

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

Case No: 14224/17P

In the matter between:

ANTHONY BRINK

Applicant

and

VIDHU VEDALANKAR N.O.

INFORMATION OFFICER

LEGAL AID SOUTH AFRICA

Respondent

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APPLICANT'S HEADS OF ARGUMENT

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*Access to information is a fundamental tool in the fight against corruption.*

Gabriella Razzano, Head of Legal Research at the Open Democracy Advice Centre; presentation to the Fourth National Anti-Corruption Forum Summit in Cape Town, 8–9 December 2011

1. The respondent, information officer Vedalankar, or her national office lawyers, responded to this application to compel her to fix LASA's corrupted, defective PAIA manual, faulted in my founding affidavit,<sup>1</sup> by publishing an amended, corrected version on its website.<sup>2</sup> Prayers 4 and 5 of my notice of motion have consequently become redundant,<sup>3</sup> and my case in support of them likewise.<sup>4</sup>

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<sup>1</sup> Paginated papers , pages 28–36 paragraphs 95–30.

<sup>2</sup> Pp 293–4 para 39.

<sup>3</sup> P 279 para 1.

2. Mtati's many obvious basic factual mistakes, irrelevancies and obfuscation in his answering affidavit are dealt with and disposed of in my replying affidavit, and won't be addressed again in this summary argument.

3. As I truthfully stated in paragraph 29 of my founding affidavit,<sup>5</sup> I duly complied with the prescribed formalities in making my records request; and Mtati's careless vague denial of this in his blanket denial of 'paragraphs 26 to 32'<sup>6</sup> is false and insupportable, and creates no genuine dispute about it. Under section 81(3)(a), 'the burden ... rests' on Mtati to 'establish... that [his] refusal ... complies with the provisions of this Act',<sup>7</sup> being 'the party claiming that it [does]'.

4. Part A of my PAIA request specified records revealing the legal costs of LASA's top officers' corruptly motivated, malicious, failed attempt to strip me of my constitutional rights to information and to approach the courts to enforce them in our democracy, with the object of preventing me accessing its records, including records it had agreed at court to give me, for which I'd had to sue, by trying to have me expelled from the courts as a vexatious litigant.<sup>8</sup> These ordinary legal cost records comprise counsels' fee-notes; LASA's attorneys' time-sheets kept in the case; their hourly charge rates; all LASA's advocates' and attorneys' travel, accommodation and meal vouchers; and the sheriff's invoice for serving LASA's abortive application on me.<sup>9</sup>

5. There's nothing 'manifestly frivolous or vexatious'<sup>10</sup> about my request for these records within the contemplation of section 45, as Mtati falsely alleged (nominally only) both in his refusal<sup>11</sup> and in his answering affidavit<sup>12</sup> – more especially having

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<sup>4</sup> Mtati's answer to my case on this aspect at pp 202–3 paras 136–40 is likewise of no further interest, other than as a cameo of his mendacity under oath, shown in my replying affidavit at pp 293–5 paras 39–43.

<sup>5</sup> P 13. See also p 8 para 11 and p 193 para 98.

<sup>6</sup> P 196 para 108.

<sup>7</sup> P 17 para 46.

<sup>8</sup> Pp 58–60 paras 6–10.

<sup>9</sup> Pp 53–4.

<sup>10</sup> P 167 para 8.1.

<sup>11</sup> Pp 209–16.

regard to my serious purpose in making it, stated in a letter to the respondent Vedalankar a couple of days later, namely to report and ventilate this unlawful abuse and waste of public revenue to ‘the Auditor General; the Public Protector; the SAHRC; the Information Regulator; the Minister; the Portfolio Committee; the International Legal Aid Group; the media, including two of our country’s leading investigative journalists watching the case; and several nationally prominent corruption fighting and information transparency NGOs who’ve expressed their support for my struggle against the corruption at LASA and its contempt for constitutional information transparency that I’ve encountered.’<sup>13</sup>

6. Lumped onto this clearly indefensible ‘manifestly frivolous and vexatious’<sup>14</sup> justification for totally refusing my cost records request, Mtati told other nonsensical stories in his refusal, and heaped on yet more useless justifications in his answering affidavit.

