
**COMPLAINT TO THE AUDITOR-GENERAL REGARDING THE
WHOLESALE PROCEDURAL AND ETHICAL CORRUPTION OF
SENIOR LITIGATOR RECRUITMENT AT LEGAL AID SOUTH AFRICA,
INVOLVING NON-COMPLIANCE WITH SUBORDINATE LEGISLATION,
NEPOTISM, RIGGING OF RECRUITMENT PROCESSES, AND
ILLEGAL APPOINTMENTS –
ALL ‘MATERIAL IRREGULARITY’ WITHIN THE DEFINITION
GIVEN IN SECTION 1 OF THE PUBLIC AUDIT ACT**

I, Anthony Robin Brink, affirm:

1. I am an adult male, 61, an advocate of the High Court of South Africa, admitted to practice on 12 April 1983, and a former prosecutor and magistrate of the District and Regional Courts. My professional background includes several years as a full-time civil trial magistrate, and civil litigation in the Supreme Court of Appeal and Constitutional Court. I reside at 36 Pearson Street, Eshowe 3815, KwaZulu-Natal. My cellphone number is 083 779 4174 and my email address is anthonybrink.sa@gmail.com.

INTRODUCTION

2. This Part Two of my complaint to the Auditor-General details the gross systemic corruption of Senior Litigator recruitment at Legal Aid South Africa (‘LASA’), in which former Board chairperson Dunstan Mlambo JP; former Chief Executive Officer (‘CEO’) Vidhu Vedalankar; National Operations Executive (‘NOE’) Brian Nair; Human Resources Executive (‘HRE’) Amanda Clark; Chief Legal Executive (‘CLE’) Patrick Hundermark (formerly titled Legal Development Executive); and former Chief Operations Officer (‘COO’) Jerry Makokoane have been involved.

3. The corruption of Senior Litigator selection and approval procedure detailed herein commenced and took place during the tenure of former Board chairperson Mlambo JP and CEO Vedalankar, both of whom have since retired from LASA. Neither of their successors, Chairperson Motsamai Makume J and CEO Mantiti Kola, have been complicit in this recruitment corruption, but unless it's remedied, Hundermark and Nair, now both executive members of LASA's Board, are certain to misdirect them into perpetuating it for the reasons set out in Chapter One hereof.

4. All 'material irregularity' (per the definition in the Public Audit Act quoted below) to be detailed herein is independent from the 'material irregularity' to be detailed in Parts Three to Five to follow, which in a separately drawn affidavit will canvass a different, essentially unrelated set of facts concerning corruption in the recruitment processes for the Pietermaritzburg and Durban Senior Litigator posts (cancelled off the record after the selection and recommendation of suitable candidates). The determination of the complaints set out in Chapters One to Three below is accordingly in no wise dependant on the merits of the complaints to be presented in Chapter Four to follow. The complaints set out herein stand to be assessed on their own terms immediately.

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EXECUTIVE SUMMARY

5. In radically deviating from, failing to comply with, and contravening LASA’s internal regulations precisely prescribing recruitment and appointment procedure, Senior Litigator recruitment operations at LASA are grossly procedurally corrupt in multiple fundamental respects. In the apt words of

Gorven J in an unrelated case, they have been ‘arbitrary, offending the principle of legality, and, therefore, the rule of law and ... unconstitutional’;¹ and they remains so.

6. Exponentially aggravating the breakdown of proper corporate governance at LASA, and the abject lawlessness and unconstitutionality of its Senior Litigator recruitment operations, is the central role played in it by then Board chairperson Mlambo JP, having regard particularly to the requirement of section 8(1) of the Legal Aid South Africa Act 39 of 2014 (‘the LASA Act’) that ‘The judge appointed in terms of section 6(1)(a) is the chairperson of the Board.’ (Section 4(1)(a) of the preceding Legal Aid Act 22 of 1969 also required a judge be on the Board; in practice he chaired it.) The requirement that a judge be on the Board, and later specifically that it be chaired by a judge sworn to ‘uphold and protect the Constitution’ under section 174(8) thereof, is indubitably intended by the Legislature to ensure effective oversight of LASA’s operations by a sitting judge to guarantee their probity, legality and constitutionality.

7. In actively contravening the regulations governing recruitment and appointment operations at LASA, which he and the rest of the Board promulgated, in other words in breaking the law and violating the Constitution, at the cost of serious prejudice to LASA and to the public, Board chairperson Mlambo JP egregiously breached his fundamental fiduciary duty to LASA as a judge heading its Board, as well as his judicial obligation imposed by article 6 of the Code of Judicial Conduct (‘CJC’): ‘A judge must at all times, also in relation to extra-judicial conduct, comply with the law of the land.’

8. In thus contravening the CJC, Mlambo JP committed gross misconduct within the contemplation of section 14(4)(b) of the Judicial Service Commission Act 9 of 1994, for which he is liable to be disciplined by the Judicial Conduct Committee of the Judicial Service Commission, upon the Auditor-General’s referral of this complaint to it under section 5(1A) of the Public Audit Act 25 of 2004 (‘PAA’).

JURISDICTION AND POWERS OF THE AUDITOR-GENERAL

¹ Booyesen v Acting NDPP, Case No. 4665/10, High Court, KZN Local Division, Durban.

9. LASA was ‘established’ in 2014 by section 2(1) of the LASA Act as ‘a national public entity as provided for in the Public Finance Management Act’. Under section 26(5) of the LASA Act, LASA succeeded the former Legal Aid Board – referred to as the ‘LAB’ in its internal documents. Since there’ve been no material changes to the regulations governing staff recruitment and appointment since the transition from the former entity to the substantially identical new one, the same acronym ‘LASA’ will be used for both herein.

10. As ‘a national public entity’, LASA is bound by one of the core ‘values’ our constitutional order is ‘founded on’, the ‘rule of law’, as section 1(c) of the Constitution puts it, requiring that LASA respect the ‘Supremacy of the Constitution’. Section 2 requires that ‘the obligations imposed by it must be fulfilled’ by LASA’s officers, and holds that any ‘conduct inconsistent with it is invalid’.

11. Under section 1 of the PAA:

“**material irregularity**” means any non-compliance with, or contravention of, legislation ... or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in ... substantial harm to a public sector institution or the general public[.]

[my ellipses for relevance, as elsewhere in this complaint]

12. Section 5(1A) of the PAA provides:

The Auditor-General may, as prescribed, refer any suspected material irregularity identified during an audit performed under this Act to a relevant public body for investigation, and the relevant public body must keep the Auditor-General informed of the progress and final outcome of the investigation.

13. In the event that that the Auditor-General deems it necessary that this complaint be further investigated, and elects under section 5(1A) of the PAA to refer the ‘material irregularity’ detailed herein to a ‘relevant public body for

investigation’, the Public Protector would be best placed to conduct such further investigation, in which event, she ‘must keep the Auditor-General informed of the progress and final outcome of the investigation.’

14. The corruption of Senior Litigator recruitment, approval and appointment procedure is an ongoing, unresolved, seriously unlawful ‘material irregularity’ at LASA, threatening due process in the filling of LASA’s three remaining long vacant budgeted and funded Senior Litigator posts.

15. Section 5A(1) of the PAA provides:

The Auditor-General must, within a reasonable time after the issuing of an audit report in terms of section 20, follow up on whether the accounting officer or accounting authority has implemented the recommendations contained in the audit report relating to any material irregularity, within the time-frame stipulated in the audit report.

16. The recruitment corruption canvassed herein indeed concerns ‘non-compliance with, or contravention of, legislation’ (per the definition of ‘material irregularity’ by section 1 of the PAA), to wit subordinate legislation comprising two internal regulations promulgated by the Board to govern executive management’s conduct of recruitment and appointment processes at LASA, namely its Policies and Procedures on Recruitment, Induction, Probation and Relocation (‘Recruitment code’) and its Approval Framework. This ‘non-compliance with, or contravention of’ these legal instruments indeed ‘resulted in or is likely to result in ... substantial harm to a public sector institution or the general public’ (per section 1 of the PAA), namely, in:

- *one case*, the rigging of the recruitment for a Senior Litigator at Mthatha, in which an unsuitable applicant was recommended, to the potential prejudice of LASA and of the public;
- *two cases*, the irregular appointment of persons to Senior Litigator posts at Bloemfontein and Mahikeng without having been selected and recommended

for them by duly constituted selection panels as the most suitable applicants for appointment to these top-level legal specialist posts, also to the potential prejudice of LASA and of the public;

- *three cases*, the illegal unrecorded, unauthorised cancellation of completed recruitment processes after the selection and recommendation of eminently suitable qualified and experienced candidates for LASA's Senior Litigator posts at Pietermaritzburg and Durban and an unsuitable candidate for its Mthatha post on account of ethical recruitment corruption and its cover-up, thus depriving LASA of expert legal professional capacity, and the indigent public of access to specialist complex litigation services as contemplated by all of LASA's three approved Strategic Plans since 2009 – entirely in KwaZulu-Natal and substantially in the geographically vast Eastern Cape, with its four High Courts serviced by a single Senior Litigator at Port Elizabeth; and
- *four cases*, the legally unauthorised appointments of Senior Litigators at Pretoria, Johannesburg, Cape Town and Port Elizabeth. For the reason set out below, however, no prejudice to LASA or to the public resulted from these four appointments, and it's not contended that they should be disturbed.

17. Former Board chairperson Mlambo JP's disregard for and contravention of LASA's internal regulations governing recruitment and recommended candidate approval processes, giving rise to many of these harmful irregularities, furthermore constituted a 'breach of a fiduciary duty' owed to LASA, a matter of concern to the Auditor-General under the definition of 'material irregularity' in section 1 of the PAA.

The supporting documents referenced herein are accessible online in PDF at illegal-aid.co.za/AG. Document bundles 1, 2 and 3 will be referred to in the footnotes as 'B1', 'B2' and 'B3'. For easy copying, reprinting, electronic transmission, and reading on a portable device, copies of this complaint are available in PDF, MS Word, and HTML at

the same site.

