannot be said to be in the public interest'. But besides to the learned judge, it's elementary that a request for access to public body records needn't be made 'in the public interest' for it to be enforceable.

150. Put another way, it's no justification recognised by PAIA for a public body information officer to refuse a records request on the basis that the requester

¹³³ Footnote 26.

¹³⁴ *HSP*, para 44.

¹³⁵ *Ibid.*

seems to be on a fishing expedition for documentary evidence of wrong-doing, and that he hasn't shown his fishing expedition to be in the public interest.

151. Stacking these irrelevancies one on top of the other – namely that in her view the appellant's requests are just 'a fishing expedition' in the hope of finding some 'wrong doing' at LASA, so compliance with them 'cannot be said to be in the public interest' – the learned judge is 'therefore unable to find that the Legal Aid or Mr Mtati erred in any way in refusing the appellant's requests for records.'

152. Never even part of Mtati's or the substituted respondent's case, these arbitrary considerations thought up and relied on by the learned judge to support Mtati's refusal to grant the appellant's requests were completely irrelevant under PAIA and were wrong.

PART TWO

153. In stating in her opening 'background'¹³⁶ paragraph 2 that 'The appellant was recommended for appointment [to the Senior Litigator post at Pietermaritzburg], but due to budgetary constraints the recruitment process was aborted', the learned judge deplorably failed to consider the mountain of evidence set before her in the appellant's affidavits, contradicting, refuting and exposing this original cover-story as an obvious brazen lie – later abandoned and substituted with completely different, mutually exclusive and destructive cover-stories advanced by NOE Nair in a written report to LASA's Board and then by CEO Vidhu Vedalankar to the Justice Portfolio Committee during a minuted oral presentation at which she was taxed by the Committee about the discrepancy between salary budget provided and post occupancy – which abandoned financial insufficiency cover-story was then revived in the courts, including in this court. This profusion of evidence presented to the learned judge included the following:

¹³⁶ The learned judge's word in her paragraph 3.

153.1. NOE Nair repeatedly confirmed on oath that no record whatsoever exists to show that any such decision was ever taken by any competent authority at LASA or by anyone at all;¹³⁷ and since, in the language of the Supreme Court of Appeal, an organ of state 'does not operate like a glorified spaza shop',¹³⁸ and both the Public Finance Management Act 1 of 1999 and LASA's Code of Conduct and Ethics require that records be kept of such major financial decisions, the learned judge was wrong to take at his word her former colleague Mtati's unsupported, objectively contradicted, quite obviously false allegation that LASA hadn't received the budget to complete its Senior Litigator recruitment by appointing the appellant to the long vacant post, thrice advertised, twice interviewed for (rather than then Board chairperson Dunstan Mlambo JP's erstwhile judicial colleague Mzochithwayo Ngcamu AJ (as he used to be), the appellant's rival applicant also interviewed for the post, with whom Mlambo JP had served for about six years as an acting judge of the Labour Court).¹³⁹

153.2. Contradicting and refuting the central lie that LASA lacked the budget to fill the still vacant, critical, top-level post, LASA's own financial records show that at all times it has always been, and continues to be, budgeted by LASA, voted by the National Assembly, and funded by the Treasury via the Third Party Funds Directorate of the Department of Justice.¹⁴⁰

153.3. LASA reported a massive unspent budgetary surplus in 2010/11,¹⁴¹ the financial year in which it claimed it couldn't afford to appoint the appellant to the top post for which he was duly and unanimously selected and recommended.

¹³⁷ Record, p 237, para 72.1.

¹³⁸ 'State grilled over "secret" Zimbabwe report', *Mail & Guardian*, 11 January 2011.

¹³⁹ So the uncensored recommendation report disclosed, after being persistently refused and ultimately sued for and then surrendered, long after the appellant's labour case, wrongly based on unfair discrimination, had been dismissed. The report shows that Ngcamu was disqualified and rejected by the selection panel for lack of Right of Appearance and consequently no litigation experience in the High Court to qualify him for appointment as a Senior Litigator. Record, pp 258-9, paras 139-40.

¹⁴⁰ Record, p 14, para 37; and p 237, para 72.2.

¹⁴¹ Record, p 237, para 72.3.

154. The learned judge's uncritical restatement of the budgetary insufficiency lie is highly relevant to the rest of her judgment, because it had the gravely prejudicial effect of depicting the appellant as a vexatious, disgruntled sore loser, rather than a whistleblower on the most serious imaginable criminal and other corruption at LASA, *including judicial corruption*.¹⁴²

155. And in uncritically restating the budgetary insufficiency lie, the learned judge looked away, after the manner of Judge Seriti at the Arms Commission, from the multitude of facts set out in the appellant's extensive affidavits, vouched by supporting documents, categorically exposing and refuting it.

