

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

Case No: 5239/18P

In the matter between:

ANTHONY BRINK Applicant

and

VIDHU VEDALANKAR N.O.
INFORMATION OFFICER
LEGAL AID SOUTH AFRICA First Respondent

PATRICK HUNDERMARK
CHIEF LEGAL EXECUTIVE
LEGAL AID SOUTH AFRICA Second Respondent

LEGAL AID SOUTH AFRICA Third Respondent

APPLICANT'S HEADS OF ARGUMENT

*It's only when people have something they are not proud of that they try to
hide things.*

Ela Gandhi, former director of the Board of Legal Aid South Africa
The Mercury, 23 November 2011

1. It's beyond serious dispute that my PAIA request addressed to the information officer of the Department of Justice and Correctional Services for access to certain financial records,¹ duly transferred to LASA information officer Vedalankar,² the

¹ Paginated papers, pages 88–95.

first respondent, indeed ‘complied in all respects with the form prescribed by section 18’,³ as I truly affirmed; and the second respondent Hundermark’s casually perjured vague denial of this in his answering affidavit⁴ raises no genuine dispute about it. (He didn’t dispute that my request was formally compliant before refusing it.)⁵ Section 81(3)(a) therefore sets the onus on him to justify his refusal to allow me access to the requested records, being ‘the party claiming that it ... complies with the provisions of this Act’.

2. With submission, my ill-considered concession in my replying affidavit that Hundermark is a deputy information officer at LASA⁶ was mistaken. As I correctly showed in my founding affidavit,⁷ in fact he isn’t one. This is because whereas section 17(1) provides generally that (my following *added emphasis*) ‘each *public body* must ... designate such number of persons as deputy information officers as are necessary’, section 17(3) provides specifically that ‘*The information officer* of a public body may delegate a power or duty conferred or imposed by this Act to a deputy information officer of that public body.’ And section 17(6) provides that ‘Any delegation in terms of subsection (3) – (a) must be in writing; (b) does not prohibit *the person who made the delegation* from exercising the power concerned or performing the duty concerned *himself or herself*; and (c) may at any time be withdrawn or amended in writing by that *person*.’ In short, LASA’s Board doesn’t have the power and can’t legally appoint a deputy information officer just by approving a PAIA manual listing certain executive management post-holders categorically as deputy information officers ‘*ex officio*’⁸ – as Hundermark wrongly contended⁹ and I wrongly conceded.¹⁰ Under section 17, only information officer Vedalankar has the power to delegate deputy information officers: specifically,

² P 12 para 19.

³ P 10 para 13.

⁴ P 145 para 81.2.

⁵ P 19 para 38.

⁶ P 245 para 229.

⁷ Pp 14–18 paras 25–35.

⁸ Pp 152–3 para 97.2.

⁹ P 152–3 para 97.

¹⁰ P 245 para 229.

individually, and in writing. And Hundermark holds no delegation from her as such.¹¹ All he can point to is LASA's PAIA manual approved by the Board, incorrectly informing the public that the 'Chief Legal Executive' (Hundermark currently) is one of LASA's deputy information officers.¹² He isn't.

3. The central issue for decision in the case is whether Hundermark's denial of my access to the financial records I requested was justified, or whether it violated my vital constitutional right to public body information in our open democracy, entrenched and guaranteed by section 32(1)(a) of the Bill of Rights.

4. Hundermark's first reason for blocking my access to the requested records is 'in terms of section 7 of PAIA, on the basis that the requested documents relate to pending court proceedings between Legal Aid SA and yourself.' Not only is the factual premise ('the basis') of his reliance on the section completely false, but the section anyway has no application to the decision of a PAIA request.¹³

Hundermark's invocation of section 7 to refuse my request was consequently both factually misconceived and legally incompetent.

5. When I made my request for the financial records in question, there weren't and still aren't any 'pending court proceedings between Legal Aid SA and yourself' (me) – besides my PAIA applications pending in this court and in the Eshowe Magistrate's Court to compel the surrender of other different documents also illegally and unconstitutionally denied me. My instant request for certain financial records doesn't in any way 'relate' to those other applications; and anyway, what a record request might 'relate to' is no ground for refusing it under the Act. It's evident from the next paragraph of Hundermark's refusal¹⁴ that he had in mind my

¹¹ Pp 14–18 paras 25–35.

¹² P 166.

