IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 11187/16P

In the matter between:

ANTHONY BRINK — Appellant/Applicant

and

THEMBILE MTATI,

DEPUTY INFORMATION OFFICER,

LEGAL AID SOUTH AFRICA — First Respondent

THE INFORMATION OFFICER

LEGAL AID SOUTH AFRICA — Second Respondent

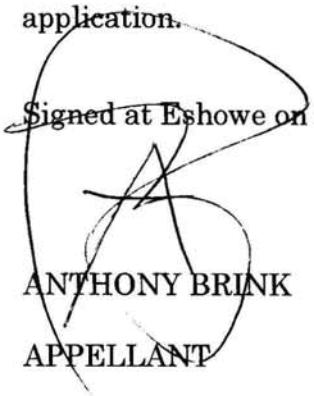
FILING SHEET: APPLICATION FOR LEAVE TO APPEAL DISMISSAL OF RULE 49(13) APPLICATION

TAKE NOTICE that the appellant files his application for leave to appeal the Honourable Madam Justice Poyo Dlwati's dismissal of his application made under Uniform Rule 49(13) for an order exempting him from providing security in the sum of R300 000 demanded by Legal Aid South Africa for its costs of opposing his appeal in his main case brought under section 78 of the Promotion of Access to Information Act 2 of 2000, leave to argue which she granted.

TAKE NOTICE FURTHER that proof of service of this application on the respondents by email is annexed hereto.

TAKE NOTICE FURTHER that evenly herewith the appellant files his separate application for the said judge's recusal and for condonation for making his application for leave to appeal outside the prescribed period for all the reasons set out in his founding affidavit supporting that recusal and condonation application.

Signed at Eshowe on 21 November 2022



ANTHONY BRINK

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TO:

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AND TO:

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c/o Pietermaritzburg Justice Centre, Legal Aid SA

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(Mr Kaloo)

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AND TO:

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IN THE HIGH COURT OF SOUTH AFRICA

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Case No: 11187/16P

In the matter between:

ANTHONY BRINK Appellant

and

THEMBILE MTATI,

DEPUTY INFORMATION OFFICER,

LEGAL AID SOUTH AFRICA First Respondent

THE INFORMATION OFFICER

LEGAL AID SOUTH AFRICA Second Respondent

NOTICE OF APPEAL

TAKE NOTICE that the appellant applies for leave to appeal against the whole of the judgment by the Honourable Madam Justice Poyo Dlwati ('the judge') dismissing his application under Uniform Rule 49(13) for an order exempting him from paying into court the cash sum of R300 000 demanded by the second respondent as security for the costs of opposing his appeal against her dismissal of his claim under section 78 of the Promotion of Access to Information Act 2 of 2000 ('PAIA'), leave to appeal which she'd granted.

TAKE NOTICE FURTHER that the appellant's application for the judge's recusal and for condonation for applying for leave for appeal out of time is filed evenly herewith.

TAKE NOTICE FURTHER that the appellant's grounds of appeal are the following:

1. In dismissing the appellant's application, the judge fatally neglected to consider and apply the rule made by the Constitutional Court in *Biowatch*[1] governing 'the proper approach to costs awards in constitutional litigation',[2] pertinently and repeatedly called to her attention.[3]

2. The Biowatch rule holds that litigants who lose their constitutional claims against the state[4] shouldn't ordinarily be ordered to pay its costs, for the reason that this 'might have a chilling effect on litigants who may wish to vindicate their constitutional rights'.[5]

3. The rule is qualified to exclude from such costs immunity a litigant who's sued the state in a manner that's 'frivolous or vexatious, or in any other way manifestly inappropriate'.[6]

4. In his main case under PAIA ('main case'), the appellant sued to vindicate his fundamental right to access public body information held by an organ of

[1] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).
[2] Biowatch, para 6.
[3] Replying affidavit ('RA'), para 62, 121 and 129.
[4] Including any of its organs; see Maoke and Another v Telkom (Soc) Limited and Another (15246/2019) [2020] ZAGPPHC 125; para 68.
[5] *Biowatch*, para 21.
[6] *Biowatch*, para 24. The same language is used in paras 18, 21, 23, 44 and 53.

state – like Biowatch did[7] in a substantially similar 'case involving [its] constitutionally protected right… to information'[8] held by the state, entrenched by section 32(1)(a) of the Bill of Rights.

5. In granting him leave to appeal against her judgment in the main case, on the principal basis that 'I held the view that another court could interpret the provisions of PAIA differently than I did',[9] the judge accepted that the appellant has a properly arguable claim for the relief he claims under section 82 of PAIA, and that his main case against the respondents isn't 'frivolous or vexatious, or in any other way manifestly inappropriate'.[10] And in dismissing the instant application, she didn't claim it was any of these things either. On the contrary, by enumerating in paragraph 5 of her judgment the several high authorities to whom the appellant announced he intends referring the requested records in support of criminal and financial malfeasance complaints against certain top officers at Legal Aid South Africa ('LASA'),[11] the judge implicitly accepted that the appellant's main case to compel access to these records is entirely serious.

6. Consequently, in the inconceivable event that the appellant's appeal in the main case fails before a full bench of this court,[12] there's scant possibility that he will be condemned to pay the respondents' costs of opposing his appeal.

[7] *Biowatch*, para 2.
[8] In the language of *Biowatch*, para 9.
[9] Para 3 of the judgment dismissing the application. As appears from the appellant's appeal notice in the main case, the judge's errors went way beyond her gross misinterpretation of the provisions of PAIA.
[10] In the language of *Biowatch*, para 24.
[11] Para 5 of the judgment.
[12] See the very extensive appeal notice in the main case, in which the appellant shows the judgment dismissing it was botched atrociously.