156. Consistently with her Seriti approach to the case, the learned judge very incorrectly and prejudicially referred to a 'decision' to 'abort...' 'the recruitment process' following the appellant's unanimous recommendation by the selection panel, disregarding the potent fact made by the appellant in his papers that, as NOE and deputy information officer Nair repeatedly confirmed on oath on affidavit, and again under oath on his feet in the Labour Court, *LASA has no record whatsoever of any such alleged 'decision' ever having been taken by any competent authority at LASA or by anyone at all*.¹⁴³

157. The learned judge correctly stated that the appellant unsuccessfully sued for his appointment in the Labour Court, but neglected to mention the appellant's evidence (a) that he incorrectly sued on the grounds of unfair discrimination, kept ignorant of his rival applicant Ncgamu's long collegial relationship with Mlambo JP as a fellow judge, recorded on the repeatedly requested but persistently furtively suppressed recommendation report made by the selection panel, the whole of which was only released after trial and judgment in the labour case after it had been sued for under section 78 and was

¹⁴² Record, pp 15-16, paras 39-41.

¹⁴³ Record, pp 13-14, para 36.

about to be disgorged by court order;¹⁴⁴ and (b) that LASA perverted the appellant's petition for leave to appeal the dismissal of his labour action with a poisonously defamatory and prejudicial note slipped to the appeal judge (inadvertently left in the court file) – a matter currently pending before the JCC's JCC.¹⁴⁶

158. These things should have put the learned judge on notice that she had to do with an extremely serious case of public sector corruption, *including corruption of the judiciary*. Instead she elected to look away from it.

159. In her paragraph 3, the learned judge falsified the appellant's evidence in stating that the 'enquiry' he wanted 'undertaken on massive irregular, fruitless and wasteful expenditure' '[a]ccording to him ... would lead to the unveiling of corruption and other criminal activities undertaken at the Legal Aid's various offices.' This is outright fabrication by the learned judge. Clearly the cost records specified in the first request had no bearing on and couldn't 'unveil... corruption and other criminal activities', unlike the very different records specified in the second request. Nor did the appellant ever claim that there was corruption and criminality in LASA's 'various offices', only in its national office – already established, and canvassed extensively in his papers.

160. The learned judge misstated s 38(1)(c)(ii) as the relevant section of the PFMA concerning irregular, fruitless and wasteful expenditure by public bodies like LASA. Correctly stated in the appellant's replying affidavit, which the learned judge evidently didn't read through, it's section 53.¹⁴⁶

¹⁴⁴ Record, p 234, para 64. On a point of correction: my rival and the Board chairperson had been judicial colleagues during the years mentioned; as the appellant discovered only recently, Mlambo JP was elevated to Judge President of the Labour and Labour Appeal Court in March 2010.

¹⁴⁵ As said above, the Office of the Chief Justice telephoned after hours on 16 February 2020 urgently requesting a copy of the complaint.

¹⁴⁶ Record, p 238, para 72.5.

161. In her paragraph 4, the learned judge mangled and falsified the appellant's stated purposes in making his requests. In claiming that the appellant 'averred in his letter [amending his two requests] that all this evidence would be handed over to the National Prosecuting Authority (NPA) for the prosecution of the individuals involved', the learned judge falsified the appellant's actual stated intentions in seeking in his first request all cost vouchers for the Magistrate's Court litigation, namely to use in support of a complaint to the Auditor-General of irregular and fruitless and wasteful expenditure, and to refer this also to the Justice Minister and Justice Portfolio Committee; and she misleadingly omitted the appellant's several other intentions as regards the records specified in his second request.

162. The learned judge's crude and grossly inaccurate summation in her paragraph 4 of the appellant's two record requests as amended before her bears little relation to the actual contents of his requests, and her false description prejudiced her decision to uphold Mtati's refusal to comply with the second request, which she especially egregiously misdescribed.

163. In her paragraph 5, otherwise quite correct, the learned judge falsified the appellant's case by claiming that he 'averred ... that it did not matter that he already had some of the information.' In truth and in fact, contrary to the learned judge's absolutely false claim about this, as his papers show (and the transcript of the argument will vouch), the appellant made no such 'aver[ment]'. It ought to have been obvious to the learned judge that the appellant would hardly have requested and sued for records he already possessed, more especially considering the appellant's mindful deletion in his amendment of a couple of records from the list annexed to his second request that he'd since obtained.¹⁴⁷

¹⁴⁷ Record, p 58, part 1: 'Reduction of ...'.

164. The learned judge's grossly deficient, wholly unrepresentative summary of the appellant's extensive case omitted the dense aggravating background to the application and the abundant documentary evidence the appellant presented of the gravest malfeasance at LASA that he'd already uncovered.

165. On the other hand, in summing up Mtati's evidence and contentions, the learned judge parroted them uncritically without pausing to assess their truthfulness, legal relevance, and validity, thereby leaving his claims and contentions unexamined, and implicitly finding them sound.

166. For instance, the learned judge nowhere dealt with Mtati's manifestly spurious claim, which she uncritically parroted in her paragraph 7, that the appellant's second request was improperly made because 'the appellant was impermissibly seeking to re-litigate his non-appointment to the senior litigator post even though that issue [the appellant's *wrongly founded, correctly dismissed* unfair discrimination complaint]¹⁴⁸ had been finally determined by both the Labour and Labour Appeal Courts'¹⁴⁹ – a wholly spurious argument addressed and knocked down in the appellant's replying affidavit.¹⁶⁰

167. Likewise in her paragraph 8 the learned judge uncritically parroted Mtati's manifestly perjured allegation that 'the records, which the appellant requested, were the subject of an ongoing litigation between the parties and therefore the Legal Aid was entitled to refuse the request as prescribed by s 7 of the Act', when in truth and in fact, besides the appellant's applications to compel LASA's compliance with his PAIA requests, there was and is no 'ongoing litigation between the parties'; and indeed the learned judge herself had just noted that the 'issue' of the appellant's 'non-appointment to the senior litigator post ... had

¹⁴⁸ Record, pp 254–5, para 123.