7. Counsels’ fee-notes (item 1 of Part 1 of my request) are falsely claimed to be ‘personal information of third parties and both the parties have refused to release such information.’<sup>15</sup> Advocates’ invoices for their professional services rendered don’t comprise ‘personal information’<sup>16</sup> as defined by section 1 of PAIA. Such an invoice is a ‘record’ as defined by the same section,<sup>17</sup> and even by LASA’s own PAIA manual.<sup>18</sup> So whether LASA’s advocates consented to the release of their fee-notes to me or not is legally quite uninteresting.<sup>19</sup> In his answering affidavit, Mtati specifically invokes sections 34<sup>20</sup> concerning his ‘personal information’ allegation in his refusal, and additionally raises sections 36 and 37<sup>21</sup> to further justify refusing

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<sup>12</sup> P 168 para 9.4 and 9.4.1.

<sup>13</sup> P 61 para 12.

<sup>14</sup> Section 45 says ‘or’ not ‘and’.

<sup>15</sup> P 167 para 8.1.

<sup>16</sup> Quoted at p 17 para 50.

<sup>17</sup> Quoted at p 18 para 52.

<sup>18</sup> Quoted at p 19 para 53.

<sup>19</sup> P 17 para 49 to p 20 para 61.

<sup>20</sup> P 183 para 60.

<sup>21</sup> Pp 183–4 paras 62–5.

me access to counsels' fee-notes, ridiculously calling these routine commercial invoices 'personal and proprietary information'.<sup>22</sup> Clearly they're not.

8. In his answering affidavit, Mtati fails to explain the non-existence of LASA's attorneys' time-sheets (item 2),<sup>23</sup> as I required in my founding affidavit.<sup>24</sup>

Nonetheless, I record here that in the interests of expedition I've elected not to pursue these records.<sup>25</sup>

9. Concerning my request for the record of LASA's attorneys' hourly rate (item 3), a document at his fingertips in his national office, Mtati transparently untruthfully claims my request for it 'further seeks to substantially and unreasonably divert the resources of Legal Aid SA'<sup>26</sup> – mindlessly and dishonestly parroting section 45 of the Act.

10. Mtati refuses me the records of all subsistence and travel disbursements by LASA's advocates and attorneys incurred in trying to shut me down, have me thrown out of court, and banned in the Government Gazette as a vexatious litigant (item 4), on the pitifully clueless ground that I don't need them to 'fully exercise [my] rights and protect such rights'<sup>27</sup> and he refuses me the sheriff's invoice (item 5) on the same legally spurious basis<sup>28</sup> – dismally ignorantly and incompetently applying the test for entitlement to a private body record, not a public one.<sup>29</sup>

11. Apropos of Part B of my request,<sup>30</sup> my founding affidavit records that I independently sourced items 6–8 subsequent to Mtati's false allegations that I

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<sup>22</sup> P 183 para 61.

<sup>23</sup> P 21 para 62 to p 23 para 73.

<sup>24</sup> P 23 para 73.

<sup>25</sup> I accept that unlike professional attorneys in private practice, LASA's head office attorneys don't keep a record of their work on litigation and that they resort to manufacturing their hours spent when drawing their bills of costs later on, as in my labour case.

<sup>26</sup> P 23 para 74.

<sup>27</sup> P 212.

<sup>28</sup> P 25 para 81.

<sup>29</sup> P 24 para 75 to p 25 para 80.

<sup>30</sup> P 54–5.

already had them in my possession, which false allegations he made in his refusal to justify refusing me access to them,<sup>31</sup> illegally and unconstitutionally.

12. Mtati's refusal 'in terms of the general principles of fairness'<sup>32</sup> to provide me with LASA's letter to the Magistrate's Commission covering its complaint against me (item 9) on the basis that, besides being 'manifestly frivolous and vexatious'<sup>33</sup> and an unreasonable and substantial diversion of LASA's resources,<sup>34</sup> I can go off and ask the Commission for it instead, is no justification under any provision of PAIA for refusing it.<sup>35</sup> Mtati persists with his section 45 justification in his answering affidavit,<sup>36</sup> and foolishly cooks up yet another a fresh criterion by which to block my request for this record: now it's reasonableness – found nowhere in the Act: 'It is unreasonable for the applicant to pester Legal Aid SA with requests such as this one',<sup>37</sup> and 'the decision [to refuse my entire request under section 45]<sup>38</sup> is eminently reasonable'.<sup>39</sup> Only, under PAIA, reasonableness has nothing to do with it.