7. But if the appellant's appeal in the main case does fail on the merits, the full bench duly respecting and applying the Constitutional Court's Biowatch rule will at least reverse the judge's costs orders against the appellant, both in the main case and in the application,[13] for the reason that not only was the costs order against the appellant in the main case wrongly made in light of the Biowatch rule, so too was the costs order in his subsequent application brought in the course of his litigation to vindicate his constitutionally guaranteed right to information – because in neither case did the judge find that the appellant's litigation to be 'frivolous or vexatious, or in any other way manifestly inappropriate' (in the language of *Biowatch*). In other words the appellant's appeal will have partially succeeded, at least in regard to costs.

8. And critically, the full bench observing the Biowatch rule will make no adverse order for costs in relation to LASA's opposition of the appeal. So there's no good reason why the judge required the appellant to find and put up security for the respondents' costs of opposing it, and every reason why she should have upheld his application and exempted him from his ordinary obligation to do so had he been pursuing any other sort of civil claim against the state.

9. The judge's judicial dereliction in not dealing at all with this long-established and elementary legal principle concerning costs in constitutional litigation against the state, and her failure to treat it as the pivotal, decisive

[13] By way of precedent, see the Constitutional Court's decision in *Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1 (22 January 2018) in which, although the appellant failed on the merits, the wrongly made costs orders in the courts below were nonetheless reversed.

consideration in deciding the application, on its own justifies the appellant being granted leave to appeal her clearly wrong judgment dismissing it, quite aside from the further grounds of appeal set out below.

10. In her paragraph 4, the judge limply quoted the appellant's finely detailed case on the equities, namely, in short, that (a) LASA's implicated officers themselves corruptly engineered his financial embarrassment and consequent inability to meet the security demand by dint of a retaliatory counter-strike against him professionally and personally, calculated to cut off his financial oxygen and, short of a knife or bullet, kill him off as the relentless private investigator of the rampant corporate, financial, and criminal corruption he'd uncovered in its top ranks and prevent him reporting it to the several high authorities he'd mentioned on the fullest available documentary evidence; and that (b) LASA is grossly unfairly standing on this corruptly won advantage to block his return to court with leave to argue his appeal before a full bench, with the ultimate objective of preventing him accessing the records he'd duly requested and had to sue for, and placing them before these high authorities, as said.

11. In talking down the appellant's account of this outrageous situation with her incredulous phrase, 'according to him', instead of noting that the material facts in this crucial regard aren't even disputed,[14] the judge falsely insinuated that the appellant's complaint about this was open to doubt, so as to suggest that this leg of his case was lame, the better to avoid the work of dealing with it, because indeed she never went on to consider its implications

[14] RA, paras 1–3.

and decide the application in light of them; she just left this vital part of the appellant's case on the equities in the air and moved on to chat about other things. Unlike the judge, a full bench of this court is likely to consider the appellant's case in this respect to be a cogent basis for reversing her judgment and granting his application.

12. In her paragraph 4, the judge noted the appellant's further contention in support of his application that it was 'of exceptionally compelling public interest that the appeal be heard' for all the reasons he set out, and she quoted his case in this regard in her paragraph 6; but again, in her habit, she didn't stop to assess its merit before skipping over it. Again, unlike the judge, a full bench of this court is certain to consider the point, and find it another cogent basis for reversing her judgment and granting the appellant's application.

13. The reason the judge failed to treat these two potent considerations may be traced to her paragraph 5, because, as she made plain there in as many words, she still reckoned the appellant's main case, and by extension his application also, to be a waste of the court's time: just another round of vexatious litigation by some disgruntled sore loser in a unsuccessful contest he properly lost long ago between shortlisted interviewees for a top-deck, big-ticket, specialist legal professional position, LASA's Senior Litigator post at Pietermaritzburg,[15] the recruitment process for which, according to LASA, had silently been cancelled 'immediately'[16] after the appellant was duly

[15] Mentioned in para 2 of the judgment.
[16] See 'All the Different Stories', annexure 'K' to the replying affidavit in the main case.

selected and recommended for it, for the reason, also according to LASA, it very unfortunately just hadn't been furnished with the necessary salary budget by the Justice Department[17] to fill its remaining three long-vacant Senior Litigator posts;[18] and also according to LASA, claiming these new different things on a later occasion after the false budgetary insufficiency excuse had fallen apart: (a) because of 'recruitment challenges',[19] (b) because LASA first wanted to make sure that its incumbent Senior Litigators at other centres were delivering, and (c) because LASA urgently intended conducting a professional audit of these persons by 'possibly a retired judge' to ascertain whether they were competent or not.[20]

14. The judge evidently failed to understand that a seasoned trial lawyer, with decades of years of experience on both sides of the bar and bench, was indefatigably pursuing a colossal corruption case involving a disintegrated cover-up, entailing diametrically contradictory, mutually and exclusively destructive cover-stories, of top-level recruitment corruption, soaked in crime – extending *inter alia* as far as to the successful criminal perversion by

[17] In truth and in fact, and contrary to this cretinous lie, the post was indeed funded by the Treasury via the Justice Department upon the annual budget vote of the National Assembly. See main case, founding affidavit, paragraph 37.

[18] Canvassed in main case replying affidavit, para 75 and more particularly in annexure 'K' thereto, entitled 'All the Different Stories'.