GENERAL CORRUPTION OF PRESCRIBED SENIOR LITIGATOR RECRUITMENT AND APPROVAL PRACTICE

BACKGROUND

18. On 24 November 2006, the Board duly resolved² to create nine Senior Litigator posts upon the due motivation³ by executive management:

to increase the capacity of the LAB to deliver legal services, as well as to address gaps in its current service delivery programme.⁴ ...

The LAB often has cases of a highly complex nature. However, we do not have professional staff that are senior enough to take on such matters. It is proposed that we build up such capacity at each province linked to a high court unit. Such senior litigators would be able to undertake this more complex work as well as support and mentor our other High Court unit staff.⁵

19. At grade LP10⁶ (formerly 'level 13'),⁷ Senior Litigators are LASA's most 'Senior Professional staff',⁸ its 'most senior and experienced lawyers'⁹ at the apex of its regional professional staff establishment,¹⁰ appointed to handle 'very complex matters ... in specialist and higher courts such as the SCA and CC';¹¹ 'impact litigation matters' and 'High profile matters which could negatively affect our reputation if not handled properly.'¹² 'In very complex matters [involving 'the rights of women and children'], our Senior Litigators provide

² B4 Pre-trial conference bundle, answer to agenda, p 49, paragraph 4.1. And B2, p 702.

³ B2, pp 989–92.

⁴ B2, p 989.

⁵ B2, pp 990–1.

⁶ B2, p 1021, paragraph 16; and p 1036.

⁷ B1, p 372, paragraph 8.2.2.b; and B2, p 690.

⁸ B2, p 1036, section 8.2.2 (b).

⁹ B2, p 870, paragraph 4.

¹⁰ B2, p 734: 'positions such as senior litigator' exist for 'employees to advance into'.

¹¹ B2, p 869.

¹² B2, p 870.

support and advice to practitioners that need it.¹³ The respondent accordingly describes a Senior Litigator post as a ‘critical position’.¹⁴

20. As LASA has correctly stated:

The criteria set for the appointment of a senior litigator [were fixed] at a level to ensure that only very senior and experienced practitioners were eligible.¹⁵

And, discussed below, indeed they were.

PROVISIONS IN THE REGULATIONS MADE BY THE BOARD GOVERNING
PROCEDURE FOR EXECUTIVE MANAGEMENT TO FOLLOW IN
SELECTING SHORTLISTED, INTERVIEWED APPLICANTS FOR SENIOR
LITIGATOR POSTS AND IN APPROVING SUCH RECOMMENDED
CANDIDATES FOR APPOINTMENT

21. The recruitment and appointment processes to be followed in filling the Senior Litigator positions were and remain precisely governed by LASA’s Recruitment code and Approval Framework.

22. In force at the time the recruitment irregularities detailed in this complaint were committed, ‘Version 2’ of the Recruitment code was approved and issued by the Board on 29 November 2008.¹⁶ ‘Version 23’ of the Approval Framework was approved and issued by the Board on 27 February 2010.¹⁷ Its provisions delegating final approval power in the case of Senior Litigator appointments to the National Operations Executive remained the same as they had been in previous years.¹⁸

¹³ B2, pp 825–6.

¹⁴ B4 Response, paragraph 48.9; and answer to agenda, paragraph 43.1 (LASA contradicts itself in paragraph 79.1 of the same pleading).

¹⁵ B2, p 869.

¹⁶ B1, p228 ff and B2, p717.

¹⁷ B2, pp 1034–40.

¹⁸ B1, p 19.

23. LASA gave me excerpts of these legal instruments in October 2010¹⁹ and January 2011²⁰ (for its own purposes; I hadn't requested them). Multiple pre-trial discovery processes finally disgorged the full Approval Framework in mid-2013;²¹ and it was unchanged.

24. I doubt the Recruitment code has been amended in any material respect since; and a relatively recent version of the Approval Framework supplied me in 2017 (again unrequested, for LASA's own purposes) hadn't changed in regard to the Board's delegation of executive authority to approve the appointment of an applicant recommended by a selection panel for a Senior Litigator post.

25. Section 1.1.1 of the Recruitment code states the truism that:

Recruitment is a process of attracting and appointing the best possible candidates for employment into suitable positions within the Legal Aid Board with the purpose of enhancing high performance in the business.²²

26. Section 1.1.2 records:

This policy and procedure aims at ensuring that appropriate recruitment procedures are followed in line with all relevant statutory legislation and business practices so that the Legal Aid Board's operational needs and requirements are met adequately. The recruitment process must be fair, objective, transparent, and non-discriminatory.²³

27. By the phrase, 'in line with all relevant statutory legislation and business practices', LASA's Board recognises that 'recruitment procedures' carried out by its management executives must conform to those prescribed by the Public Service Regulations ('PSR') governing employment in departments of state, promulgated under section 41 of the Public Service Act, 1994, and more finely in

¹⁹ B1, pp 105–7.

²⁰ B1, pp 225–7.

²¹ B2, pp 1034–40.

²² B1, p 228.

²³ *Ibid.*

the case of ‘high level managers or specialists’²⁴ by the ‘Recruitment’ provisions in Chapter 2 of the Senior Management Services Handbook (‘the SMS Handbook’),²⁵ issued on 1 December 2003 under chapter 4.D of the old Public Service Regulations, to wit:

The Minister may include any or all of the determinations, directives, guidelines and provisions applicable to the SMS in a Handbook for the SMS.²⁶

28. Section 84 of the current PSR, replacing the old on 1 August 2016, states substantially identically, adding: ‘in a Handbook contemplated in section 42 of the Act.’²⁷

29. At grade LP10²⁸ (formerly ‘level 13’),²⁹ Senior Litigators are ‘Senior Professional staff’,³⁰ not ‘Senior Management’³¹ staff, but the recruitment principles are the same, namely to ensure ‘fair selection processes’³² as the SMS Handbook put it – stating in its Introduction: ‘Compulsory elements of the recruitment and selection process are set out in the Act, the PSR, and other laws of general application.’ As said, LASA’s Recruitment code is ‘in line with all relevant statutory legislation and business practices.’

30. Section 4.1.A of the old PSR refers to members of Senior Management Services as:

high level managers or specialists ... Only the finest candidates shall be appointed to those posts and steps shall be taken to retain and develop persons so appointed as a corporate resource.³³

31. Under chapter 4.1.B.1, ‘Composition of SMS’:

²⁴ B3, p 1158, Chapter 4.1.A

²⁵ B2, p 782-81.

²⁶ B3, p 1159.

²⁷ B3, p 1213.

²⁸ B2, p 1021, paragraph 16; and p 1036.

²⁹ B1, p 537 and p 372, paragraph 8.2.2.b.

³⁰ B1, p 372, paragraph 8.2.2.b.

³¹ *Ibid.*

³² B2, p 788, para 2.4.

³³ B3, p 1158, Chapter 4.1.A

The SMS shall consist of employees ... who immediately before 1 January 2001 were remunerated on grade 13 and higher[.]³⁴

32. As for Senior Litigators being 'specialists' and a 'corporate resource' (in the language of section 4.1.A of the old PSR), their advertised job function is indeed to:

- * Take responsibility for and expertly/proficiently attend to legal matters in various legal forums/courts requiring expert litigation skills such as impact litigation and/or warranting the services of a Senior Litigator.
- * Attend to referrals from National Office, Regional Office and Justice Centres regarding cases as in above and provide support to Justice Centres in specialised, complex or impact litigation matters.
- * Provide written legal opinion for the Legal Aid South Africa as requested.
- * Build and manage a caseload as agreed by the ROE, that makes optimum usage of the expertise and skills of the senior litigator position.
- * Assist with in-house legal training sessions as identified/agreed by the ROE or LDE.
- * Develop the litigation expertise within the Legal Aid South Africa by providing individual mentoring and coaching to legal staff as identified by ROE, involving other Legal Aid South Africa practitioners to assist in legal matters and others means.³⁵

33. Reiterating the principle just stated in section 1.1.2 of the Recruitment code, namely that the code 'aims at ensuring that appropriate recruitment procedures are followed', section 1.1.3 following it stipulates:

³⁴ B3, p 1158, Chapter 4.1.B1.

³⁵ B1, p 537.

This policy and procedure provides the Legal Aid Board with clear guidelines to be followed when a vacancy exists.³⁶

34. Section 1.2.3.4 mandates:

After the selection committee has identified the most suitable candidate for appointment in a post, procedures will be followed to appoint the individual into a position or a temporary one.³⁷

35. This section is clear enough about the point at which the recruitment process is concluded and the appointment ‘procedures’ then begin: it’s ‘[a]fter the selection committee has identified the most suitable candidate for appointment in a post’.

36. Section 8.1(1) of the SMS Handbook is even more explicit:

The selection process commences after the closing date of the advertisement and is concluded when a recommendation is made regarding the most suitable applicant.³⁸

37. The ‘procedures ... to appoint the individual into a position’ mentioned in section 1.2.3.4 of the Recruitment code then to ‘be followed’ are precisely defined in the sections immediately after it: Section 1.2.3.5 provides, ‘The selection committee may require certain short listed candidates undergo for [sic] psychometric assessment to supplement the interview results.’³⁹ Section 1.2.3.6 allows for an applicant’s referees to be contacted, where they were required by the advertisement.⁴⁰ (No referees have been required by any Senior Litigator advertisement.) Section 1.2.3.7 provides for checking of ‘qualifications, security checks and credit checks ... in compliance with the LAB Recruitment Check Procedure’, with the candidate’s consent, per section 1.3.3.⁴¹ Crucially, section 1.2 concludes:

³⁶ B1, p 228

³⁷ B1, p 233.

³⁸ B2, p 796.

³⁹ B1, p 233.

⁴⁰ *Ibid.*

⁴¹ B1, p 234.