¹⁴⁹ Judgment, para 7.

¹⁵⁰ Record, p 243, para 78.6.

been finally determined by both the Labour and Labour Appeal Courts',¹⁵¹ and was therefore clearly *not* 'ongoing'.

168. In her paragraph 8, the learned judge again uncritically parroted Mtati's perjured claim that 'some of the records required by the appellant related to the private affairs of third parties and that the release of that information would prejudice those parties' rights to privacy.' As is apparent from a glance at the lists of records requested, Mtati's claim was manifestly untruthfully false and insupportable.

169. In her paragraph 8, the learned judge even uncritically parroted Mtati's mistake in his answering affidavit, corrected by the appellant in his replying affidavit, and accordingly quietly dropped by LASA's counsel from his argument, that after bringing the instant application, the appellant had brought another one in respect of the same records, i.e. had sued for them twice. Silently abandoned by LASA, this was no longer its case in court and wasn't argued, yet the learned judge thoughtlessly and prejudicially parroted it anyway.

170. In her paragraph 9, the learned judge uncritically parroted Mtati's inherently implausible one-sided version of LASA's total surrender to and concession of the appellant's five PAIA applications in the Magistrate's Court, and LASA's subsequent release of a number of requested records, and then more in successive batches when the appellant returned to court to compel full and proper compliance with the settlement agreement. The learned judge didn't pause to consider that LASA wouldn't have abandoned its refusal justifications and other defences had any of them, even one, been supportable. (The learned judge wrongly claimed the 'settlement agreement ... was made an order of court';

¹⁵¹ Footnote 95.

in truth, as the appellant told her no less than three times, it was merely handed in for the record.)¹⁵²

171. Getting the order of events completely back to front, the learned judge falsified the facts in stating in her paragraph 10 that 'the appellant accused the Legal Aid of being in breach of that settlement agreement. This led to Mr Mtati deposing to an affidavit in terms of s 23 of the Act [in respect of non-existent records]', as if by doing this Mtati duly responded to and resolved the appellant's persistent complaints that LASA had failed to fully and properly comply with the settlement agreement. In truth and in fact, albeit irrelevant to the instant case, Mtati made two section 23 affidavits, the first at the time some of the finally pledged records were delivered, and the second to supplement it shortly afterwards – both defective. The learned judge didn't mention the appellant's point, undisputed by LASA, that even the magistrate remarked that Mtati's section 23 affidavits were non-compliant, and that LASA's counsel responded by giving him the undertaking (dishonoured, naturally) that a fresh affidavit compliant with the detailed information requirements of section 23 would be delivered to the appellant.¹⁵³

172. Nor were the appellant's five settled PAIA applications re-enrolled; the appellant brought a separate substantive application to compel full and proper compliance with the settlement agreement, by delivering *all* requested and finally pledged records, or else a *compliant* section 23 affidavit certifying specified records that don't exist, 'contain[ing] all the detailed information prescribed by that section' as explicitly undertaken in paragraph 4 of the settlement.¹⁵⁴

¹⁵² Record, p 242, para 78.4; p 262, para 152; and p 275, para 198.

¹⁵³ Record, p17 para 46; pp 227–8, para 40.1.2; p 245, para 85.1; and p 281, paras 219–21.

¹⁵⁴ Record, p 163.

173. In her paragraph 12, the learned judge grossly mischaracterised the appellant's case in claiming that he 'reiterated that he believed that there was serious corruption at the offices of Legal Aid', as if this was some paranoid delusion of his, whereas in truth and in fact, the appellant's affidavits comprehensively prove it.

174. In her paragraph 13, the learned judge absolutely falsely stated that the appellant's complaint about Mtati's refusal of his second request was that he hadn't mentioned in his refusal that the information was required for issues that had been fully ventilated in the Labour Court. The appellant's affidavits and heads of argument show (and the transcript of his oral argument will vouch) that the appellant said nothing of the kind. This was pure invention by the learned judge, arising from her abject confusion about what the issues were.

175. The learned judge's paragraph 13 omitted to mention the appellant's *immediate* stated reasons for making his second request, as opposed to his *ultimate* stated intention to return to court, recited above.

176. In her paragraph 14, the learned judge entirely mangled and falsified the appellant's stated reason for specifying records he believed didn't exist: in truth and fact, it was to force the delivery of a section 23 affidavit confirming that certain records didn't exist, for use in perjury complaints.¹⁵⁵ (Had the truth been told on oath, records would exist to vouch it.)

177. The learned judge's paragraph 15 falsified the appellant's expressly stated 'main aim' in making 'his application', which she misleadingly claimed was to expose the fruitless and wasteful expenditure LASA incurred in indefensibly opposing his PAIA applications and application to compel full and proper compliance with its settlement agreement. In truth and in fact, this was the

¹⁵⁵ Record, p 230, para 46.