[19] Contradicting and refuting this new lie, replacing the old financial insufficiency one; in truth and in fact, LASA's recruitment processes to attract, select and recommend suitable Senior Litigator candidates at Pietermaritzburg, Durban and Mthatha had all been successfully completed, with recommendations made for all three posts. See main case, founding affidavit, annexure 'B', para 3.

[20] All these very different contradictory cover-stories, fabricated by different LASA executives at different times, were high-toned cock and bull, exposed and refuted by LASA's own internal records; see main case replying affidavit, para 72.6. Two judges have commented on this mendacity, proved by the appellant. In his main judgment in the Labour Court, Cele J found LASA's single witness National Operations Executive Brian Nair to have been 'not generous with the truth … a number' of times (*ibid*, para 73); and during the argument of LASA's abortive application to interdict the appellant from proceeding with the main case, this court (Vahed J) quoted the appellant's description of LASA's different childishly contradictory cover-stories about why his recruitment had been cancelled as 'pack of lies', mentioning further that all lawyers know that occasionally cases are won by perjury (*Ibid*, para 74).

then-LASA Board chairperson Dunstan Mlambo JP of a parliamentary enquiry into this corruption by way of a 'confidential' report to the Justice Portfolio Committee 'Re: Adv Anthony Brink' packed full of verifiable lies, and to the successful criminal perversion, almost certainly by Mlambo JP, of judicial proceedings by dint of a 'memorandum' slipped to his long-time former colleague in the Labour- and Labour Appeal Courts, Basheer Waglay JP, defaming the appellant, lying about his case, and suborning him to dismiss his petition for leave to appeal.[21]

15. The judge's paragraph 5 is a shambolic layer-cake of errors stacked one upon another, aggravated by the fact that none of it's even remotely material to the narrow issues and merits of the application. It tees off disastrously with the judge's untruthful statement, 'The appellant, in his application, further details how the documents he was seeking would be used in the further litigation against the Legal Aid.'

16. In isolation, this sounds like a bit of neutral, innocuous background information. Quite the opposite, for the reasons set out below, the statement read with the judge's judgment in the main case potently biased her approach to the application and doomed its result.

17. In that absolutely false statement of hers, the judge repeated by allusion her most basic factual and legal mistakes that fundamentally misdirected her judgment in the main case; for in talking this way, she implicitly asserted

[21] Which Waglay JP promptly did, even before all the prescribed papers had been filed and the case was ripe for adjudiciation – without the involvement much less concurrence of the other two appeal judges named in the fraudulently issued order. See main case founding affidavit, annexure 'A' (letter to Mogoeng CJ (ret.), paras 6–9). Five-and-a-half years later, the appellant's extraordinarily serious complaint to the Judicial Conduct Committee ('JCC') of the Judicial Service Commission about this, filed in mid-2017, has yet to decided.

that the appellant's claim to the documents he'd requested and sued for was legally insupportable, for the reason, she further implied, that his motive for requesting them was illicit under section 7 of PAIA. Consequently, in her opinion, just as the second respondent was legally justified in refusing the appellant's request for them, she was equally right to heartily approve the second respondent's concealment of these records from the appellant and from the high authorities he'd stated he intends referring them to.

18. In this manner, the judge threw a pall over the merits of the application, suggesting it's not worthy of serious consideration, because, in the judge's estimation of her judgment in the main case, it's rock solid, so the appellant's appeal against it is anyway going nowhere.

19. *First*, as appears clearly and indisputably from the appellant's papers in the main case, and contrary to the judge's incorrigibly wrong *idée fixe* and her repeated untrue claims about it, the appellant doesn't actually have any 'further litigation' pending against LASA in which any of the requested records sought in the main case might be relevant, and in which he could conceivably adduce them as evidence.

20. As the papers show, the appellant has never claimed that he intends using any of the records he's requested in any of 'the further litigation' that he does indeed have pending against LASA. As the appellant repeatedly explained to the judge unsuccessfully, all of his 'further litigation' currently pending against LASA is directed at compelling its surrender of other records requested under PAIA.

21. More particularly, this 'further litigation' between the appellant (as applicant) and LASA comprises (a) two more undecided PAIA claims pending in this court, launched subsequently to the main case, in which the appellant (as applicant) seeks orders compelling LASA to allow him access to other, quite different records;[22] and (b) an application pending in the Eshowe Magistrate's Court to compel LASA's full and proper compliance with its settlement agreement made with him at court upon abandoning its spurious defences and conceding his PAIA claims there moments before argument.[23] On which agreement it reneged.[24]

22. As further pointed out to the judge vainly in the appellant's appeal notice in the main claim, (a) all answering and replying affidavits have been filed in this 'further litigation', and this 'further litigation' is therefore complete and ready for argument in this court and for oral evidence in the Magistrate's Court; and there's no suggestion, not even by the respondents, that the appellant needs and intends using in this pending 'further litigation' the records sued for in the main case.

23. As the appellant also fruitlessly explained to the judge in his appeal notice in the main case, this 'further litigation' under PAIA pending against LASA is perfectly irrelevant to the main case.[25]

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[22] Case No's: 14224/17P and 5239/18P.

[23] By agreement, all this other litigation has been shelved pending the final determination of the main claim. LASA has an application against the appellant pending in this court to transfer up to it the appellant's application pending in the Magistrate's Court to compel full and proper compliance with its settlement agreement. Under the rules of court and in light of all case law directly on point, LASA's application is incompetent and a non-starter, but this is irrelevant here.

[24] Main case replying affidavit, para 40, footnote 109.

[25] Appeal notice, paras 126-9.