NB: Motivation has to be signed off by all the members of the panel and the line executive before being forwarded to the HRE/COO/CEO/ delegated for approval, appointment recommendations will be approve in line with the approval framework.⁴²

[*sic*: original grammar and spelling]

38. In sum, under the Recruitment code, once the process for recruiting a Senior Litigator has been concluded upon the recommendation by the selection panel of the most suitable candidate, and (i) a psychometric test has been performed, if directed by the selection panel; (ii) the candidate's referees contacted, if they were required by the advertisement, and (iii) the 'Recruitment Check Procedure' has been carried out with the candidate's consent, the next process for his or her appointment is governed by the Approval Framework.

39. This conforms perfectly with section 67 of the current PSR:

(1) An executive authority shall appoint a selection committee to make a recommendation on the appointment to a post. ...

...

(5) The selection committee shall make a recommendation on the suitability of a candidate after considering only—

- (a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;
- (b) the inherent requirements of the post;
- (c) the department's employment equity plan as contemplated in regulation 27; and
- (d) in respect of candidates applying for posts from salary level 9 and above—
 - (i) the level of understanding of the relevant departmental mandates;

⁴² *Ibid.*

(ii) the ability to identify problems and find innovative solutions; and

(iii) the ability to work in a team.

(6) A selection committee shall record the reasons for its recommendation with reference to the criteria mentioned in subregulation (5).

(7) If the selection committee is unable to recommend a suitable person for appointment from those who applied in terms of subregulation (5), the executive authority may, after that selection process has been completed, approve the head-hunting of one or more persons with the requisite competencies and subject such person or persons to the same selection process as those who applied.

(8) If an executive authority does not approve a recommendation of a selection committee, he or she shall record the reasons for his or her decision in writing.

(9) Before making a decision on an appointment or the filling of a post, an executive authority shall—

(a) satisfy herself or himself that the candidate qualifies in all respects for the post and that his or her claims in his or her application for the post have been verified as directed by the Minister; and

(b) record that verification in writing.⁴³

40. Like those of the Recruitment code and Approval Framework, these provisions in the PSR unambiguously contemplate a selection and recommendation process, and then an approval process.

41. Section 1.5 of the Recruitment code requires that unsuccessful applicants interviewed for vacant post at LASA be notified, and the reasons for not recommending them be recorded.⁴⁴

⁴³ B3, p 1211–2.

⁴⁴ B2, p 718.

42. Depending on the seniority of the post, LASA's Approval Framework identifies the management executives 'delegated for approval' of the 'appointment recommendation'.⁴⁵ Appointments to Senior Litigator posts at the apex of LASA's legal professional staff establishment (originally 'level 13') are governed by section 8.2.2(b) of the Approval Framework, and it delegates 'Final approval' of the selection panel's 'appointment recommendation' to the 'NOE' subject to the concurrence of the 'CEO', who 'Must agree'.⁴⁶

43. In short, the executive officers co-authorised to approve or disapprove Senior Litigator candidates recommended by selection panels are the NOE and CEO, and no one else.

44. Under law, Senior Litigator recruitment and appointment must be conducted as follows: 'After the selection committee has identified the most suitable candidate for appointment in a post', 'procedures will be followed to appoint the individual into a position'.⁴⁷ These 'procedures' that must 'be followed to appoint the individual into a position' are the conduct of (i) a psychometric examination, if directed by the selection panel,⁴⁸ and (ii) the 'LAB-RC (Legal Aid Board recruitment check)';⁴⁹ and once the former, if ordered, and the latter enquiries prove clear, the 'appointment recommendation' must be considered and approved or disapproved 'in line with the approval framework',⁵⁰ which delegates the NOE and CEO as the joint executive officers responsible for making Senior Litigator appointments.⁵¹

45. Put another way, the selection panel interviews the shortlisted Senior Litigator candidates and recommends the most suitable one for appointment; and after his or her identity, qualifications, and credit have been verified (also his or her mental health, if queried by the selection panel), the NOE approves (or

⁴⁵ B1, p 234, 'NB: ...'.

⁴⁶ B1, p 226.

⁴⁷ B1, p 233, section 1.2.3.4.

⁴⁸ B1, p 233, section 1.2.3.5.

⁴⁹ B1, p 233, section 1.2.3.7.

⁵⁰ B1, p 234, 'NB: ...'.

⁵¹ B1, p 226.

disapproves) the recommended candidate for appointment, subject to the CEO's agreement.

THE ARBITRARY, VERY DIFFERENT MANNER IN WHICH SENIOR LITIGATOR SELECTION, RECOMMENDATION AND APPROVAL PROCEDURES AT LASA ARE ACTUALLY CONDUCTED – NON-COMPLIANT WITH LASA'S INTERNAL REGULATIONS, GROSSLY IRREGULAR, ILLEGAL, AND UNCONSTITUTIONAL

46. Responding to my telephonic enquiry as to the status of the Pietermaritzburg Senior Litigator recruitment process in the third week of April 2010, five strangely silent months after my interview for the post in November 2009, KwaZulu-Natal Regional Human Resources Manager Baboo Brijlal couldn't tell me, but he mentioned that Senior Litigator candidates recommended by selection panels were subject to 'a final interview by the chairman, a Judge of Appeal', that is, by Mlambo JP, who'd acted in the Supreme Court of Appeal.

47. I'd already heard this. Before applying for the said post, I'd learned that after interviewing the candidate previously selected for it in 2008 after it was first advertised, Mlambo JP had rejected him; and this led me to understand that the Board chairperson held ultimate authority to approve or disapprove the appointment of an applicant recommended by a selection panel for a Senior Litigator post.

48. I repeated this information I'd been given about Mlambo JP again interviewing and approving or disapproving recommended Senior Litigator candidates in my letter to CEO Vedalankar in July 2010, in which I was enquiring when the Pietermaritzburg Senior Litigator recruitment process might be finalised, now eight months after my successful interview in November 2009. (To be discussed in Chapter Four, HRE Clark had backhandedly confirmed that I'd been selected and recommended.)

49. It was to this information given me about Mlambo JP having final decision power in Senior Litigator appointments that Nair was referring in his reply on Vedalankar's behalf to my July letter:

Contrary to what you may have been informed, please note that the person responsible for the final approval of the Senior Litigator appointments in our organisation would be the line function executive, which in this case is myself.⁵²

50. *De jure* Nair was right and I was wrong. *De facto*, however, Nair was wrong and I was right. In fact, though not in law, Board chairperson Mlambo JP indeed had final say in Senior Litigator appointments, and in as many words quoted below, LASA later on confirmed it repeatedly.

51. In her emailed response on 30 April 2010 to my second enquiry that month about progress in the finalisation of the Pietermaritzburg Senior Litigator recruitment process, Clark claimed:

At this stage it is not even clear which candidates will be considered in the second round or if indeed we will proceed with a second round.⁵³

52. In other words, Clark implied unequivocally – and, quoted below, Nair would reiterate her contentions absolutely explicitly: (i) the selection panel’s ‘appointment recommendation’,⁵⁴ *i.e.* its determination under section 1.2.3.4 of the Recruitment code of which shortlisted candidate it had interviewed was ‘most suitable’, and should be considered for approval and appointment by the executives delegated by the Approval Framework, was not decisive, and was essentially irrelevant; (ii) a candidate not recommended by the selection panel, even rejected by it, could also be ‘considered in the second round’ together with, or in place of, the recommended one; (iii) both recommended and not recommended candidates could be considered for appointment ‘in the second round’; and (iv) even a candidate rejected by the selection panel was eligible for appointment.

⁵² B1, p 19.

⁵³ B1, p 256

⁵⁴ B1, p 234, ‘NB: ...’

53. Before Nair confirmed Clark's prevarication about this (I quoted him below), LASA contradicted and refuted it. In my wrongly founded, correctly dismissed⁵⁵ labour action, LASA truthfully pleaded (as indeed the recommendation report reflected) that of the four applicants shortlisted to be interviewed for the Pietermaritzburg and Durban Senior Litigator posts:

two persons [were] eliminated early in the selection process and ... not recommended for the second round of interviews[.]⁵⁶

54. As said, quoted below, Nair, would contradict this in evidence and testify that even 'persons eliminated ... in the selection process and ... not recommended for the second round of interviews' were nonetheless eligible for consideration for appointment in place of the recommended one.

55. Also according to Clark in her said email, LASA's executive managers were free to cancel a substantially complete recruitment process undertaken to fill a budgeted and funded post. That is, in Clark's opinion (shared *inter alia* by Mlambo JP, Vedalankar, Nair, and Hundermark, quoted below) she and her HR colleagues are free (i) to disregard their obligation imposed by section 1.2.1.3 of the Recruitment code: 'The newly created position will then be filled by the Human Resources Department';⁵⁷ and (ii) to contravene section 53(4) of the Public Finance Management Act 1 of 1999 ('PFMA') by cancelling* a substantially complete recruitment and deliberately leaving the post vacant, thus illegally contravening the PFMA, as the Constitutional Court pertinently pointed up in the *Zungu* case, cited, quoted and discussed in Part One of this complaint. (*Clark's involvement, on her own sworn version, in the cancellation of the Pietermaritzburg, Durban and Mthatha Senior Litigator recruitments will be dealt with in Chapter Four to follow.)

⁵⁵ Deliberately kept in the dark about Board chairperson Mlambo JP's professional relationship with my rival applicant for the post, a former long-time acting fellow judge of the Labour Court, achieved by illegally redacting this critical information from the selection panel's recommendation report that I'd repeatedly requested and been repeatedly denied, I'd incorrectly surmised and pleaded unfair discrimination as the reason my appointment was aborted, whereas, as I discovered from the complete recommendation report disgorged through PAIA litigation years later, the problem was just everyday jobs-for-pals recruitment corruption.

⁵⁶ B4, p 1126, clip 6; p 1125, clip 4; and B1, p 245.

⁵⁷ B1, p 229.