¹³ Treated extensively at pp 19–25 paras 39–55. The best Hundermark can do is 'disagree': p 155 para 104.1.

¹⁴ P 102 para 3.3.2.

intended rescission application announced in Note 3 of my request,¹⁵ i.e. *future* litigation I'm contemplating, and not 'pending court proceedings'.

6. Section 11(1) stipulates that 'A requester must be given access to a record of a public body if – (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.' '[T]his Part' mentioned in section 11(1) is 'Part 2', headed 'Access to Records of Public Bodies'; and 'Chapter 4 of this Part' is headed 'Grounds for Refusal of Access to Records'. Section 7 is not among the 'Grounds for Refusal of Access to Records' allowed by Chapter 4, enumerated and limited by sections 34–45; it's in Chapter 2, headed 'Publication and Availability of Certain Records'. It doesn't afford an information officer a ground for refusing a records request. It governs judicial discretion to admit documentary evidence that's been obtained via PAIA instead of via a court's discovery procedure or under any other law

7. Hypothetically, had my (intended) rescission application already been launched and was pending at the time that I requested the financial records in question, this wouldn't have posed any absolute bar to my use of them in the case, because section 7(2) vests the court trying it with the power to admit them if it would be 'detrimental to the interests of justice' not to do so.

8. Hundermark's second reason for blocking my access to the financial records I requested is 'in terms of section 45'. Parroting the language of this section and rolling its provisions into one, he claims my request is 'manifestly frivolous and vexatious and the work involved would substantially and unreasonably divert the resources of Legal Aid SA.'¹⁶ The 'basis' of these claims is 'that your request forms part of a larger, systemic [sic] pattern of substantially similar requests that impermissibly seek to re-litigate your non-appointment to [the Pietermaritzburg] Senior Litigator post, which issue has been finally determined by the Labour Court

¹⁵ Pp 92–3.

¹⁶ P 102 para 3.3.2.

and Labour Appeal Court.’ Besides being a semantic, syntactical and grammatical shambles, dressed in quasi-legal treacle, this second justification is also insupportable for manifold obvious reasons.¹⁷

9. Note 3 to my request detailed my several serious purposes in making it. In sum, ‘I intend placing these records before the Auditor General, the Public Protector and the Labour Court in support of a complaint of gross financial irregularity and recruitment corruption at LASA’.¹⁸ Hundermark doesn’t suggest I’m bluffing or that these aren’t serious purposes; quite the opposite: as ‘the basis’ of his charge that my request is an obvious waste of his time, he seizes on one of them, my serious intention, which he doesn’t dispute, among others, also not disputed, to use the records in litigation (actually in intended future litigation).

10. But in asserting one of my reasons for making my request as his ‘basis’ for refusing it, Hundermark stepped foul of section 11(3) of PAIA. It prohibits an information officer from having regard to a requester’s reasons – stated or surmised – for making his or her request when deciding it.

11. There’s nothing improper about using PAIA to gather evidence for future intended litigation. Nor is it ‘impermissabl[e]’ to ‘re-litigate’ a claim settled by final judgment by way of a rescission application brought under common law showing with reference to documents surfaced after trial (in casu, forced out of LASA by suing for them) that the trial court was defrauded by perjury – as this court has already observed on the record.¹⁹ And a PAIA request itself can hardly ‘re-litigate’ a claim, as Hundermark nonsensically claims.

12. Hundermark doesn’t suggest that my other two stated reasons for requesting the financial records, namely to use in support of complaints to ‘the Auditor General [and to] the Public Protector’ about ‘gross financial irregularity and recruitment

¹⁷ Treated extensively at pp 25–35 paras 56–95. Again, Hundermark’s answer is to ‘disagree’ and robotically reiterate his time-wasting justification: pp 156–9 para 105.

¹⁸ Pp 92–3.

¹⁹ P 26 para 59 and 62.

corruption at LASA' also make my request a waste of his time in his opinion. He's silent about those other incontestably serious purposes of mine in requesting the financial records in question. So even if one of my three stated purposes in requesting the documents is bad (and it certainly isn't) my other two are unimpeachable, even from Hundermark's ignorant, wrong view of the matter, which is that my reasons for making my request were and remain relevant criteria by which to decide to refuse it. He doesn't dispute that my other purposes for requesting the records, namely to use in support of complaints to 'the Auditor General [and] the Public Protector' about 'gross financial irregularity and recruitment corruption at LASA', are serious. And being incontestably serious, which indeed he doesn't dispute, they can't be 'manifestly frivolous and vexatious'. Obviously.