24. *Second*, as the appellant also tried explaining to the judge ineffectually many times – in his affidavits in the main case, again orally in court, and yet again in his appeal notice in the main case – even if, hypothetically, the appellant did have some piece of litigation pending against LASA in which he intended using the documents sued for in the main case, section 7 of PAIA would indeed ordinarily have barred him from using in such (hypothetical) pending litigation any records accessed improperly via PAIA after the litigation had commenced instead of accessed properly via the trial court's discovery rules; but this bar imposed by section 7 is not absolute, in that section 7(2) vests the trial court with the overriding discretion to allow the use of such improperly obtained records at trial, if deemed just. Section 7 is not included in PAIA's closed list of grounds enumerated in sections 33–45 for lawfully refusing a request for access to public records, and consequently it does not afford an information officer a ground for refusing a PAIA request.

25. So plainly it was incompetent and unlawful of the first respondent to have asserted and relied on section 7 – as an afterthought in his answering affidavit,[26] not in his refusal notice[27] – as a basis for justifying his refusal[28] to allow the appellant access to the records he'd duly requested, and it was equally obviously wrong of the judge to have held in her judgment in the main case that the records had been lawfully suppressed on the basis that the appellant enjoyed no constitutionally guaranteed right to see them. And

[26] Answering affidavit, main case, page 174, para 12.2.1 of the combined, indexed and paginated papers.
[27] Founding affidavit, main case, page 64-5.
[28] *Ibid*, page 65, para 3: 'I accordingly refuse to grant the records requested in terms of 45 of the Promotion of Access to Information Act 2 of 2000 as it is manifestly frivolous, vexatious, substantially and unreasonably divert the most needed resources of Legal Aid South Africa.' (Broken English in the original)

it was likewise wrong of the judge to keep banging the same ill-tuned drum in her judgment dismissing the application.

26. But as said, all this is entirely academic in the instant case, because there's no pending litigation in which the applicant intends or might conceivably use the requested records.

27. *Third*, although the appellant stated in his founding papers in the main case that once he has all the records he's sued for in the main case, he has in mind on some future date to bring a rescission application under common law in the Labour Court, in which he'll show, using some of those records and others already disgorged from LASA, that its budgetary insufficiency defence to his labour claim many years ago was a fraud on the court and that LASA's sole witness committed multiple objectively provable central, peripheral, and contradictory perjuries that perverted the court's decision of the case,[29] it's a flat fact that such envisaged litigation is no more than an idea bouncing around in the appellant's head; doesn't exist on paper; hasn't been launched; is a long way off in the future; and therefore isn't pending, and in the circumstances, nothing in section 7 (or any other section of PAIA) prevented the appellant from requesting records from LASA for use in that envisaged future litigation.[30]

[29] As noted above, Vahed J of this court appreciated this, because during the debate of LASA's abortive interdict application against the appellant, he remarked that all trial lawyers know that case are won by perjury sometimes, even if not often. He mentioned that he'd spent a week studying the papers, including the appellant's (in that case the respondent's) many volumes of answering papers in which he identified and proved LASA's witness's perjuries at the trial of his labour claim, contradicted and refuted by the documents annexed to them. See RA, para 45.

[30] Quite the contrary, the SAHRC has reported that one of the main purposes that requesters duly seek access to documents under PAIA is precisely to gather evidence for use in intended future litigation.

28. And since this intended future litigation hasn't even started yet, the Labour Court's discovery machinery isn't available to the appellant to extract from LASA any records he might need to further support his envisaged rescission case. Which is to say, the appellant's main case to compel access to the records he wants can't by any proper measure be condemned as 'manifestly inappropriate', in the language of *Biowatch*. So when the appellant does bring his rescission application one day (if the core dispute hasn't been resolved through settlement by then), LASA will have no basis under section 7 of PAIA to object to the use of the records obtained via PAIA in the main case, and to contend that the appellant should have sought those records under the Labour Court's discovery rules.

29. *Fourth*, section 11(3) of PAIA explicitly prohibits an information officer from having regard to a requester's purposes in deciding whether to grant or refuse a request for access to records held by the state; and the same naturally goes for a judge when deciding a requester's disputed entitlement to them.

30. That is, the appellant's stated intentions to use the requested records in support of further complaints to the several high authorities mentioned in the appellant's papers, and – here's the point – thereafter one day use some of them in support of a rescission application still to be launched, was none of the respondents' business, and it was equally none of the judge's.

31. In other words, just as the appellant's stated intentions were no legal basis for the first respondent to reject his request for access to the records he

sought and to hide them from him,[31] they were no legal basis for the judge to dismiss the appellant's claim to access them under section 32(1)(a) of the Constitution and section 9(a)(i) of PAIA – access to which public body records of this kind the Supreme Court of Appeal has confirmed the appellant enjoys 'a general and unqualified right'.[32] Indeed, as the Constitutional Court has emphasized in this regard, '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.'[33] (Footnote 50 in the judgment references 'Section 9(a)(i) of PAIA.')

32. *Fifth*, in any event, contrary to the judge's false and misleading general claim about this, many of the documents for which the appellant sued in the main case manifestly had nothing whatsoever to do with any such intended future litigation. These include legal costs records revealing what LASA unlawfully squandered on dilatory, insupportable, and ultimately abandoned opposition to the appellant's earlier PAIA litigation in the Magistrate's Court,[34] which the appellant stated in his papers he intends referring to the Auditor General for the personal recovery of this massive fruitless and

[31] As said above, the first respondent didn't rely on section 7 in his refusal notice, but raised it as a defence in his answering affidavit ('AA').

[32] *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.'