56. In her first letter to me of 18 October 2010, Vedalankar explained Clark's 'second round' story:

- 6.2 Noting the seniority of these positions, it was decided to implement a two stage interview process in the appointment to these posts.
- 6.3 The first stage takes place at Regional Office level where an interview Panel will make a recommendation for candidates to proceed to the second stage of interviews.
- 6.4 The second stage comprises an interview process by a national office panel, including the Chairperson of the Board, National Operations Executive (NOE), Legal Development Executive, Human Resources Executive and Chief Operations Officer. This panel does not have to recommend for appointment any of the recommended candidates from the first phase interviews conducted by the region.
- 6.5 The recommendation of the second stage of interviews are [*sic*] finalised by the responsible executive in terms of section 8.2.2 (b) of the Legal Aid SA Approval Framework. As per this Approval Framework, the relevant Regional Operations Executive (ROE), in the case of the Durban and Pietermaritzburg positions the ROE for KwaZulu-Natal together with the NOE and CEO approve the final appointment. The Approval Framework is approved by the Board of Legal Aid SA from time to time, and was last approved on 27 February 2010. The relevant extract of the approval framework is hereby made available and attached for ease of reference.⁵⁸

57. In other words, the 'national office panel' functioned to vet candidates recommended by selection panels.

⁵⁸ B1, p 103. The 'extract' follows at pp 105–6.

58. To the extent that Vedalankar suggested that ‘it was decided’ that a selection panel’s function was not, as the Recruitment code puts, to ‘identif[y] the most suitable candidate for appointment in a post’,⁵⁹ but rather to ‘make a recommendation for candidates to proceed to the second stage of interviews’, *i.e.* select more than one candidate for another interview, this flatly contradicts the provisions of the Recruitment code just quoted, which precisely requires a selection committee to ‘identif[y] the most suitable candidate’ (*singular*) ‘for appointment in a post’, not a plurality of them for a second interview.

59. Discussed below, LASA’s records contradict Vedalankar’s false assertion of how Senior Litigator recruitment was conducted, even in its procedurally corrupted form. All records show a *single* ‘most suitable candidate’ was ‘identified’ for each post, not candidates *plural*.

60. Why Vedalankar should have lied about this – and shown below, she did so repeatedly – will be addressed in Part Four of this complaint to follow.

61. Telling a completely different story, however, Nair would later allege that the so-called ‘national office panel’ functioned not just to vet recommended candidates but as a selection panel in its own right. This is discussed below.

62. Vedalankar’s second letter to me of 28 January 2011 claimed similarly to her first:

[T]he process for Senior Litigator was two-pronged: that there were 2 candidates recommended for the next round of interviews [one for each of the Pietermaritzburg and Durban posts, advertised together⁶⁰ and interviewed for on the same day]⁶¹ ... a second interview process for which the interview panel included Mlambo JP and other National Office Executives[.]⁶²

⁵⁹ B1, p 233, section 1.2.3.4.

⁶⁰ B1, p 45.

⁶¹ B1, pp 244–8.

⁶² B1, p 215, V7.

Seeing as the posts of Senior Litigator's post was a senior post, second round interviews were to proceed to national level with national executives and was to be coordinated by the HRE.⁶³

Mr Nair is the line executive/manager responsible for the appointment of Senior Litigators.⁶⁴

Legal Aid SA Executives are not precluded from formulating processes for recruitment.⁶⁵

I provide you with ... [t]he Approval Framework as approved by the Board on 23 May 2009 ... [and an] edited/blacked out recommendation⁶⁶ of the 1st round Panel recommending inter alia you "For Next Round Interviews" dated 6 November 2009 [*sic*: the interviews were in fact held on the 12th].⁶⁷

63. Contrary to Vedalankar's false suggestion that I was recommended 'inter alia' for the Pietermaritzburg post for which I'd applied, in other words that the selection panel had recommended more than one candidate for it, LASA later admitted repeatedly that I was the sole candidate recommended for Pietermaritzburg. Another candidate was recommended alone for a different post, at Durban. This is treated below.

64. In her first letter in October 2010, Vedalankar identified the 'National Office Executives' on the so-called second round 'interview panel' sitting in committee with Board chairperson Mlambo JP, namely the 'National Operations Executive' Nair, the 'Legal Development Executive' Hundermark, the 'Human Resources Executive' Clark, and the 'Chief Operations Officer' Makokoane.⁶⁸

65. No such committee, no such hybrid structure of those particular executives and the non-executive Board chairperson, is recognised by the Legal Aid

⁶³ B1, p 217, para 13.

⁶⁴ B1, p 217, para 12.

⁶⁵ B1, p 214, V2.

⁶⁶ B1, pp 244–8. As mentioned in footnote 55 above, the redaction concealed my rival applicant's professional connection with then Board chairperson Mlambo JP.

⁶⁷ B1, 219, para 23.

⁶⁸ B1, p 103, para 6.4.

Guide/Manual, the Recruitment code, or the Approval Framework. In other words, the so-called second round interview panel comprising Mlambo JP and the said national executives was illegally constituted.

66. No provision in the Recruitment code or the Approval Framework requires the assent of the Board chairperson and/or of the ‘Legal Development Executive, Human Resources Executive and Chief Operations Officer’ for Senior Litigator appointments.

67. Indeed, Vedalankar has stated very correctly:

[T]he concurrence of the COO is not required for these [Senior Litigator] posts.⁶⁹

68. Equally, under the Recruitment code and the Approval Framework, the ‘concurrence’ of the Board chairperson, of the ‘Legal Development Executive [now called Chief Legal Executive], Human Resources Executive and Chief Operations Officer’ ‘is not required’ for ‘these [Senior Litigator] posts’ either.

69. Nor is the ‘concurrence’ of the National Operations Executive required; instead, the Approval Framework delegates ‘Final approval’ authority to him in Senior Litigator appointments, subject only to the CEO’s accord: she ‘Must agree’.⁷⁰

70. Besides attorney Hundermark, none of the rest of the ‘National Office Executives’ were legally qualified. (Nair graduated after 2013.)⁷¹ So besides Mlambo JP and Hundermark none of the other members of the so-called second round ‘interview panel’ were professionally competent to assess the legal acumen and suitability for appointment of the Senior Litigator candidates they interviewed. (This contravenes section 1.2.2.2 of the Recruitment code which requires that a ‘selection committee/panel’ be ‘knowledgeable’.)⁷²

⁶⁹ B1, p213, para V1.

⁷⁰ B1, pp 225–6.

⁷¹ NE On qualifying with a legal degree he got himself admitted as an advocate:

⁷² B1, p 231.

71. In an affidavit he made on 8 April 2011, supported by confirmatory affidavits put up by Vedalankar⁷³ and Clark,⁷⁴ Nair alleged:

The National Operations Executive in consultation with both the Chief Executive Officer and the Human Resources Executive agreed that the process of recruitment for Senior Litigators will include a second round of interviews. This decision was taken verbally in April 2008.⁷⁵

The Chairperson of the Board was also invited to participate in this panel.⁷⁶

The second interview panel would consider all candidates recommended from the first round of interviews to the second round of interviews.⁷⁷

72. That is, according to Nair, Vedalankar and Clark, all deposing under oath in April 2011, the ‘second interview panel would consider all candidates recommended’ – *not candidates who’d not been recommended* – which is to say the function of the ‘second interview panel’ was to vet the candidates selected and recommended by selection panels for the posts they’d applied and been interviewed for.

73. Consistently with Nair, Vedalankar and Clark, LASA’s then in-house attorney and Corporate Services Executive Mtati (later renamed ‘Legal Executive’) Thembile Mtati spoke in paragraph 25 of an affidavit made on Mlambo JP’s behalf on 16 January 2013 and filed in the Labour Court, of ‘those applicants that made it to the second round of interviews’⁷⁸ – that is, having ‘made it’ through the selection and recommendation process conducted by the selection panels that interviewed them. This implied that other shortlisted and

⁷³ B1, pp 390–1.

⁷⁴ B1, pp 392–3.

⁷⁵ B1, p 379–80, para 8.

⁷⁶ B1, p 380, para 10.

⁷⁷ B1, p 380, para 11.

⁷⁸ B3, p 1127, clip 10.

interviewed applicants didn't make it, because the selection panels that interviewed them didn't recommend them.

74. Discussed below, however, later giving evidence in court Nair would tell a completely different story, namely that the 'second interview panel' functioned as a selection panel in its own right to make another candidate recommendation – also that it interviewed candidates selection panels had rejected, thus illegally negating and usurping the function of the selection panel delegated to it by the Recruitment code to interview shortlisted applicants for a vacant post and to 'identif[y] the most suitable candidate for appointment'.⁷⁹

75. In his April 2011 affidavit, Nair continued:

If after the second round interviews a recommendation is made, the Regional Operations Executive in charge would finalize the appointment only after the National Operations Executive and the Chief Executive Officer agree with the recommendation.⁸⁰

76. What Nair meant by 'finalize the appointment', Vedalankar made clear in her October 2010 letter:

As per this Approval Framework, the relevant Regional Operations Executive (ROE), in the case of the Durban and Pietermaritzburg positions the ROE for KwaZulu-Natal together with the NOE and CEO approve the final appointment.⁸¹

77. That is, according to Vedalankar and Nair, the ROE has approval power in Senior Litigator appointments.

78. Under cross-examination in my labour action on 1 August 2013, Nair first conceded that the ROE has no approval power, then prevaricated about it, then, in the teeth of section 8.2.2(b) of the Approval Framework⁸² flatly contradicting him, persisted in asserting the exact opposite. Asked, '[O]nce the ROE has signed

⁷⁹ B1, p 233, section 1.2.3.4.

⁸⁰ B1, p 380, para 12.

⁸¹ B1, p 103, para 6.5.

⁸² B2, p 1036.

off the motivation, his [*sic*: he's] *functus officio*, his function is complete and he has no say whatsoever in the approval decision. This is what the Approval Framework tells me. Do you concede this?', Nair replied: 'Yes.' He then retreated, suggesting elliptically that the ROE could properly block the appointment: 'The ROE in this case would have to, would have to implement it.' Finally, leaving no doubt as to his meaning, Nair insisted again: 'But he does have final approval.'⁸³

79. But as mentioned above, and as Nair⁸⁴ and Vedalankar⁸⁵ had themselves repeatedly pointed out correctly, NOE Nair has final approval power in regard to Senior Litigator candidate appointment recommendations – subject to the CEO's agreement, as section 8.2.2(b) of the Approval Framework prescribes. And the ROE has no approval power at all.