'main aim' of the appellant's first request only, not his second, whose 'main aim', recited above, was manifold and completely different.

178. Consistent with her generally cavalier approach to the facts right in front of her, repeatedly pointed out above, the learned judge claimed in her paragraph 15 that the appellant applied for the substitution of the original 'second respondent for the respondent, being the information officer, Legal Aid South Africa.' In fact, there never was a second respondent to substitute, and 'The Information Officer, Legal Aid South Africa' (*per* the appellant's citation) was never the 'second respondent' and had not been cited before being substituted.

179. The learned judge hopelessly botched and falsified the appellant's argument alleged in her paragraph 21. The appellant's heads of argument contradict and refute (as will the transcript of his oral argument) her absolutely false statement that the appellant argued that 'his requests were not frivolous' because 'Mr Mtati did not refer to his requests as frivolous and vexatious in his initial response to him prior to the launching of the application.'

180. The learned judge has it all upside down. Quite the contrary, it was precisely Mtati's justification 'in his initial response' that the appellant's requests were 'frivolous and vexatious', as his refusal notice shows.¹⁶⁶ It was only in his answering affidavit that Mtati then raised and relied on sections 7, 36 and 37¹⁶⁷ to fortify his refusal of the appellant's requests on the dual grounds envisaged by section 45(a) and (b), namely that they were frivolous and vexatious, and that responding to them would unreasonably tax LASA's resources.

¹⁶⁶ Record, pp 64-5.

¹⁶⁷ Record, pp 190-3, paras 69-81; *et seq.*

181. Indeed, totally contradicting her absolutely false statement in her paragraph 21 of what the appellant 'submitted',¹⁵⁸ the learned judge earlier in her paragraph 5 very correctly recorded the contrary truth of it: 'According to the appellant, Mr Mtati refused to furnish him with the records he requested and relied on s 45 of the Act. Mr Mtati advised him that his requests were manifestly frivolous, and vexatious, and substantially and unreasonably diverted the most needed resources of the Legal Aid.'¹⁵⁹ And again, in her paragraph 7, the learned judge very correctly recorded that Mtati's 'contention was that the appellant's requests were frivolous and vexatious; and the work involved in compiling the information would, substantially and unreasonably, divert the Legal Aid's resources. Relying on the provisions of s 45 of the Act, he believed that his decision ought to be sustained as it was not reviewable.'

182. The learned judge's garbled, contradictory claim in her paragraph 21 that the appellant 'conceded that all his requests arose from his non-appointment to the senior litigator post by the Legal Aid, even though some pertain to costs incurred during the PAIA litigation' is absolutely false (as the transcript of the appellant's argument will show). It's obvious from a glance at the annexure to the appellant's second request that only about a third of the specified records concern the appellant's 'non-appointment to the senior litigator post by the Legal Aid'. And not all of the first request, as amended, 'pertain[s] to costs incurred during the PAIA litigation'.

183. The learned judge's blatant falsification of the appellant's oral argument to portray him as dishonest was an outright fabrication (as the transcript of the argument will vouch): 'He submitted that it was untrue that he required the information in order to pursue the litigation against the Legal Aid but he later

¹⁵⁸ Judgment, para 21.

¹⁵⁹ Judgment, para 5.

conceded that his ultimate intention was to launch a rescission in his Labour Court matter'.

184. *First*, in truth and in fact, the appellant forthrightly stated at the outset, by clear, unequivocal implication in his letter amending his requests, in which he set out his several intentions, that he intended using some of the requested records in support of a rescission application to the Labour Court.¹⁶⁰

185. *Second*, the appellant's affidavits and heads of argument show (and the transcript of his oral argument will vouch) that he never hid, denied, disputed or equivocated about his intention to use some of the requested records in support of a rescission application. And the reason the appellant was forthright about his ultimate intention in this regard, among his several other immediate intentions, is that, as he correctly understood and repeatedly asserted, using PAIA to gather evidence *before* the institution and commencement of legal proceedings is an impeccably proper use of the Act.

186. *Third*, flatly contradicting herself, the learned judge herself stated very correctly in her paragraph 25 that (appellant's added emphasis): 'The appellant made it clear *in his affidavits* that he required the information in order to launch an application for rescission of judgment in the Labour Court as he believed that court was defrauded hence it came to the conclusion that it did.'

187. In claiming utterly falsely that the appellant initially lied to conceal his intention to use some of the requested records in a rescission application, only to later concede it – in other words in absolutely falsely portraying the appellant as a shifty liar caught out in court – the learned judge announced her own ignorant misconception that PAIA doesn't allow the gathering of documents for use in future intended litigation.

¹⁶⁰ Record, p 61; and p 243, para 79.

188. The learned judge's flagrant disregard for section 11(3), which indeed holds unequivocally that (her language) 'the purpose of why he sought the records was irrelevant if one has regard to s 11(3) of the Act', just as the appellant correctly asserted, has been dealt with above. The learned judge discounted this correct statement of law to be the appellant's mere 'submission', which she later wrongly rejected – in doing so, rejecting the law itself.