[33] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8, para 44.

[34] Cost records showing what LASA spent (a) on opposing the appellant's preceding PAIA litigation in that lower court all the way to the courtroom, only to fold moments before argument, and then (b) on persistently and obstructively opposing the appellant's application to compel full and proper compliance with the surrender treaty it signed at court, after reneging on it, even as under pressure of the appellant's set-downs LASA surrendered more of the pledged documents in two successive batches.

wasteful expenditure unlawfully incurred in violating his constitutional right to access LASA's records and in obstructing his further investigation of the criminal and other corruption at LASA that he'd turned up there.

33. By repeating in her judgment dismissing the application her most basic, elementary, multi-storied root errors committed in her judgment in the main case, canvassed above, the judge misdirected herself again in wrongly dismissing the application.

34. It's evident from the judge's paragraph 7[35] that she couldn't have read the appellant's extensive replying affidavit, because she gladly recited the respondents' allegation – on the way falsely exaggerating it to the appellant's prejudice – that 'Legal Aid had about two costs orders against the appellant which remained unpaid.'

35. In truth and in fact, as the appellant pointed out in his replying affidavit, of two costs orders[36] made against him – and exactly two, not 'about two' – only one taxed bill was ever presented to him for payment; and he had duly commenced paying it in massive instalments volunteered from his salary as a magistrate when Hundermark moved to get him summarily fired and deprived of his income – in retaliation for identifying, in his papers in his labour and subsequent litigations against LASA, then-Board chairperson

[35] The judge didn't decide and uphold the respondents' allegation, mentioned in this paragraph, that the appellant's application was brought out of time (AA, para 6), refuted by the appellant in reply (RA, para 9). In proceeding to deal with the application, in the absence of a condonation application that the respondents falsely claimed was necessary, the judge implicitly accepted that it was properly before her, so the question is not further treated here.

[36] Both cost orders wrongly made: as regards his labour action, according to the Constitutional Court in *Zungu* and in *Long*; and as regards his application to interdict the taxation of LASA's bill of costs in that labour case, according to this court (Vahed J), observing this during the hearing of LASA's failed application to interdict him from proceeding with his main PAIA claim in this matter: Case No: 12124/16P ('vexatious interdict case').

Mlambo JP's impeachable misconduct of on multiple counts, including his crimes.[37]

36. All this is canvassed in close detail in the appellant's papers, but as usual the judge didn't mention a jot of it in her judgment; instead she gleefully picked up on and repeated LASA's lying narrative to gaslight the appellant as a chronically failed litigant bringing endless meritless claims and insouciantly and delinquently disobeying court orders against him.

37. Again falsely pumping up LASA's story to denigrate the appellant in the law reports,[38] demean him before his colleagues, and depict him in as jaundiced a manner as possible, the judge falsely stated in her judgment that 'In some instances, a *nulla bona* return of service was obtained from the sheriff after the Legal Aid instructed the sheriff to execute its writs for the costs against the appellant.'

38. In truth and in fact, there was just one such instance, not several as falsely and untruthfully alleged by the judge; and moreover, as the appellant demonstrated in his replying affidavit, the return was actually false in multiple respects, *inter alia* in that instead of executing his writ against the appellant's *bona* which he indeed found in and at his home – namely his household goods and car – the sheriff elected to leave with the appellant's proposal and undertaking to settle LASA's Labour Court bill in substantial

[37] The appellant's criminal and other capital complaints to the JCC against Mlambo JP were put up as annexures to his supplementary answering affidavit in LASA's vexatious interdict case. LASA's objection and attempt to suppress it failed, and this additional affidavit was admitted into the evidence by this court (Vahed J), so the appellant's capital complaints against Mlambo JP are a matter of public record. All documents in the Mlambo JP matter, including those filed or issued subsequent to the disposal of LASA's abortive interdict case, are publicly accessible at corrupt-judges.co.za.

[38] At the head of her order, the judge recorded that she'd released the judgment to SAFLII.

monthly instalments, which the appellant duly honoured by making his first payment immediately. In other words, the sheriff's *nulla bona* return, suggesting that the appellant had no goods to excuss, was absolutely false. The appellant canvassed all this in fine detail in his replying affidavit,[39] but as usual the judge didn't bother reading and dealing with it.

39. The judge concluded her paragraph 7 by uncritically repeating LASA's alleged 'view that if security was not furnished by the appellant it would be placed in an unenviable position of being unable to recover its costs if the appeal was unsuccessful.' She didn't proceed to assess the merit of this 'view' in light of the Biowatch rule. Had she done so, and had she respected the Constitutional Court's jurisprudence in the matter, she'd have found the respondents' 'view' unmerited and rejected it.

40. Again in her paragraph 8, carelessly getting her basic facts wrong, the judge mindlessly adopted and trotted out the respondents' 'contention that even though the appellant was impecunious, that had not stopped him from what it called proliferating litigation against the Legal Aid despite also being unsuccessful.' In other words, as judge painted it, thoughtlessly echoing what the respondents had falsely alleged, the appellant was a vexatious litigant constantly harassing LASA with bad claims that he kept losing and not paying for. As the record shows, these are lies.

