

**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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**BRINK'S NOTES ON**  
**RESPONDENT'S CONCISE HEADS OF ARGUMENT**

Only new points will be addressed, not those already treated in my notes on  
the respondent's heads in the first application 11187/16P

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**OVERVIEW**

- 1 The applicant ("**Brink**") has, since August 2010, filed sixteen requests for information in terms of the Promotion of Access to Information Act, 2 of 2000 ("**PAIA**" or "**the Act**") with the respondent ("**Legal Aid SA**"), requesting more than 270 records.<sup>1</sup>
- 2 The requests all relate to the 2009 recruitment process for the senior litigator post in the Pietermaritzburg offices of Legal Aid SA, which Brink interviewed for but Legal Aid SA subsequently abandoned the filling of the post due to budgetary constraints.<sup>2</sup> Brink unsuccessfully challenged Legal Aid SA's decision to not fill the post in the Labour Court, Durban.<sup>3</sup> His application to that Court, and subsequent petition to the Labour Appeal Court ("**LAC**"), for leave to appeal were also dismissed.<sup>4</sup>

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<sup>1</sup> AA p 167 para 7; pp 174-179 paras 30-53.

<sup>2</sup> AA p 173 para 26.

<sup>3</sup> AA pp 173-174 para 27.

<sup>4</sup> AA p 174 para 28.

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

### **POINTS IN LIMINE**

#### ***Non-joinder***

- 4 Brink seeks to compel the production of certain records sought in terms of PAIA that were refused by Mr Thembile Mtati ("**Mtati**") on 28 November 2017. However, Brink has not joined Mtati or Legal Aid SA to these proceedings.<sup>5</sup> Joinder of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of the court in the proceedings concerned.
- 5 Mtati and Legal Aid SA has a direct and substantial interest in the relief sought by Brink. Consequently, we submit that Brink's failure to join Legal Aid SA and Mtati constitutes a material non-joinder and this application should be dismissed on this basis.

**This is addressed in Brink's short heads with case authority.**

#### ***Delayed Application to this Court***

- 6 Brink failed to launch a review application against Legal Aid SA in terms of section 78(1) of PAIA, which gives Brink 180 days to bring an application challenging refusal of access to information. Brink has not applied for condonation. We submit that there is no justification for finding that it would be in the interests of justice to condone non-compliance with the 180-day period. The decision refusing access to the information sought had been properly taken under the provisions of section 39(1)(b)(iii)(ee) of the Act.

**The mistake about the alleged delay is dealt with below.**

**The section 39(1)(b)(iii)(ee) justification for refusing my request is a brand new story featuring nowhere in the refusal notice or answering affidavit!**

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<sup>5</sup> AA p 170 para 12.

**Now LASA's counsel reckon the 'the disclosure of the record could reasonably be expected ... to prejudice or impair the fairness of a trial or the impartiality of an adjudication'!**

**How my access to LASA's cost records revealing what it squandered on trying to have me banned as a vexatious litigant 'could reasonably be expected ... to prejudice or impair the fairness of a trial or the impartiality of an adjudication' they naturally don't say.**

**These people clearly don't have the faintest idea of what they're doing.**

7 The effect of delay is clear in our law. An applicant for review who fails to bring the application within a reasonable time will lose the right to complain of the irregularity in regard to which the review is brought – unless condonation can be obtained.<sup>6</sup>

**My request was refused on 28 November 2017. I sued to compel it two weeks later on 15 December 2017. I pointed this out in my replying affidavit. Still they persist with stupid mistake in their heads of argument.**

### ***Striking out***

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

### **THE RELIEF SOUGHT BY BRINK IS INCOMPETENT**

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

10 First, the PAIA request of 30 October 2017 was correctly refused in terms of section 7 of the Act, which provides that PAIA does not apply to the records requested for criminal or civil proceedings after commencement of those proceedings.

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<sup>6</sup> *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) paras 12-3. See also *Lion Match Company Ltd v PPWAWU* 2001 (4) SA 149 (SCA); *WolgroeiërsAfslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).

- 11 Brink could have exercised the remedies available to him in terms of PAIA prior to instituting his claim against Legal Aid SA in the Labour Court. He elected not to. Instead, he chose to prosecute his claim through a full trial before the Labour Court and the LAC and is not entitled now to rely on PAIA to access the records requested insofar as they relate to his non-appointment to the senior litigator post.
- 12 Second, the PAIA request of 30 October 2017 was correctly refused in terms of section 45 of the Act, which allows a public body to refuse a request for access to a record if the request is manifestly frivolous or vexatious. Brink's request is both frivolous and vexatious, as evidenced through his behaviour over the past 10 years.<sup>7</sup>
- 13 Legal Aid SA is entitled to refuse the request, under section 45, where the work involved in processing the request would substantially and unreasonably divert its resources. More than 180 hours have already been spent on processing Brink's various PAIA requests.<sup>8</sup> Brink's vexatious requests compromise the delivery of legal services as mandated to Legal Aid SA and it was entitled to refuse to provide the information on this basis.
- 14 Third, Brink's requests for information fall within the mandatory exclusionary provisions under PAIA that protect third party information,<sup>9</sup> the disclosure of which would affect a person other than the body from which it is requested.
- 15 Further, principles of public policy dictate against the misuse of the Act in circumstances where there is a definitive decision on the merits of the dispute between the parties, despite Brink's continued attempts to re-litigate the matter, puts an end to the dispute.
- 16 Brink is also not entitled to the relief sought in paragraphs 6 and 7 of the notice of motion, being extraordinary and without any basis in law. Brink has simply failed to make out a case to sustain such relief.
- 17 Finally, no factual basis has been laid for a personal costs order *de bonis propriis* against Vedalankar. Costs orders *de bonis propriis* are only awarded in exceptional circumstances,<sup>10</sup> and the general rule in relation to public officers is that costs

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<sup>7</sup> AA p 176 para 40; p 178 para 48; p 179 paras 51-52; FA pp 26-27 paras 89-92.

<sup>8</sup> AA p 186 para 71.

<sup>9</sup> Section 34, 36 and 37 of the Act.

<sup>10</sup> *Lushaba v Member of the Executive Council for Health, Gauteng* 2015 (3) SA 616 (GJ) at para 69-70.

should not be awarded against an officer who carried out his duties mistakenly, but in good faith.<sup>11</sup>We submit that Vedalankar acted in accordance with the law.

**ANTHONY BRINK**  
**APPLICANT**

**TJB BOKABA SC**

**T SCOTT**

11 March 2019

Counsel for the Respondents

Chambers, Sandton

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

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<sup>11</sup> *Omnia Fertilizer Ltd v Competition Commission; Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd*[2008] ZACT 45 (20 June 2008), with reference to *Coetzeestroom Estate & GM Co v Registrar of Deeds* 1902 TS 216.