189. Likewise, the learned judge discounted as the appellant's mere 'view' the appellant's incontrovertibly correct legal statement, made on the highest authority, that 'mere curiosity' (the appellant's phrase, duly quoted by the learned judge) suffices to entitle a requester to access public body records (provided he or she has complied with the prescribed formalities and paid the prescribed request fee). Later implicitly rejecting this 'view' – having regard to her corrupted, incomplete, distorted paraphrase of the Preamble to PAIA and her evident misconception arising from it that it's necessary to show that records requested are needed to exercise or protect the requester's rights¹⁶¹ – the learned judge implicitly rejected the authority of the Constitutional Court in holding in *HSF* that:

PAIA affords any person the right of access to any information held by the state. 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.

190. The appellant's affidavits and heads of argument show (and the transcript of his oral argument will vouch) that in truth the appellant never claimed, as the learned judge falsely stated he did, in doing so making him appear legally ignorant, that he was enforcing his constitutional right to information as

¹⁶¹ Judgment, para 26.

provided for in s 34 of the Constitution'. And the reason the application never claimed or argued this is that 's 34 of the Constitution' has nothing to do with the appellant's 'constitutional right to information'.¹⁶² In short, the learned judge imputed her ignorance of the Bill of Rights to the appellant.

191. The learned judge's claim in her paragraph 22 that LASA's counsel 'submitted that the appellant did not have an absolute right of access to information ...' is totally false. In truth and in fact, (as the transcript of the argument will vouch) LASA's counsel made no such submission. Instead, *he falsely and untruthfully alleged that the appellant had contended that he had an absolute right to the records he'd requested*, thereby imputing to the appellant his own incomprehension of the appellant's case and precise understanding of his 'general and unqualified right'¹⁶³ to public body information under section 32(1)(a) of the Constitution. (Indeed, as the transcript will vouch, when the appellant protested LASA's counsel's gross misrepresentation of his position, the learned judge recognised this and rebuked the latter's false claim from the bench. But in her judgment she gave a false and untrue account of the spat.)

PART THREE

192. In her paragraph 18, the learned judge jumbled and misrepresented the appellant's reason for putting up his Special Report to the SAHRC (annexure 'F' to his founding affidavit), finely detailing LASA's persistent, defiant, incorrigible, recidivist PAIA delinquency since 2010, as being 'to confirm to the court that he had indeed delivered that report to [the] SAHRC'. In fact, it was annexure 'G' comprising the appellant's covering letter and proof of post of the Special Report, that 'confirm[ed] to the court that he had indeed delivered that report to [the]

¹⁶² Section 34 of the Constitution, 'Access to courts' provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

¹⁶³ Footnote 26.

SAHRC'. The learned judge's unfamiliarity with the evidence before her further suggests she never read the report before trying the case.

193. The learned judge 'agree[d] with the respondent's submissions that paragraphs 29, 30, 32, 33, 34, 38, 40, 41, 42, 45, 47, 55, 65, 66, 75 as well as annexure 'F' are irrelevant to the merits of the application. They do not in any way, contribute to the determination of the issues between the parties in *casu*.'

194. A careful, impartial, and considered examination of these paragraphs and of annexure 'F' – the Special Report – doesn't support this finding. 'Some of the averments are defamatory', the learned judge found, without stating which, and wrongly held that they're unsubstantiated, when quite the contrary, each and every allegation concerning (i) the corruption at LASA unearthed by the appellant and (ii) LASA's persistent strenuous resistance to making its records available, the better to obstruct the appellant's investigation and full exposure of this corruption, is vouched. As appears from the Special Report, none of the appellant's allegations are 'vague and unsubstantiated'; quite the opposite, all are *severely direct*, and all are *vouched* by way of footnoted references to supporting documents.¹⁶⁴ The judge's statement that the appellant's allegations in his Special Report are 'vague and unsubstantiated' is patently untrue. The learned judge was likewise wrong to hold the information set out in the said enumerated paragraphs and the whole of annexure 'F' to be 'scandalous, vexatious and irrelevant and ought to be struck out with costs.' This falsely and insupportably mischaracterised the essential background evidence presented by the appellant in support of the special orders he sought in his notice of motion.

195. The learned judge's treatment and decision of the strike-out application, in which she mechanically recited a series of negative descriptions of the appellant's evidence, show that she failed to consider the matter properly –

¹⁶⁴ Record, p 12, para 31.

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unlike Vahed J who briskly dismissed an identical attempt by LASA to suppress exactly the same incriminating evidence of pervasive, systemic corruption in LASA's top ranks, including LASA's habitual PAIA delinquency since 2010 detailed in the Special Report, presented in and attached to the appellant's (in that case, the respondent's) answering and supplementary affidavits in LASA's failed application to have him declared a vexatious litigant (12124/16P).¹⁶⁵

196. The learned judge's striking out of whole swathes of the appellant's carefully assembled case on the several manifestly insupportable grounds she unjustifiably advanced relieved her of the need to deal with the corruption and lawlessness in LASA's top ranks, closely described in the appellant's founding affidavit.