80. In paragraph 6 of an affidavit made on 13 February 2012, Mtati alleged roughly similarly in regard to the so-called second round interview scheme, but with some critical differences:

In preparation for the recruitment of people for the post, the Respondent's [LASA's] executive took a decision, by virtue of the seniority of the post and the high responsibilities it would have, to follow a two-stage interview process in terms of which the shortlisted candidates, would first attend a regional interview conducted by regional executives. The regional executives would then have to select one or more of the candidates they had interviewed and recommend him/her/them for a second round of interviews, this time to be conducted by the national executives in Johannesburg. The Chairperson of the Respondent's Board of Directors who is also the Judge President of this [Labour] Court sits

⁸³ NE, p 451, lines 10–25, p–452, line 1.

⁸⁴ B1, p19: '[T]he person responsible for the final approval of Senior Litigator appointments in our organisation would be the line function executive, which on this case is myself.'

⁸⁵ B1, p 217, para 12: 'Mr Nair is the line executive/manager responsible for the appointment of Senior Litigators.'

in the national selection process and participates in the second round of interviews.⁸⁶

81. *First*, a clique comprising Nair, Vedalankar and Clark doesn't constitute LASA's 'executive'. The Legal Aid Guide (now '-Manual'), 'ratified [by] both houses of Parliament,'⁸⁷ explains:

The Board delegates authority to the CEO, the Management Exco [Management Executive Committee], LSTC ['Legal Services Technical Committee'], other committees and officials through its Approval Framework.⁸⁸

82. But according to Nair, Vedalankar and Clark on affidavit, the three of them decided on the so-called second round interview scheme and to invite Mlambo JP to join in.⁸⁹ (Contradicting their sworn allegations – repeated by Mtati, also under oath – that LASA's 'executive' decided on the double-decker interview scheme, LASA alleged differently in court pleading for the true information of the judge that actually it was Mlambo JP's idea.⁹⁰ This is discussed below.)

83. Had LASA's 'executive' taken such a decision to introduce the scheme, there'd be a record of it (as well as of the Board's approval of this innovation), but there isn't any; to the contrary, Nair alleged on oath, with Vedalankar and Clark confirming, that the decision was taken by the three of them 'verbally'.⁹¹

84. Any decision taken off the record by Nair, Vedalankar and Clark to deviate from and not comply with the Board's Recruitment code is not 'a decision [LASA's] executive took'. (In any event, as mentioned, the Board formulates and prescribes recruitment procedure in its Recruitment code, not executive management.)

⁸⁶ B3, p 1129, clip 13.

⁸⁷ B2, p 763.

⁸⁸ B2, p 767, section 3.2.3.

⁸⁹ B1, pp 378–86.

⁹⁰ B 3, p 1125, clip 2.

⁹¹ B1, p 380, para 8.

85. *Second*, Mtati's allegation that 'regional executives would then have to select one or more of the candidates they had interviewed and recommend him/her/them for a second round of interviews' diametrically contradicts the Recruitment code in two respects, and is contradicted by the actual facts.

86. Under section 1.2.3.4, the selection panel's function is to 'identif[y] the most suitable candidate for appointment in a post'⁹² – not 'one or more of the candidates', as Mtati falsely alleged on oath. And once the selection panel has 'identified the most suitable candidate for appointment in a post, procedures will be followed to appoint the individual into a position'.⁹³ Section 1.2.3 concludes with a 'NB' provision: 'Motivation has to be ... forwarded to the HRE/COO/CEO delegated for approval'⁹⁴ – which in the case of Senior Litigator posts is the NOE.⁹⁵ That is, on receipt of the selection panel's 'motivation', *i.e.* its 'appointment recommendation',⁹⁶ NOE Nair must approve it or disapprove it, and not conduct another interview in committee with some of his national executive colleagues and the Board chairperson.

87. The facts contradicting Mtati's quoted allegation and showing it to be false are dealt with below. In short, LASA's records show⁹⁷ that selection panels 'identified the most suitable candidate for appointment in a post',⁹⁸ just as the Recruitment code required of them, not a plurality of candidates. That is, a single candidate was recommended in respect of each post, not 'one or more of the candidates they had interviewed and recommend[ed]', In other words, it was always 'him' or 'her', never 'him/her/them' as Mtati falsely alleged on oath.

88. *Third*, Mtati's talk of a second 'national selection process' after a duly constituted selection panel has already made its selection and recommendation of 'the most suitable candidate' has no basis in the Recruitment code. That is, under the Recruitment code the Board chairperson, the NOE, the COO, the LDE

⁹² B1, p 233.

⁹³ *Ibid.*

⁹⁴ B1, p 234.

⁹⁵ B1, p 19.

⁹⁶ B1, p 234, 'NB: ...'

⁹⁷ B1, pp 244–8; B2, pp 994–7.

⁹⁸ B1, p 233, section 1.2.3.4.

and the HRE have no authority whatsoever to conduct a second, now ‘national selection process’.

89. Such a second so-called ‘national selection process’ overriding the selection process duly conducted by the selection panel constituted under the Recruitment code is manifestly illegal.

90. Contradicting Nair, Vedalankar, Clark and Mtati’s sworn claim that the first three said management executives decided on the double interview scheme, LASA alleged contrariwise in its pleading to my labour claim, for the true information of the judge, that actually it was Mlambo JP’s idea:

The second round of interviews is, in fact, the brainchild of the Chairperson together with the executive management[.]⁹⁹

91. So on this different version given to court – contrary to what Nair, Vedalankar and Clark all swore to be the truth under penalty of perjury in April 2011 – it was Mlambo JP’s idea, not theirs, to flout the ‘clear guidelines to be followed when a vacancy exists’¹⁰⁰ and a recruitment process is conducted to fill it; it was Mlambo JP’s idea to violate the Constitution by disregarding the rule of law.

92. In stating in his April 2011 affidavit, corroborated by Vedalankar and Clark also on oath, ‘The second interview panel would consider all candidates recommended from the first round of interviews to the second round of interviews’,¹⁰¹ Nair falsely implied either that the selection panels that interviewed candidates for LASA’s vacant Senior Litigator posts didn’t discharge their function under the Recruitment code to ‘identif[y] the most suitable candidate’¹⁰² (candidate, singular – not candidates, plural) for appointment to the post in question, or that their due performance of this mandate under the Recruitment code was practically irrelevant and their selection and

⁹⁹ B4, response, paragraph 8.

¹⁰⁰ B1, p 228, 1.1.3.

¹⁰¹ B1, p 380, para 11.

¹⁰² B1, p 233, section 1.2.3.4.

recommendation was as good as *pro non scripto* and of no legal force and effect, in the opinion of Mlambo JP, Nair, Hundermark, Clark, and Makokoane.

93. In their said affidavits, Nair, Vedalankar and Clark further falsely suggested that the selection panel recommended several candidates for consideration by the so-called ‘second interview panel’, but the ‘Summary of the Scoring’¹⁰³ record dealt with below contradicts and refutes this: *seven* candidates recommended for *seven* of LASA’s Senior Litigator posts were again interviewed by the so-called ‘second interview panel’.

94. And in stating on oath also, ‘If after the second round interviews a recommendation is made, the Regional Operations Executive in charge would finalize the appointment only after the National Operations Executive and the Chief Executive Officer agree with the recommendation’, Nair falsely claimed the ROE ‘finalize[d] the appointment’ provided that the NOE and CEO ‘agree[d] with the recommendation.

95. As said, this false assertion is contradicted and refuted by the Approval Framework, which gives the ROE no power to finalize a recommended Senior Litigator candidate’s appointment, so any such exercise of this power by the ROE is *ultra vires* and illegal. And as shown below, LASA’s own records show that in fact the ROEs were accorded no approval power in the appointment of LASA’s first four Senior Litigators.

96. Responding on 22 June 2011 to an enquiry by the Portfolio Committee that I’d initiated into (i) the cancellation of my recruitment to the Pietermaritzburg Senior Litigator post after I’d been unanimously selected and recommended for it, (ii) the false budgetary insufficiency excuse advanced to me to cover the true reason for it, and (iii) Vedalankar’s repeated and persistent illegal and unconstitutional blanket refusals to comply with my record requests for access to LASA’s records, made in my investigation of the illegal abortion of my recruitment and of her and Nair’s lies told me to cover it, Mlambo JP alleged:

¹⁰³ B3, pp 1094–7.

Adv Brink was ... recommended by the regional selection panel to the second stage of the interview process, before a nationally constituted interview panel ... of which the Chairperson of the Board of Directors is one.¹⁰⁴

97. Noteworthy is that Mlambo JP did not falsely claim, as Vedalankar had in her October 2010 letter, that I was recommended ‘inter alia’ (along with others) for a second interview by his co-called ‘nationally constituted interview panel’.

98. *En passant*: For perverting the Portfolio Committee’s enquiry, and the Minister’s separate enquiry, with multiple lies – including and centrally that LASA lacked the budget to fill the post, and that it had duly complied with my requests for access to its records – gross misconduct complaints against Mlambo JP are pending before the Judicial Conduct Committee of the Judicial Service Commission, accessible online at illegal-aid.co.za/JSC. In response to my letter to him about the delay in disposing of my complaints, the Chief Justice called for copies on 18 February 2020; my letter is also online at that site.