13. 'Finally'<sup>40</sup> Mtati justifies his rejection of my entire request for cost records in the failed legal attack on me and for the covering letter to the Magistrates Commission 'because the applicant intends using this information for purposes of ongoing litigation against Legal Aid SA, which section 7 proscribes.'<sup>41</sup> Only that isn't my intention at all; my actual intention is stated in my letter to Vedalankar a couple of days after<sup>42</sup> my request: 'I intend reporting and ventilating the massive unlawful fruitless and wasteful expenditure squandered on the malicious application that you and Hundermark authorised to obstruct my exercise of my fundamental right to

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<sup>31</sup> P 26 para 85 to p 28 para 93.

<sup>32</sup> P 214.

<sup>33</sup> P 214.

<sup>34</sup> Ibid.

<sup>35</sup> P 28 para 94.

<sup>36</sup> P 187 paras 72.4; 74 and 75.

<sup>37</sup> P 188 para 75

<sup>38</sup> P 198 para 120.

<sup>39</sup> P 200 para 120.

<sup>40</sup> P 188 para 76.

<sup>41</sup> Ibid.

<sup>42</sup> P 9 para 16.

information with the object of smothering or at least severely hindering my investigation and reporting of [serious top-level corruption and criminality at LASA, detailed]'.<sup>43</sup> Not only did Mtati wrongly state my intention as a basis for refusing my request, but moreover his wrong assertion of my reason for making my request, falsely attributed to me in the face of my actual stated reason, as his rationale for refusing it, illegally contravened section 11(3), prohibiting an information officer from having regard to a requester's reasons, stated or surmised, when deciding a request.

14. How LASA's letter to the Magistrates Commission could possibly be of any use to me in any litigation, and therefore, he reckons, hit by section 7 (which section is anyway irrelevant to the decision of a PAIA request), Mtati just leaves in the air.<sup>44</sup>

15. Part Three of my founding affidavit<sup>45</sup> makes my case for this court's order that information officer Vedalankar comply with my request, since Mtati is quite clearly functioning as a cipher only<sup>46</sup> and his involvement in refusing it and opposing this application to compel it is clearly nominal, as a mere signatory only.<sup>47</sup>

16. Since Mtati defends his (nominal) refusal in the answering affidavit he signed and put up to oppose me, he can't complain of any prejudice from not being sued.<sup>48</sup>

17. Since I'm not claiming any relief against LASA, I'd no need to join it, as Mtati insists.<sup>49</sup> See for instance, *Clause v Information Officer of South African Airways* [2006] SCA 163 (RSA), a judgment of the Supreme Court of Appeal in which an information officer alone was competently sued for records, SAA not having been joined.

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<sup>43</sup> P 60 para 11.

<sup>44</sup> P 202 para 135.

<sup>45</sup> P 36 paras 131 to p 41 para 153.

<sup>46</sup> P 289 para 26 and p 299 para 62.

<sup>47</sup> Pp 14–16 paras 34–41.

<sup>48</sup> Pp 170–1 paras 12–16.

<sup>49</sup> *Ibid.*

18. The complex of facts supporting my claims for publication, referral, and costs in prayers 6–8 of my notice of motion is too dense to summarise here, and are comprehensively set out in my affidavits in support of them.<sup>50</sup>

Signed at Eshowe on 25 February 2019.

ANTHONY BRINK

APPLICANT

AUTHORITIES RELIED ON:

*A Company and Others v Commissioner for SARS* (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) (17 March 2014)

*Westwood Insurance Brokers (Pty) Ltd v Ethekewini Municipality and Others* (8221/16) [2017] ZAKZDHC 15 (5 April 2017); and ZAKZDHC 29 (31 July 2017)

*Mandag Centre for Investigative Journalism and another v Minister of Public Works and another* (67574/12) [2014] ZAGPPHC 226 (29 April 2014)

*Zungu v Premier of the Province of KwaZulu-Natal and Others* (CCT136/17) [2018] ZACC 1 (22 January 2018)

*Claase v Information Officer of South African Airways* [2006] SCA 163 (RSA) (30 November 2006)

For easy quotation by copying and pasting, these heads and the application papers are accessible in a Dropbox folder online at [goo.gl/KKjMB7](http://goo.gl/KKjMB7).

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<sup>50</sup> Pp 41–7 paras 154–78.