197. None of the appellant's *replying* affidavit was attacked by the original or substituted respondents, and consequently none of it was struck out. So to avoid dealing with the appellant's further description of the criminal and other corruption at LASA it pointedly described,¹⁶⁶ the learned judge simply looked past it, as if it didn't exist.

198. The learned judge's failure to have considered the background of criminal and other serious corruption and lawlessness at LASA¹⁶⁷ – *even the documented perversion of judicial proceedings*¹⁶⁸ – resulted in her failure to have properly considered *on a conspectus of all the evidence set before her* the implications of section 46 for Mtati's refusal of the appellant's second request, overriding the dual justifications allowed by sections 45, even had they applied, and requiring compliance with a request where, *per* subsection (a), 'the disclosure of the

¹⁶⁵ Record, p 280, para 214.

¹⁶⁶ Record, pp 212, para 1.11; p 214, para 2.2; pp 235–40, paras 67–75; p 241, para 78.4; p 248–9, paras 95–100; p 262, para 152; p 266, para 164; pp 269–70, paras 178–80; p 273, para 192; p 278, para 201; and pp 279–80, para 213.

¹⁶⁷ Record, pp 13–15, paras 35–38.

¹⁶⁸ Record, pp 15–16, paras 39–40; p 212, para 1.11.

record[s] would reveal evidence of- (i) a substantial contravention of, or failure to comply with, the law'.

199. Finally, in condemning the appellant in costs, the learned judge wrongly and insupportably disregarded the well-established *Biowatch* rule, shielding from cost orders *bona fide* but ultimately unsuccessful litigants seeking to vindicate their constitutional rights. It's significant here that the learned judge didn't uphold Mtati's charge in his refusal notice that the appellant's intentions in making his requests were frivolous and vexatious and calculated to waste LASA's time.¹⁶⁹ Instead she arrived at her finding that the appellant's requests were hit by section 45 because, in her view, they were hit by section 7;¹⁷⁰ and also that Mtati was justified in refusing the appellant access to LASA's counsels' fee-notes by sections 36 and 37.¹⁷¹ In other words, the learned judge came to her decision against the appellant on the merits of the main case by way of her peculiar technical analysis, even if completely wrong. Her costs order accordingly failed to respect the Constitutional Court's *Biowatch* rule.

200. In the premises, the judgment falls to be set aside and the appellant's claim for the orders set out in his amended notice of motion upheld.

Signed at Eshowe on 9 July 2020



ANTHONY BRINK
APPELLANT

¹⁶⁹ Record, pp 64-5.

¹⁷⁰ Judgment, para 28.

¹⁷¹ Judgment, paras 30-33.

ANTHONY BRINK

APPELLANT

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TO:

The Information Officer, Legal Aid South Africa

c/o Pietermaritzburg Justice Centre

Legal Aid SA

183 Church St, Pietermaritzburg

(Mr Kaloo)

By email: ashokk@legal-aid.co.za

AND TO:

Corporate Legal Manager Solly Sekgota

Legal Aid South Africa, National Office

29 De Beer Street, Braamfontein, Johannesburg

By email: sollys@legal-aid.co.za

AND TO:

The Registrar

High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

301 Church Street

Pietermaritzburg

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'AAS'

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

CASE No: 11187/16P

In the matter between:

LEGAL AID SOUTH AFRICA Applicant

and

ANTHONY ROBIN BRINK Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the abovenamed applicant intends making application to the above Honourable Court, on a date to be decided by the registrar, for an order on the following terms:

1. The application by the Respondent seeking to waive to the provision of security of costs in terms of rule 49(13) has lapsed and should not be condoned;
2. The respondent's be ordered to provide security of costs in terms of rule 49(13) of the above Honourable Court to the amount of R300 000



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- 3. Costs of suit,
- 4. Further and/or alternative relief.

TAKE NOTICE FURTHER that the answering affidavit of **PATRICK ROBERT HUNDERMARK** together with the annexures thereto, filed in opposition to the Respondent application for waiving of security will be used in support of this application.

KINDLY ENROLL THE MATTER ACCORDINGLY

DATED at PIETERMARITZBURG on this the 8 day of **OCTOBER** 2020.


LEGAL AID SOUTH AFRICA
Applicant

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BRAAMFONTEIN, 2017
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FAX: 011 877 2222
**C/O: PIETERMARITZBURG
LOCAL OFFICE**



187 BERG STREET

PIETERMARITZBURG, 3201

TEL: 033 3942190

REF: ASHOK/S SEKGOTA

TO:
**THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PIETERMARITZBURG**

AND TO:
AND TO: ANTHONY ROBIN BRINK

RESPONDENT

23 BAKER ROAD

PRESTBURY

PIETERMARITZBURG

CEL: 083 676 0884

SERVICE BY SHERIFF



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

Case No: 11187/2016

In the matter between:

ANTHONY BRINK

APPLICANT

and

**INFORMATION OFFICER
LEGAL AID SOUTH AFRICA**

RESPONDENT

JUDGMENT

Delivered on 6 March 2020

Poyo Dlwati J:

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

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

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

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

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(b) all charges relating to the PAIA litigation between the Legal Aid and the applicant in the Eshowe Magistrates' Court, including costs of WE White Attorneys;

(c) various information relating to the senior litigator post arising, either from correspondence between the applicant and Ms Vedalankar (the Chief Executive Officer of the Legal Aid), or to the Justice Portfolio Committee or communication or record of the decision taken to terminate the recruitment of the senior litigator post;

(d) and internal memos relating to the whole recruitment process from commencement of the senior litigator post to the end when a decision not to appoint was taken. All the information he required was listed in annexures 'A' & 'B' annexed to his founding affidavit.