99. Consistently with the unauthorised, unrecorded, verbally decided double-decker interview scheme applied to Senior Litigator recruitment, to which Clark, Vedalankar, Nair, and Mlambo JP all referred, the selection panel’s report recommending me for the Pietermaritzburg post for which I’d applied, and recommending an internal candidate for the Durban post, is indeed cast in terms of a ‘recommend[ation]’ ‘for the next round of interviews’ – a phrase appearing on pages 1,3 and 4 of the report, and in similar terms on the final page, on which provision was made for NOE Nair to record his ‘Next Round Interview Approval’ by signing either in the ‘Recommendation Accepted’ or the ‘Recommendation Not Accepted’ box.¹⁰⁵

100. The ‘Summary of the Scoring for Senior Litigator Positions’,¹⁰⁶ following the so-called second round interviews held in late 2008 for seven of the nine posts, reflects that Mlambo JP, Nair, Clark, Hundermark and Makokoane were all

¹⁰⁴ B1, p 505.

¹⁰⁵ B1, p 248.

¹⁰⁶ B3, pp 1094–7.

‘panel members who interviewed the candidates’ a second time – consistently with Vedalankar’s claim about this (quoted in paragraph ... above). All were members of a so-called ‘nationally constituted interview panel ... of which the Chairperson of the Board of Directors is one’¹⁰⁷ (per Mlambo JP’s said report to Parliament) – ‘panel members who interviewed the candidates’ for a second time, after they’d already been duly interviewed and duly recommended by selection panels for seven of LASA’s nine Senior Litigator posts.

101. Since only Mlambo JP and Hundermark were legally qualified at the time (Nair graduated in law several years later, and was still a student in mid-2013),¹⁰⁸ the majority of the so-called second round interview panel members, namely Nair, Clark and Makokoane, were manifestly professionally incompetent to assess and score the ‘Level of Competency’ of the legal candidates they interviewed – yet the ‘Summary of the Scoring’ shows they assessed and scored them anyway.¹⁰⁹

102. In the case of candidate Patrick Loots, Mlambo JP scored his ‘Level of Competency’ at 60, as did former school principal Nair.¹¹⁰ Judging Loots’ ‘Level of Competency’ to be better than Mlambo JP’s measure of it, Makokoane and Clark, both legally unqualified and consequently completely incompetent to assess it, marked him 64 and 65 respectively. In Clark’s legally ignorant estimation, unlike Mlambo JP’s, Loots’ ‘Level of Competency’ was ‘Above Average’. On the other hand, Hundermark, albeit an attorney, disagreed with Mlambo JP and rated Loots a low 53.¹¹¹

103. And whereas Mlambo JP rated candidate Ashok Kaloo 55 (‘Average’, ‘Meeting the required standard’) as Nair and Clark did, Hundermark gave him a damning 43 (‘Poor’, ‘Falling short of the required standard’),¹¹² which is to say, in Hundermark’s opinion, the selection panel that recommended him misjudged his

¹⁰⁷ B1, p 505.

¹⁰⁸ NE

¹⁰⁹ B3, pp 1096.

¹¹⁰ B3, p 1094 and 1096. NE

¹¹¹ B3, p 1094 and 1096.

¹¹² *Ibid.*

professional competence and ought to have rejected him as legally inept and therefore unsuited for the post.

104. These strikingly anomalous discrepancies in the scoring by a mix of lawyers and legal ignoramuses, and by the only two lawyers on the so-called second round panel, Mlambo JP and Hundermark, all marking wildly discrepant scores, speak to the subjectivity of their assessments, and the arbitrariness and gross unfairness of the so-called second round interview scheme. Plainly no objective criteria were applied in scoring the recommended candidates who were interviewed again.

105. The ‘Summary of the Scoring’ record shows that four of the recommended candidates interviewed for a second time were again ‘Recommended’ by the so-called ‘nationally constituted interview panel’ (Mlambo JP’s expression), but that three of the candidates originally recommended by selection panels (misdescribed by Mlambo JP as ‘regional selection panel[s]’)¹¹³ were ‘Not recommended’.¹¹⁴

106. Concerning the four candidates ‘Recommended’ by the so-called ‘nationally constituted interview panel’, Vedalankar recorded on ‘5.12.08’: ‘Recommendation Accepted’.¹¹⁵

107. But under the Approval Framework, CEO Vedalankar had no final approval power in the appointment of Senior Litigator candidates. Section 8.2.2(b) delegated it to NOE Nair, subject to her concurrence.¹¹⁶ Technically therefore, none of the four incumbent Senior Litigators finally approved by Vedalankar on 5 December 2008 were duly appointed.

108. No prejudice to LASA or to the public resulted from this irregularity, however, in that Nair was practically no better placed to approve the appointments than Vedalankar was, because neither of them was legally qualified. (As said, Nair graduated in law many years later.)

¹¹³ B1, p 505.

¹¹⁴ B3, p 1094.

¹¹⁵ B3, p 1097.

¹¹⁶ B1, pp 225–6.

109. Plainly in the deliberations of the so-called second round interview panel members following their re-interviews of the seven candidates recommended by selection panels, Board chairperson and Judge President Mlambo's vote wasn't really equal to those of the others, and especially not equal to the legally unqualified members.

110. It's obviously entirely inconceivable that Nair, then legally unqualified, would have opposed Mlambo JP, a senior judge, in his positive or negative assessment of any candidate's professional ability and suitability for appointment and recommendation. In other words, Nair – delegated 'Final approval' power in Senior Litigator appointments – indubitably deferred to Mlambo JP's professionally competent (though not legally authorised) assessments of the interviewed candidates. The implications are as follows.

111. Regarding the *seven* candidates recommended by selection panels, and interviewed and recommended again by the so-called 'nationally constituted interview panel', Nair illegally abdicated his delegated final approval authority to Mlambo JP.

112. Regarding the *four* candidates again 'Recommended' by the so-called 'nationally constituted interview panel' after selection panels had recommended them, Nair illegally abdicated his delegated final approval authority to Vedalankar – to the extent that she did any more than rubber-stamp what was ultimately and practically Mlambo JP's approval of the four candidates.

113. Regarding the *three* candidates 'Not recommended' again by the so-called 'nationally constituted interview panel' after selection panels had recommended them, Nair again illegally abdicated to Vedalankar his delegated final power to disapprove them – to the extent that she did any more than rubber-stamp Mlambo JP's rejections of the three candidates.

114. It's not the function of an executive authority to decide the 'Level of Competency' of a lawyer found by a selection panel to have met the qualifying criteria for a Senior Litigator post and to be the most suitable candidate for appointment, following the interrogation of his or her professional background,

experience, knowledge of law, and forensic skills at his interview. Rather, an executive authority's function is essentially administrative. Section D8 of the previous PSR, applicable at the time (and section 67(9) of the current PSR prescribes the same)¹¹⁷ makes the point:

Before making a decision on an appointment or the filling of a post, an executive authority shall—

- (a) satisfy herself or himself that the candidate qualifies in all respects for the post and that his or her claims in his or her application for the post have been verified as directed by the Minister; and
- (b) record that verification in writing.¹¹⁸

115. Deciding solo, Vedalankar's nominal rejection of the three 'Not recommended' candidates was unlawful for a further reason. Section 1.5.1 of the Recruitment code is explicit about record keeping by selection panels conducting interviews as to their deliberations (and according to Nair, quoted below, the so-called second round interview panel functioned as a selection panel in its own right, and not just to vet candidates recommended by selection panels):

As part of the selection process, reasons why a particular candidate was not successful should be recorded in case the unsuccessful candidate asks for reasons for rejection.¹¹⁹

116. Section 8.7 (5) of the SMS Handbook prescribes similarly in peremptory terms:

A selection committee shall record the reasons for its decision/recommendations with reference to the criteria mentioned above.¹²⁰

(The 'criteria' are discussed just below.)

¹¹⁷ B3, p 1212.

¹¹⁸ B3, p 1138.

¹¹⁹ B2, p 718.

¹²⁰ B2, p 800.

Both section D7 of the old and section 57(3) of the new PSR specifically require an executive authority to record his or her reason for not approving a recommended candidate:

When an executing authority does not approve a recommendation of a selection committee, she or he shall record the reasons for her or his decision in writing.¹²¹

117. Section 8.7 (6) of the SMS Handbook stipulates likewise.¹²²

118. Vedalankar didn't record her reason for rejecting the three candidates 'Not recommended' by the so-called second round interview panel, despite their having been recommended by selection panels. Her failure to have done so shows incontestably that she didn't apply any independent judgment of her own, and that she merely rubber-stamped the so-called second round interview panel's disapproval of the candidates it had interviewed again.

119. The so-called 'second round of interviews' were illegally conducted in two further respects: off the record, and without a prepared set of written criteria, as required by section 8.2 (5) of the SMS Handbook under 'Transparency':

To be able to demonstrate that the process was fair and transparent, easily accessible written records of the following should be kept:

criteria used in selecting interviewees

criteria used in selecting the most suitable candidate; and

evaluations of individual candidates

120. The Recruitment code ('in line with all relevant statutory legislation and business practices')¹²³ stipulates accordingly in section 1.2.3.1:

The Human Resources Department will prepare criteria against which all applications for a specific post are to be evaluated

¹²¹ B3, pp 1138 and 1212.

¹²² B2, p 801.

¹²³ B1, p 228, section 1.1.2.

consistent with and based on the inherent requirements of the post as listed in the advertisement.¹²⁴

121. When I called for the minutes of the ‘second round interview’ of the attorney Kaloo whom the so-called second round interview panel had rejected several months before¹²⁵ I applied for the readvertised Pietermaritzburg Senior Litigator post,¹²⁶ in order to see by what criteria he’d been assessed and rejected, Mtati confirmed on oath: ‘No such record exists.’¹²⁷

122. It’s certain therefore that no record exists of the minutes of the ‘second round interview’ of the other six candidates either, both ‘Recommended’ and ‘Not recommended’ by the so-called second round interview panel.