41. *First*, the judge failed to note in her judgment that this poisonously false portrayal of the appellant determinedly persistently pursuing his rights

[39] RA, para 33.

through the courts had been precisely the basis of LASA's application to interdict him as an alleged vexatious litigant, intended to shut him down, block his access to any further LASA records, expel him from the courts he was already busy in and permanently prevent his return to them; and that this court (Vahed J) had carefully considered LASA's factually and legally baseless case in light of the appellant's comprehensive answer refuting it (taking an entire week to study all the papers, he said in court)[40] and had quickly dismissed it at the end of LASA's counsel's hopeless argument.[41]

42. *Second*, and more particularly, the judge further failed to note that, contrary to her misrepresentation of the facts by crucial omission, in truth and in fact:

    1) After his failed labour action (because his cause of action was wrong, having been misdirected by LASA's criminal suppression of a duly requested, illegally refused, critical, all-explanatory record)[42] and his failed petition for leave to appeal (criminally perverted by improper influence exerted in writing on the Judge President of the Labour Appeal Court),[43] the appellant had practically won all his PAIA litigation in the Magistrate's Court against LASA – five applications and a condonation application set down together – upon LASA's capitulation to all his claims in the courtroom moments before argument, recorded in an undertaking

[40] RA, para 29.
[41] RA, para 50. Actually, a transcription of the argument will show that this court's opening question (per Vahed J) to LASA's counsel as he stood up to argue took LASA's case like a bullet through the forehead, and he flailed like a winged duck for the next forty-five minutes before sitting down exhausted and defeated. As noted, the appellant wasn't even required to answer LASA's collapsed case.
[42] The judgment was built on a mountain of basic legal and factual errors, but right in the result, in that the appellant's cause of action turned out, years later, to have been wrong; the problem was just jobs-for-pals, not unfair discrimination; see main case founding affidavit, para 86; and RA, paras 25, 64 and 99.
[43] Main case founding affidavit, para 40, and its annexure 'K'.

handed into court to surrender the records he'd sued for. In other words, this 'proliferating litigation' by the appellant after his criminally misdirected then criminally perverted labour case had been successful.

2) LASA had twice incrementally conceded his next application to compel full and proper compliance with its surrender treaty by giving up further records from among those pledged in the settlement agreement but still withheld in breach of it. In other words, this 'proliferating litigation' had been substantially successful.

3) The appellant's application to interdict the taxation of LASA's costs in the Labour Court wasn't dismissed on the merits, but on account only of a service hitch.[44]

4) The appellant had thrashed LASA in its above-mentioned interdict application against him, corruptly calculated to shut down his continuing investigation, using PAIA, of its criminal, financial, and administrative corruption.

5) Besides the appellant's main case, which his appeal notice clearly shows is certainly not meritless 'proliferating litigation' – and the judge herself implicitly conceded this in granting him leave to appeal – his further two PAIA applications made to this court are pending by agreement, under the supervision of the case manager (Van Zijl J) appointed by the Judge President. And since the defences raised by LASA are similar to those raised in the main case under appeal, defences certain to be rejected by a

[44] Main case, replying affidavit, para 223.2.

full bench, it's obviously idle to categorise these two further PAIA cases as meritless 'proliferating litigation' also.

43. *Third*, the judge failed to note in relation to the equities of the matter that:

    1) According to Constitutional Court in *Zungu* and in *Long*, the Labour Court's costs order against the appellant was wrongly made, in that, unlike in civil actions, costs don't ordinarily follow the result in labour disputes.[45]
    2) According to this court (Vahed J, expressing this view from the bench during the argument of LASA's abortive vexatious interdict application), this court (Pillay J) had wrongly ordered the appellant to pay LASA's costs when dismissing his application to interdict the taxation of LASA's Labour Court costs, instead of just striking it from the roll, for want of service.[46]

44. *Fourth*, the judge implicitly included the main case in her disparaging reference to the appellant's 'unsuccessful … proliferating litigation' – the very case she'd utterly bungled in her judgment dismissing it, for all the reasons identified in his phone-book thick appeal notice, leave to appeal which the judge was constrained to grant on sight of it, and which very incorrect judgment of hers stands certain to be reversed by a full bench. After which, the appellant's two further PAIA applications pending in this court, against which LASA has raised the same spurious defences, will likely be conceded in accordance with the full bench judgment.

[45] RA, para 34.
[46] Main case replying affidavit, para 223.2.

45. In sum, the judge's glib depiction of the appellant's 'litigation' against LASA, as 'unsuccessful' yet 'proliferating' vexatiously is both substantially false and highly prejudicial, and misdirected her in dismissing the application.

46. Further in her paragraph 8 the judge uncritically repeated the respondents' empty plaint that 'the appellant's litigation' against LASA to enforce his fundamental right to public body information guaranteed by section 32(1) of the Constitution – which LASA had repeatedly and consistently violated in attempting to maintain its high-level recruitment corruption cover-up – were draining its 'scarce resources' and 'impeding the Legal Aid from performing its core functions' – to which the judge incoherently tacked on the ridiculous rider, never contended by LASA, and completely fatuous on any serious view of the extraordinarily grave matter, to wit: 'which undermined the public interest that the functioning of the courts and the administration of justice should proceed unimpeded by groundless proceedings.'

47. In other words, in the learned opinion of this senior judge of the KwaZulu-Natal Division of the High Court of South Africa, in persistently and hopefully, albeit thus far unsuccessfully, looking to the High Court to vindicate his constitutionally entrenched right to public body information guaranteed by the Constitution in the democratic era, the effective exercise of which was crucial to his ongoing, long-term project – repeatedly impeded by the judge – in investigating and reporting on the fullest available documentary evidence the criminal, financial, and administrative corruption at LASA that he'd run into, the appellant was behaving like a demented pest,

a menace to the public, a sort of sociopath deleterious to the common weal, who should be stamped out like a noxious bug. A full bench of this court is sure to find this laughably absurd and reject this crass mischaracterisation of the appellant in his unwavering hope that the High Court will eventually take seriously the corruption described in his papers, and uphold and enforce his fundamental rights to assist him take LASA's corrupt officers to law.