13. That I'd made similar requests for similar financial records in the past is also perfectly immaterial – more especially since, in an exceptional, gratifying deviation from LASA's consistent illegal and unconstitutional refusals of my PAIA requests since 2010,²⁰ LASA deputy information officer Brian Nair promptly granted my preceding request for similar financial records in regard to preceding financial years,²¹ which I'd also directed to the Department of Justice and Correctional Services, and which had also been transferred to Vedalankar. Similar requests made in the past don't render 'manifestly frivolous or vexatious' a further request (the instant one) made to update a collection of public body financial records obtained via PAIA; nor do they make the 'work' entailed in complying with the further request a substantial and unreasonable diversion of resources.

14. Even were 'the basis' of Hundermark's refusal of my PAIA request under section 45 merited, section 46 requires 'Mandatory disclosure in the public interest'. The gross financial irregularity and continuing contravention of the PFMA that the

²⁰ Detailed in 'Special Report', pp 66–146 of the papers in the first case, 11187/16.

²¹ Pp 11–12 paras 15–18; and pp 229–30 paras 175–9.

records will reveal²² over-ride the justification envisaged by section 45 and require that they be surrendered. I canvass this extensively, citing chapter and verse of the Public Finance Management Act, in my founding affidavit.²³

15. Given the space constraints imposed by Practice Direction 9.4.1 – already overrun – it's not possible to summarise in these heads the profoundly aggravating history of Hundermark's and his national colleagues' persistent and repeated illegal and unconstitutional obstruction of my attempts to access LASA's records since 2010, in the course of their attempts to cover up their corruption, their ongoing major contraventions of the PFMA, their crimes and other capital transgressions, all amounting, in the words of retired Supreme Court of Appeal judge Robert Nugent concerning SARS, to a massive 'failure of integrity and governance' at LASA – in other words, their persistent illegal and unconstitutional suppression of documentary evidence to obstruct my investigation, reporting and ventilation of massive, pervasive criminal and financial corruption in the organization's top ranks.

16. My affidavits detail what is unquestionably the most egregious, ongoing, flagrant contempt displayed by the top officers of an organ of state for its constitutional information transparency obligations in the history of our democracy.

17. Nor is it possible to summarise my case made in my application papers for orders 4–7 prayed in my notice of motion, and the further special order prayed in my replying affidavit for the referral to his Law Society of LASA's most senior attorney Chief Legal Executive and Board member Hundermark for his gross professional incompetence and dishonesty repeatedly displayed in his refusal of my request and in his pathetic answering affidavit.

²² Pp 55–73 paras 104–116.

²³ Ibid.

Signed at Eshowe on 25 February 2019.

ANTHONY BRINK

APPLICANT

AUTHORITIES RELIED ON:

Helen Suzman Foundation v Judicial Service Commission [2018] ZACC (24 April 2018)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998)

R v Samuels 1930 CPD 67

Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others (62470/2015) [2017] ZAGPPHC 743 (8 December 2017)

Mittalsteel South Africa Ltd. v Hlatshwayo (326/05) [2006] ZASCA 93; [2007] 1 All SA 1 (SCA); 2007 (1) SA 66 (SCA); 2007 (4) BCLR 386 (SCA) (31 August 2006)

MEC for Roads and Public Works Eastern Cape and Another v Intertrade Two (Pty) Ltd (047/05) [2006] ZASCA 33; 2006 (5) SA 1 (SCA) (27 March 2006)

Boost Sports Africa (Pty) Limited v South Africa Breweries (Pty) Limited (20156/2014) [2015] ZASCA 93; 2015 (5) SA 38 (SCA); [2015] 3 All SA 255 (SCA) (1 June 2015)

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)

Corruption Watch NPC and Others v The President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others (CCT 333/17; CCT 13/18 [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) (13 August 2018)

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

South African Social Security Agency and Another v Minister of Social Development and Others (CCT48/17) [2018] ZACC 26; 2018 (10) BCLR 1291 (CC) (30 August 2018)

Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017)

Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others [2018] ZACC 36 (27 September 2018)

Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T)

Dlusha v King Sabata Dalindyebo Municipality and others (1494/09) [2011] ZAECMHC 23 (18 March 2011)

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