123. Besides the inherent illegality of the so-called second round interview scheme, the failure to keep a minute of its proceedings was in itself illegal. Without a record kept by the so-called ‘nationally constituted panel’ of their so-called ‘second round of interviews’ and of their reasons for their decisions taken with reference to a set of written criteria, it was all but impossible for a court to objectively determine in a judicial review application whether their interviews and decisions conformed to the requirements of section 1.1.2 of the Recruitment code, namely that:

The recruitment process must be fair, objective, transparent, and non-discriminatory.¹²⁸

124. Giving evidence in my labour claim on 1 August 2013, Nair radically changed his version advanced in his April 2011 affidavit, namely that ‘The second interview panel would consider all candidates recommended from the first round of interviews to the second round of interviews’.¹²⁹ Now in evidence he repeatedly alleged that that in deciding who to appoint, LASA was not limited to considering the candidate recommended by the selection panel, and that the

¹²⁴ B1, p 233.

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¹²⁷ Material excerpts of his answering affidavit – see item G83

¹²⁸ B1, p 228.

¹²⁹ B1, p 380, para 11.

so-called second round interview panel was free to consider any shortlisted and interviewed applicants for appointment, including those the selection panel had rejected:

[A]ll four [shortlisted candidates for the Pietermaritzburg and Durban posts who] were interviewed ... their CVs were sent to me. Because in deciding who will be in [the] interview for the second round, we look at all four again and not only the person that the first round panellist[s] interviewed or recommended.¹³⁰

[The second round panel] is free to make the decision it wants to make and to interview whoever it wants to interview.¹³¹

[W]e do not only interview the recommended candidates.¹³²

[T]he panel does not confine itself to only the person that is recommended. The panel, [h]as in the past, requested to see other candidates who were interviewed.¹³³

The first panel, yes, does make a recommendation. ... The second panel does have sight ... of all ... CVs and it can also select others in addition to whoever is recommended.¹³⁴

‘[The second panel] ... does have sight of all CVs and it can also select others in addition to whoever is recommended.’¹³⁵

[W]e do not only interview the recommended candidates. The panellists can look at all the people who were interviewed at the first round and they can say, “We would also like to see X, Y and Z.”¹³⁶

¹³⁰ NE

¹³¹ NE

¹³² NE

¹³³ NE pp 349, 350, and 408–10.

¹³⁴ NE

¹³⁵ NE p450 lines 3–8

¹³⁶ NE 408–9.

125. Instances of where the so-called second round interview panel selected and recommended for appointment persons not recommended by selection panels, and evidently intended doing so, are discussed in Chapters Three and Four below.

126. Regrettably the judgment in my labour claim neglected to deal with the legality of the two-tier interview scheme, notwithstanding that I'd pertinently placed it in issue on the pleadings for decision. And besides observing generally that on the witness stand Nair had been 'not generous with the truth ... a number'¹³⁷ of times, the judgment did not deal with Nair's evidence about the issue – perhaps because what he alleged in this regard was so very obviously and ludicrously illegal.

127. Since then (mid-2013), LASA's officers have continued repeatedly asserting the so-called second round interview scheme for Senior Litigators in several affidavits in various litigations. As recently as 21 June 2018, in claiming falsely in an answering affidavit that I was 'interviewed and shortlisted as a candidate for the senior litigator post at ... Pietermaritzburg',¹³⁸ Hundermark implied, consistently with Nair's absurd evidence, that any shortlisted and interviewed applicant for a Senior Litigator post could be interviewed a second time and considered for appointment, including one or more candidates who'd not 'made it to the second round of interviews', that is who'd not been recommended by the selection panel, even disqualified and 'eliminated'¹³⁹ by it.

128. Contrary to Hundermark's perjury about this, the recommendation report shows categorically that I wasn't 'interviewed and shortlisted' for the Pietermaritzburg post for which I'd applied. In truth and in fact, it was the other way round: I was shortlisted, interviewed, and selected out *alone* from among the other shortlisted and interviewed candidates for it the Pietermaritzburg post, and not 'shortlisted' for it again. An internal candidate in LASA's Durban office was recommended for the simultaneously recruited for a different post at

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Durban.¹⁴⁰ In other words, two candidates were recommended, one for each of the two posts. The other two applicants for the posts were positively disqualified and rejected by the selection panel.

129. In falsely alleging that after I was shortlisted and interviewed by the selection panel, I was again ‘shortlisted’ (in truth and in fact, there was no second written shortlist), Hundermark revealed his and his colleagues’ intention to interview again a candidate who’d not been recommended by the selection panel – indeed one who’d been ‘eliminated’ by it, with a view to illegally appointing him to the Pietermaritzburg post instead of me – as happened with the illegally irregular Mahikeng appointment, and possibly the Bloemfontein one too, discussed in Chapter Two. (The Pietermaritzburg and Durban recruitments will be dealt with in Chapter Four.)

A CRITICAL ANALYSIS OF ACTUAL CORRUPTED SENIOR LITIGATOR SELECTION, RECOMMENDATION AND APPROVAL PROCEDURES AT LASA, DEMONSTRATING THAT THEY ARE NON-COMPLIANT WITH LASA’S INTERNAL REGULATIONS, GROSSLY IRREGULAR, ILLEGAL, AND UNCONSTITUTIONAL

130. It’s trite that, as in any corporation, the Board’s responsibility is to determine and set its policy, and that executive management’s function is to implement it. As Nair put it very correctly in his April 2011 affidavit, ‘The Board’s responsibility primarily relates to policy issues’;¹⁴¹ and LASA’s management executives’ function is, as their name indicates, to execute Board policy, such as its Policies and Procedures on Recruitment, Induction, Probation and Relocation (‘Recruitment code’) – in doing so complying with the Board’s Approval Framework delegating executive authority depending on the scale and importance of the operational decisions it specifies. LASA’s management executives’ function is not to make such policy concerning recruitment, induction, probation and relocation themselves, behind the scenes, off the record, and without Board approval.

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131. Vedalankar's contention that 'Legal Aid SA Executives are not precluded from formulating processes for recruitment'¹⁴² deviating from the 'processes for recruitment' prescribed by the Board's Recruitment code, is consequently ridiculously false on its face. Put another way, if LASA's executives want to go about 'formulating processes for recruitment' differing from those prescribed by the Board in its Recruitment code, the executives 'formulating' these novel 'recruitment' 'processes' need the Board's approval for them; otherwise they have zero legal force and effect.

132. Equally fatuous is Vedalankar's reliance on the Recruitment code in her January 2011 letter, annexed to it marked 'V2', in order 'To demonstrate that Legal Aid SA Executives are not precluding from formulating processes for recruitment.'¹⁴³ Because the Recruitment code doesn't 'demonstrate' this at all.

133. Unlike in a jungle village arbitrarily ruled by the Big Man, in a constitutional democracy power is bestowed by law. Rogers J recently reiterated:

Officials who exercise public power are constrained by the principle, fundamental to our constitutional order and the rule of law, that they may exercise only those powers and perform only those functions which are conferred upon them by law.¹⁴⁴

134. The Recruitment code comprehensively circumscribes LASA's 'processes for recruitment', and it expressly stipulates that the 'clear guidelines' codified in it are 'to be followed when a vacancy exists,' thus 'ensuring that appropriate recruitment procedures are followed' to fill the post. Management executives obviously have zero legal authority to 'formulat[e]' different 'processes for recruitment' of their own, radically deviating from the comprehensive 'processes for recruitment' prescribed by the Board.

135. Nair's allegations that:

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¹⁴³ B1, p 214.

¹⁴⁴ *Department of Agriculture, Forestry and Fishing and Another v Barnabus Xulu Inc. and Others*, High Court, Western Cape Division, Case No. 6189/19.

The National Operations Executive in consultation with both the Chief Executive Officer and the Human Resources Executive agreed that the process of recruitment for Senior Litigators will include a second round of interviews. This decision was taken verbally in April 2008. ... The Chairperson of the Board was also invited to participate in this panel. The second interview panel would consider all candidates recommended from the first round of interviews to the second round of interviews. ... If after the second round interviews a recommendation is made, the Regional Operations Executive in charge would finalize the appointment only after the National Operations Executive and the Chief Executive Officer agree with the recommendation.

– are consequently absurd and plainly violate the rule of law. Moreover, they're contradicted by other statements by LASA as well as by the facts on the ground.

136. Recognising that LASA's management executives are indeed bound to comply with the Board's Recruitment code in recruiting staff, and not make up new different recruitment procedures as and when they see fit, Mtati confirmed very correctly on affidavit that:

Legal Aid SA's interviews are guided, for fairness and certainty, by its Procedures for Recruitment Policy which was adopted by Legal Aid SA's Board of Directors.¹⁴⁵

And Nair confirmed this.¹⁴⁶

137. Consistently with this very true statement of how recruitment operations ought to be conducted under law, Vedalankar was concerned to assure me in her January 2011 letter that:

processes outlined in the Policy on Recruitment were followed by the relevant regional office in seeking to recruit candidates for the [Pietermaritzburg and Durban Senior Litigator] posts.¹⁴⁷

¹⁴⁵ B4, Application to subpoena Mlambo JP, Mtati's answering affidavit, p 81, paragraph 7.

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138. These statements by Vedalankar and Mtati reveal that LASA's management executives well understand that they're legally required to comply with the 'processes outlined' by the Board's Recruitment code. And these 'processes outlined' very precisely by the Recruitment code don't include subjecting a recommended Senior Litigator candidate to a second interview by the non-executive Board chairperson sitting in committee with some national office executives, mostly legally unqualified; much less do they include interviewing again for possible appointment an applicant interviewed by a selection panel but not recommended, and even rejected by it.

139. As said above, Vedalankar's, Nair's and Clark's claim on affidavit in April 2011 that they decided to introduce a second interview into Senior Litigator recruitment procedure, and that they 'invited' the Board chairperson to participate in it, was contradicted by LASA's court pleading for the true information of the judge a few months later. In its original response in September 2011 to my original statement of claim, LASA claimed that this unauthorised deviation from the Board's Recruitment code was in fact Mlambo JP's 'brainchild'.¹⁴⁸

140. Whatever the truth of it, neither Board member Mlambo JP nor management executives Vedalankar, Nair and Clark had any power under law to deviate from recruitment and approval processes prescribed by the Board by 'verbally' deciding to impose a second interview process on a Senior Litigator candidate duly selected and recommended by a selection panel following its interview and assessment of his legal professional experience and expertise and general suitability for appointment, and even less to again interview and recommend for appointment a candidate whom a selection pane has not recommended, and has even eliminated.