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

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

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

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

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

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

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

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



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

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

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

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

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

[16] The issues to be determined in this application are whether the respondent erred in refusing the applicant's requests for information on the basis that:

- (a) the information was requested for criminal or civil proceedings after the commencement of those proceedings;
- (b) the applicant's requests were manifestly frivolous or vexatious;
- (c) the work involved in processing the requests would substantially and unreasonably divert the Legal Aid's resources;

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


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

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

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

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

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


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

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

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

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

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

¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 (SCA) para 23.

² *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) 336F-G.

³ *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) para 28.

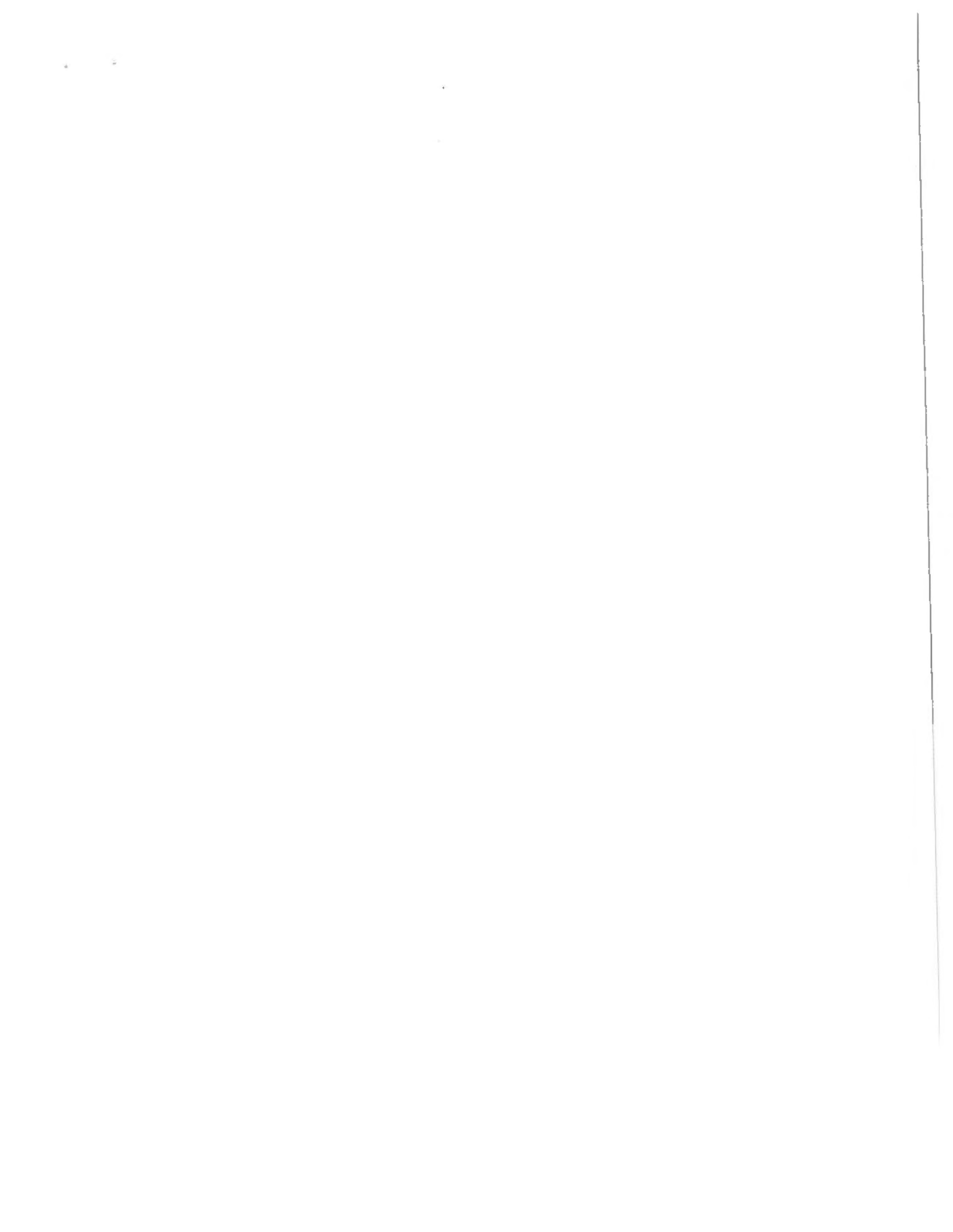
⁴ *University of the Free State v Afriforum & Another* [2017] ZASCA 32 para 40 and footnote 22

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

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

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

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

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

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

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

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

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

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

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

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

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



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

- (a) the request is manifestly frivolous or vexatious; or
- (b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

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

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

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



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

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

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

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
- (c) information supplied in confidence by a third party the disclosure of which could reasonably be expected---
 - (i) to put that third party at a disadvantage in contractual or other negotiations; or
 - (ii) to prejudice that third party in commercial competition.'

