

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

FirstRespondent

PATRICK HUNDERMARK
CHIEF LEGAL EXECUTIVE
LEGAL AID SOUTH AFRICA

SecondRespondent

LEGAL AID SOUTH AFRICA

ThirdRespondent

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

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.¹
- 2 The requests all relate to the 2009 recruitment process for the senior litigator post of Legal Aid SA, which Brink interviewed for but Legal Aid SA subsequently abandoned the filling of the post due to budgetary constraints.² Brink unsuccessfully challenged Legal Aid SA's decision to not fill the post in the Labour Court, Durban.³ His application to that Court, and subsequent petition to the Labour Appeal Court ("**LAC**"), for leave to appeal were also dismissed.⁴
- 3 PAIA establishes procedures to give effect to the constitutional right of access to information held by the State. While doing so, PAIA recognises that the right is

¹ AA pp 124-132 paras 22-50.

² AA p 123 para 18.

³ AA p 124 para 19.

⁴ AA p 124 para 20.

subject to justifiable limitations.⁵ Thus a balance is struck by creating general principles which apply to all records, ensuring that in all cases the adjudication of a request for information weighs the rights and interests of the requester, the body to whom the request is made, any third parties whose details may be divulged, and the larger society.⁶

- 4 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,⁷ 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

Security for costs

- 5 Legal Aid SA asks this Court to stay the proceedings pending before it in this matter and under case numbers 11187/16P and 14224/17P, until Brink has paid all previous cost orders granted against him, alternatively, upon payment of security for Legal Aid SA's costs.
- 6 A court will order security if it is "*satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse*",⁸ and the party against whom the security is sought would be unable to satisfy an adverse costs order.⁹ We submit that these requirements have been met where Brink's cumulative conduct is clearly vexatious and frivolous, Brink is unemployed and appears to be factually insolvent.¹⁰

There's nothing 'vexatious' about my claim to access the financial records in question – LASA complied with a previous request for such records – nor is there any basis for charging that my application to compel access to them under section 78 of PAIA is 'an abuse of court'.

I deal with the last statement at some length in my replying affidavit. The Constitutional court judgment in *Long* has just confirmed what it said in *Zungu*, meaning the Labour Court's costs order made against me was a mistake. Still I was paying it, until LASA prevented me from continuing to do so in the manner described in my replying affidavit.

⁵ Section 9.

⁶ AA p 133 para 52.

⁷ FA p 22 paras 47-48, p 24 para 55, p 25 para 58, p 26 para 59, p 29 para 68, p 30 para 71, p 44 para 92, p 45 para 94, p 47 para 96.1.5, p 48 para 96.2.4, p 49 para 96.3.1, p 68 para 108.5.5.6, p 78 para 127.

⁸ *Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 16.

⁹ *Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 10.

¹⁰ AA p 140 para 77.2.

Striking out

- 7 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

- 8 We submit that the relief sought by Brink is not only incompetent but also vexatious for the reasons that follow.
- 9 First, the PAIA request of 16 December 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. 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.
- 10 Brink's contention that he is using PAIA to gather evidence for intended litigation and that there is nothing impermissible in re-agitating a claim settled by final judgment by returning to the trial court is, we submit, without merit. Brink is not entitled to a rescission in circumstances where he formulated, brought, prosecuted and actively participated in proceedings before a court and accepts that his claim was correctly dismissed.
- 11 Second, the PAIA request of 16 December 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.¹¹
- 12 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.¹² 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.

¹¹ AA p 176 para 40; p 178 para 48; p 179 paras 51-52; FA pp 26-27 paras 89-92.

¹² AA p 137 para 64.

- 13 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.
- 14 Brink is also not entitled to the relief sought in paragraphs 2, 4, 5 and 6 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.
- 15 Finally, no factual basis has been laid for a personal costs order *de bonis propriis* against Hundermark. Costs orders *de bonis propriis* are only awarded in exceptional circumstances,¹³ and the general rule in relation to public officers is that costs should not be awarded against an officer who carried out his duties mistakenly, but in good faith.¹⁴ We submit that Hundermark 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>.

¹³ *Lushaba v Member of the Executive Council for Health, Gauteng* 2015 (3) SA 616 (GJ) at para 69-70.

¹⁴ *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.