48. *First*, had the appellant's main case amounted to 'groundless proceedings' that '…impeded …the functioning of the courts and the administration of justice', this court (Vahed J) would have stopped them at LASA's instance after hearing its vexatious interdict application. This court didn't do so, because upon a painstaking consideration of the matter entailing a week of careful study,[47] this court made no such finding about the appellant's main case.

49. Nor did this court (Vahed J) find the appellant's pending application in the Magistrate's Court to compel LASA to honour its settlement agreement to turn over all the records he'd sued for, or to duly certify under section 23 of PAIA those that don't exist, to be 'groundless proceedings' that '…impeded …the functioning of the courts and the administration of justice'.

50. Nor did this court (Vahed J) think the appellant's application to interdict the taxation of LASA's Labour Court bill to be 'groundless proceedings' that '…impeded …the functioning of the courts and the administration of justice'.

[47] See RA, para 45.

51. Before the hearing of LASA's vexatious interdict application, this court (Vahed J) had drawn the court file from the archives at his own initiative and studied the appellant's case detailing the corrupt and fraudulent disposal of his petition for leave to appeal the dismissal of his labour claim. Neither during the hearing nor in his reasons for dismissing LASA's application did this court (Vahed J) say or intimate any such negative thing about the failed application. On the contrary, during the said hearing, this court (Vahed J) rebuked LASA via its counsel for claiming and taking an order dismissing the appellant's interdict case with costs, on account of a service glitch, instead of agreeing to its removal from the roll by the presiding judge (Pillay J) for its argument on its merits later on, after due service by the sheriff.[48]

52. The presiding judge (Pillay J) did not find following any debate of the merits – there wasn't any – that the appellant's taxation interdict case amounted to 'groundless' proceedings' that '…impeded …the functioning of the courts and the administration of justice'. As said, she dismissed it on account of a service.

53. *Second*, had the appellant's main case amounted to obviously 'groundless proceedings' that '…impeded …the functioning of the courts and the administration of justice', the judge wouldn't have granted the appellant leave to appeal her judgment dismissing it, appreciating and accepting that a full bench might well reverse her judgment and, unlike her, uphold his claim.

[48] Main case, replying affidavit, para 223.2.

54. *Third*, had the appellant's PAIA 'proceedings' in the Magistrate's Court been 'groundless', and '…impeded …the functioning of the courts and the administration of justice', LASA wouldn't have conceded them and undertaken to hand over the documents he'd sued for.

55. *Fourth*, had the appellant's further 'proceedings' in that lower court to compel full and proper compliance with LASA's settlement agreement been 'groundless' and '…impeded …the functioning of the courts and the administration of justice' as well, LASA wouldn't on two successive occasions have surrendered further documents under pressure of the appellant's set-downs.

56. *Fifth*, the respondents' irrelevant whining that 'the appellant's litigation' against LASA over the years, to enforce his constitutionally guaranteed right to access its records it was illegally hiding from him, were draining its 'scarce resources' and 'impeding the Legal Aid from performing its core functions' (per the judge's echo of it here) was thoroughly and extensively picked to pieces and refuted in the appellant's replying affidavit[49] (also in his main case), but turning her customary deaf ear the judge didn't address it at all. She just mechanically recited LASA's irrelevant and untruthful distraction about this.

57. Actually, the only[50] 'groundless proceedings' between the appellant and LASA[51] were LASA's vexatious interdict application, quickly dismissed by

[49] RA, para 79ff.

[50] Also 'groundless' under the rules of court and relevant case law is LASA's subsequently launched application to this court to transfer up to it the appellant's application to the Magistrate's Court to compel LASA's full and

this court (Vahed J) immediately after its counsel ended his hopeless argument and sat down;[52] and LASA implicitly accepted this court's finding that it had indeed brought legally and factually 'groundless proceedings' against the appellant, because it didn't even apply for leave to appeal. But in her prejudice against the appellant, the judge didn't mention this. In any case, the respondents' and the judge's own points had nothing whatsoever to do with the narrow issues raised in the application. But they certainly prejudiced her decision.

58. The judge's paragraph 8 concluded with a series of pointless, logically incoherent effusions: Because he conducted his litigation against LASA himself, said the judge, he 'did not feel a pinch on costs'[53] whereas 'Legal Aid had to incur enormous costs to defend the appellant's baseless litigation.' As just noted, and for the reasons enumerated, on any honest, thoughtful, and objective appraisal, the appellant's 'litigation' wasn't 'baseless'; whereas contrariwise it was precisely LASA's litigation against him that had been found 'baseless' by this court (Vahed J), just as LASA's opposition to the appellant's PAIA litigation in the Magistrate's Court abandoned in the courtroom moments before argument had implicitly been conceded as 'baseless'; also LASA's 'baseless' opposition to his taxation interdict application, after the appellant discovered in the Labour Appeal Court file

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proper compliance with the settlement agreement to turn over the records he'd sued for, or certify under section 23 of PAIA those that don't exist. LASA's 'groundless' application is pending.

[51] The labour judge examined the appellant's cause of action in his labour claim in careful detail, quoting its factual basis at length on page after page of his judgment. But misallocating the final burden of persuasion to the appellant, instead of LASA, he was unpersuaded. See further: RA, paras 99–101.

[52] Main case, replying affidavit, paras 1.1–2.