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

A handwritten signature, possibly 'D', is written above the initials 'SB' in the bottom right corner of the page.

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

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

Order

[35] Accordingly, I grant the following order:

- (a) the application to ~~strike~~^{Strike} out is granted with costs.
- (b) the main application is to review and set aside the respondent's decision is dismissed with costs.



POYO DLWATI J

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

⁷ Section 46(a) of the Act.



APPEARANCES

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



'AA2'

HELD AT DURBAN

FILE COPY

Our Ref: H1511/138

Case No: D529/2011

In the case between:

LEGAL AID SOUTH AFRICA and ANTHONY ROBIN BRINK	EXECUTION CREDITOR EXECUTION DEBTOR
Address where served: 1 BOAST STREET, ESHOWE, KWAZULU-NATAL	
WRIT OF EXECUTION	

RETURN OF SERVICE

On this 20-Nov-2015 at 14:06 I duly served the annexed WRIT OF EXECUTION : MOVABLE PROPERTY on the within named ANTHONY ROBIN BRINK at his place of residence at 1 BOAST STREET, ESHOWE, KWAZULU-NATAL, by handing a copy thereof to him personally after explaining to him the nature and exigency of the said process. The debtor failed to satisfy the judgment or point-out sufficient movable or disposable property to attach at the given address. After diligent search and enquiry, I established that the DEBTOR has no disposable property to attach and thus render a return of Nulla Bona.

NB: Debtor located on 20 November 2015 after diligent search!

Deputy Sheriff Sudesh was in the process of removing goods at 1 Boast Street, Eshowe, when we were informed that the house belongs to Mr J Hawk. The Municipality confirmed the Ownership.

Mr Brink has no valuables;
Mr Brink has no money in his bank account., (statement checked);
Mr Brink has no vehicle., (licencing checked).

Mr Brink proposed to make a payment plan of R10 000.00 per month to our office, but failed to carry it through as he lost his job at Eshowe.

Various attempts were made to locate and trace him, but to no avail.

Various attempts were made with Cartage and labour to attach and remove as per Labour Court Rule -- sheriff's fees as indicated below have been settled direct by the debtor.

Original document to Legal Aid Board.

Handwritten initials: JT and SP

(Signed) DEPUTY SHERIFF: SUDESH SOOKDEO

From: SHERIFF
 J.S. KOCK
 PO BOX 11
 DOCEX 5
 ESHOWE, 3815
 Tel: 035-4741363
 Fax: 035-4741454
 Email: eshoweacc@mweb.co.za

Account info for bank deposits/transfers:
 STANDARD BANK (BRANCH CODE 057628)
 Name: SHERIFF ESHOWE
 No. 052550036

To: HELD AT DURBAN
 SMITH STREET DURBAN

LEGAL AID SOUTH AFRICA (BRAAMFONTEIN)
 PRIVATE BAG X76
 BRAAMFONTEIN
 2017
 Your VAT No:

Account No: 3231
 Your reference: SOLLY SEKGOTA

DESCRIPTION OF FEES	FEES
Sheriffs Fees All Inclusive	20,000.00
Sub-total Fees	20,000.00
Plus VAT	0.00
TOTAL OWING	R 20 000.00
Invoice No. 158789	My VAT No: NA
Invoice issued on 24-Feb-2016.	

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

Case No: 11187/16P

In the matter between:

ANTHONY BRINK

APPLICANT

and

**THE INFORMATION OFFICER
LEGAL AID SOUTH AFRICA**

RESPONDENT

ORDER

In an application for leave to appeal:

- (a) The application for leave to appeal is granted to the Full Court of the KwaZulu-Natal Division of the High Court;
- (b) The costs of the application will be the costs in the appeal.

JUDGMENT

Poyo Dlwati J:


[Handwritten signature]
SD

[1] This is an application for leave to appeal against my judgment and order that was handed down on 6 March 2020.

[2] The grounds of appeal were embodied in the notice of appeal, dated 27 March 2020, and I do not intend repeating them. The application for leave to appeal was filed during the national lockdown. In line with the Practice Directives issued by the Judge President on 1 May 2020 I determined that the application can be disposed of without an oral hearing. I thereafter issued further directions in line with the Practice Directive that the parties ought to submit written submissions, and thereafter I would determine the application. The applicant declined the request whilst the respondent filed its submissions and I am grateful to it for doing so.

[3] Whilst I do not wish to divert my focus from the issues raised in this application, by commenting on the disrespectful language used in the notice of application, I do wish to correct one assertion which is continually repeated throughout the notice. The assertion is that I had worked for the Legal Aid South Africa at some point and therefore, it is my former employer and its officials are my former colleagues. I have never worked for the Legal Aid South Africa and therefore it is not my former employer. I had stated on record what the relations were which I had with some of its officials, despite which the applicant agreed that I could deal with the matter.

[4] Section 17(1) of the Superior Courts Act 10 of 2013 regulates the applications for leave to appeal. It provides that leave to appeal 'may only be granted where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success' or 'there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration'. As correctly held in *Acting National Director of*


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