[53] As if spending day after day, year after year, for over a decade, on necessarily litigating against LASA has been cost-free.

the 'memorandum' that criminally perverted the decision of his petition for leave to appeal the dismissal of his labour case; also LASA's 'baseless' opposition to his labour claim with the childishly bogus defence, contradicted by LASA's own records (with totally different childishly false stories told at other times)[54] that LASA sadly just hadn't received the necessary salary budget to appoint the appellant to the long vacant, budgeted and funded, repeatedly advertised top professional echelon post he'd applied for after he'd been duly recommended for it in glowing terms by the selection panel that interviewed him and the other shortlisted candidates.[55]

59. Had LASA not persistently violated the appellant's fundamental right to information, he wouldn't have had to sue repeatedly for the records he'd duly requested, and LASA wouldn't have 'had to incur enormous costs' insupportably and financially wastefully opposing him in court to keep the records hidden from him.

60. That the appellant has the benefit of his professional acumen to conduct his own litigation to enforce his fundamental rights without the expense of hiring other lawyers[56] was obviously perfectly irrelevant to the issue of whether he should be exempted from finding nearly a third of a million rands

[54] Main case replying affidavit, annexure 'K': 'All the Different Stories'.
[55] These other applicants included then-Board chairperson Mlambo JP's long-time erstwhile judicial fellow in the Labour Court, Mzochitwayo Ngcamu, who, over a period of about six years, had been repeatedly appointed to act there. This relationship came to light as a result of the appellant's use of PAIA, and finally litigation under it, to extract from LASA very reluctantly the selection panel's recommendation report recording this crucial, all-explanatory information as to why the appellant's recruitment had been silently and illegally aborted. Ngcamu was unexpectedly rejected by the selection panel, despite the rigging of the advertised qualifying criteria for the post, whereafter the recruitment process was then permanently frozen, illegally, off the record, without authority, contrary to the express wishes of the Justice Portfolio Committee of the National Assembly, and in unlawful contravention of the Public Finance Management Act, as confirmed in *Zungu*. See main case, replying affidavit, para 72.5.
[56] The exception being to argue the taxation interdict matter, for reasons of convenience only.

in cash to secure LASA's costs of opposing his appeal in the main case to enforce his fundamental right to public body information; and the judge misdirected herself in making this totally irrelevant, prejudicial observation.[57]

61. The judge's allegation that the appellant 'did not pay his outstanding cost orders' is a grotesque and malevolent perversion of the whole truth of the matter, for all the reasons stated above. All these spurious claims made by the judge in this regard misdirected her dismissal of the appellant's application.

62. Again in her paragraph 9, without a trace of the appellant's extensive case made out in support of the relief he seeks, the judge blindly quoted the respondents' opposing case, failing to appreciate its irrelevance in light of the Biowatch rule enunciated by the Constitutional Court, governing costs in constitutional litigation against organs of state.

63. Consistent with her persistent, ill-founded allegations that the appellant's litigation, including the instant PAIA case, have been 'groundless' and 'baseless', the judge quoted *Shepard* in her paragraph 10 to suggest that the appellant just 'drags [LASA] from one court to the other'[58] with 'groundless' and 'baseless' lawsuits. As noted above, and contrary to the judge's deplorably false and misleading suggestion about this, the opposite is true.

[57] As if by investing thousands of hours in his litigation against LASA over the past decade or so while acting *pro se*, the appellant was somehow gaming or cheating the legal and judicial systems. As if section 34 of the Bill of Rights contemplates that the courts are a playground reserved for the rich and their expensive mercenaries.
[58] The judge quoting from the reported decision.

And this court (Vahed J) had already considered, assessed and dismissed this claim.

64. The judge's citation of *Carpe Diem Explorations* in her paragraph 11 without considering the implications of the Biowatch rule further misdirected her judgment.

65. She duly cited *TR Eagle Air* holding that 'the onus was on the appellant "to place facts to the satisfaction of the court why he or she should be released wholly or partially from giving security"', but then entirely neglected to evaluate the facts that the appellant had indeed placed before her in this regard; and again she failed to consider the implications of the Biowatch rule for her decision of the issue.

66. And although the dictum she quoted in *Dr Maureen Allem Inc* – 'provision of security to protect the interests of one's counterpart in litigation is not a disproportionate limitation on the access to court right' – is uncontroversial in any ordinary litigation between private parties, the appellant's main claim against LASA as an organ of state is a 'case involving [the appellant's] constitutionally protected right... to information'[59] guaranteed by section 32(1)(a) of the Bill of Rights, so costs liability is governed by the Constitutional Court's Biowatch rule, the effect of which is that the appellant is immune from being ordered to pay the respondents' legal bills even if he loses his main case on appeal.

[59] In the language of *Biowatch*, para 9.

67. In other words, there's no real prospect of such a costs order being made against the appellant, seeing as in granting him leave to appeal her judgment the judge implicitly accepted that his main case against the respondents is not 'frivolous or vexatious, or in any other way manifestly inappropriate' (in the language of *Biowatch*) so in no wise can it be hit by the qualification of the Biowatch rule, depriving a litigant who's brought and pressed a 'frivolous or vexatious, or in any other way manifestly inappropriate' case of his immunity under the rule.

68. In the situation, the judge's dismissal of the appellant's application clearly falls to be reversed, so that the appellant can proceed to set down his appeal in his main case without further impedance and delay, argue it before a full bench, and thereafter access LASA's records that he's duly requested and use them in getting this fantastically corrupt public entity held to account. And the appellant should be granted leave to appeal the dismissal of his application accordingly.

Signed at Eshowe on 21 November 2020

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