141. Nowhere in the public service, no matter how senior the post, is there any provision for a second interview of an applicant for a vacancy after he or she has been duly interviewed and recommended for appointment by a selection panel.

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Nor is there any provision for interviewing again, for possible appointment, an applicant who's been rejected by a selection panel. The minutely specific SMS Handbook,¹⁴⁹ for instance, obviously contains no such absurd provisions.

142. Concerning Vedalankar's claim in her October 2010 letter – 'Noting the seniority of these positions, it was decided to implement a two stage interview process in the appointment to these posts'¹⁵⁰ – there's no record of any such decision taken by the Board to implement such a double-decker interview scheme; and naturally not, because such a 'two stage interview process in the appointment to these posts' is at odds with the clear provisions of the Board's Recruitment code and Approval Framework quoted above, which provide for the interview, selection and recommendation of a shortlisted applicant for a Senior Litigator post, and then his or her approval and appointment – or rejection by the delegated executive authorities, the NOE and CEO.

143. As the detailed provisions of these two instruments show, LASA's Board, and no one else, makes internal regulations governing recruitment and appointment procedure. And executive management is bound to follow them; quoted above, section 1.1.3 of the Recruitment code stipulates: 'This policy and procedure provides the Legal Aid Board with clear guidelines to be followed when a vacancy exists.'¹⁵¹

144. The Board certainly never approved Vedalankar's, Nair's and Clarke's and/or Mlambo JP's 'brainchild'¹⁵² in 'verbally'¹⁵³ deciding 'in April 2008'¹⁵⁴ that Senior Litigator candidates duly selected and recommended by a selection panel of senior lawyers under the Recruitment code, and whose appointment is then subject to the co-approval of the NOE (Nair) and the CEO (then Vedalankar) under the Approval Framework, be first subject to a 'second round of interviews' to be conducted by some 'National Office executives'¹⁵⁵ and 'the Chairperson of

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155 Bundle, p 380, paragraph 9.

the Board'¹⁵⁶ – because when several months later on 29 November 2008 the Board reconsidered and resolved to amend its Recruitment code, it was not proposed that it now include a novel provision for a 'second round of interviews' for duly selected and recommended Senior Litigator candidates – even less a 'second round of interviews' for shortlisted and interviewed candidates who'd been 'eliminated' by the selection panel (on Nair's, Clark's and Hundermark's version); and accordingly, in amending its Recruitment code the Board did not consider and resolve to include any such novel provision in its 'Version 2_Aproved by Board 29 November 2008'.¹⁵⁷

145. Nor does any record exist of any such decision ('to implement a two stage interview process in the appointment to these posts') taken by executive management. Corroborated on oath by Vedalankar¹⁵⁸ and Clark,¹⁵⁹ Nair expressly confirmed on affidavit in April 2011 that their decision was taken 'verbally'.¹⁶⁰

146. Indeed, Mlambo JP and LASA's management executives, including then in-house attorney and Corporate Services Executive Mtati, themselves all appreciate that Board members have no legal business involving themselves in recruitment operations conducted by executive management, either at selection level or approval level, because they've expressly said so repeatedly.

147. In his April 2011 affidavit Nair stated very correctly:

The Board's responsibility primarily relates to policy issues and not operations, hence appointments ... are dealt with by Executives.¹⁶¹

148. LASA confirmed this in legal pleading signed by Mtati in September 2011:

[T]here was no need for the Chairperson of the Board to involve Board members in operational matters. Staffing of the Respondent

¹⁵⁶ Bundle, p 380, paragraph 10.

¹⁵⁷ Bundle, p 228, footer.

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[LASA] is an issue that is ordinarily dealt with by the Respondent's executive officials.¹⁶²

149. LASA confirmed this yet again even more directly in another legal pleading signed by Mtati the following month:

The recruitment and staff issues do not fall within the realm/jurisdiction of the Respondent's board of directors. They are properly dealt with at the Respondent's management level.¹⁶³

150. This is absolutely correct, and it follows therefore LASA's management executives and in-house lawyers well understand that a non-executive Board member's involvement in recruitment operations is irregular, *ultra vires*, and unlawful.

151. Via Mtati deposing on his instructions,¹⁶⁴ Mlambo JP himself confirmed very correctly that 'recruitment of staff is an exclusive terrain of executives.'¹⁶⁵ And again, Nair rightly confirmed it.

152. This very correct sworn statement by Mtati on Mlambo JP's instructions, confirmed by Nair on oath, is supported by and is perfectly consistent with the provisions of the Recruitment code and Approval Framework.

153. However, after confirming again that recruitment is none of the Board's business, Mlambo JP (via Mtati) then diametrically contradicted this:

[T]he Board does not ordinarily get involved in the management of Legal Aid SA. The exception being, of course, the recruitment of senior litigators.¹⁶⁶

154. Only, no such 'exception' is provided for anywhere in the Recruitment code, which does not permit a non-executive member of the Board to involve himself in such operational and management processes as Senior Litigator recruitment.

¹⁶² B4, Response, paragraph 37.8.

¹⁶³ B4, Answer to pre-trial conference agenda, paragraph 74.2.

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155. In paragraph 7 of its September 2011 response to my original statement of claim in my labour case, LASA alleged:

The second round of interviews was introduced in accordance with the Respondent's Recruitment Policy read with the Respondent's Approval Framework which was approved and adopted by the Respondent's Board on 27 February 2010.¹⁶⁷

156. The false allegation is flatly contradicted and refuted by the clear language of the two regulations themselves. Neither envisages a 'second round of interviews'. The 'second round of interviews' is accordingly in no wise 'in accordance with [LASA's] Recruitment Policy read with [its] Approval Framework' at all.

157. Both the allegation and disingenuous implication that the Board approved a 'second round of interviews' for recommended Senior Litigator candidates are patently false.

158. Indeed, forced to do so, Mlambo JP unambiguously conceded via Mtati:

On close scrutiny it will be noted that [the Recruitment code] does not provide for the two-stage interview process referred to.¹⁶⁸

Nair conceded likewise in his confirmatory affidavit.¹⁶⁹

159. But disingenuously equivocating, Mlambo JP (via Mtati) then limply hedged:

[E]ven if the Applicant be correct about the exact process to be followed and the interpretation of the provisions of the Approval Framework (which the Respondent denies) [etc.]¹⁷⁰

160. In his response demanded by the chairperson of the Justice Portfolio Committee¹⁷¹ to a parliamentary enquiry I'd instituted,¹⁷² Mlambo JP himself

¹⁶⁷ App subp dm answer p81 para 8.

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¹⁷⁰ Mtati, paragraph 52.9

confirmed in a covering letter to the chairperson of the said Committee on 22 June 2011, quoting from his email to me – quite correctly on the specific point – that ‘the level at which such [recruitment] matters are handled’ is at ‘Executive Management level’.¹⁷³

161. But contradicting his very correct statement in his covering letter that recruitment is handled at ‘Executive Management level’, Mlambo JP then claimed in his ‘Confidential ... Report’ in response:

Adv Brink was ... recommended by the regional selection panel to the second stage of the interview process, before a nationally constituted interview panel ... of which the Chairperson of the Board of Directors is one[.]¹⁷⁴

(Else on multiple scores, Mlambo JP’s report to the Portfolio Committee is the subject of a criminal complaint against him for contravening section 17(2) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004. Currently pending before the Judicial Conduct Committee of the Judicial Service Commission, the complaint is accessible online at illegal-aid.co.za/JSC.)

162. Besides that the Recruitment code and Approval Framework don’t provide for it, another basic reason why Mlambo JP had no legal role in Senior Litigator selection or approval processes whatsoever (and the current Board chairperson Makume J doesn’t either) is that the chairperson of LASA’s Board is a non-executive director.¹⁷⁵

163. In his State of the Nation Address on 16 February 2018, President Ramaphosa pointed up the general problem of public entity board members in South Africa interfering in executive management’s operations:

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¹⁷³ B1, p 504)

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We have found ... that board members get involved in operational measures. ... We will remove board members from any role in [them].¹⁷⁶

164. Mentioned above, Vedalankar's claim in her October 2010 letter that 'As per this Approval Framework, the relevant Regional Operations Executive (ROE), in the case of the Durban and Pietermaritzburg positions the ROE for KwaZulu-Natal together with the NOE and CEO approve the final appointment'¹⁷⁷ is contradicted by the Approval Framework, which delegates no power whatsoever to a Regional Operations Executive ('ROE') to approve Senior Litigator appointments.

165. 'After the selection committee has identified the most suitable candidate for appointment in a post,¹⁷⁸ under section 1.2.3.4 of the Recruitment code, thereby concluding the selection process, the ROE's power is limited to 'authorising' the 'LAB-RC (Legal Aid Board recruitment check)' under section 1.3.2.1.¹⁷⁹

166. For Vedalankar and Nair to allow an ROE any role in approving Senior Litigator appointments is an illegal abdication or sub-delegation of their co-approval power delegated to them by the Approval Framework and to no one else.

167. In truth and in fact, however, contradicting Vedalankar's false claim to me about this, the 'Summary of the Scoring'¹⁸⁰ record shows that no ROE was involved in either the so-called second round interview process, or in the approval by Vedalankar alone, of the four Senior Litigator candidates 'Recommended' for the second time by the so-called second round interview panel. Nor was any ROE involved in disapproving the three other candidates 'Not recommended' for the second time, after they'd been recommended by the selection panels that interviewed and selected them.

¹⁷⁶ [goog.gl/8o6DmG](https://www.google.com/search?q=goog.gl/8o6DmG)

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¹⁷⁸ B1, p233.

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168. Furthermore, contrary to Vedalankar’s false claim that ‘the relevant Regional Operations Executive (ROE), ... together with the NOE and CEO approve the final appointment’,¹⁸¹ the ‘Summary of the Scoring’¹⁸² record shows that by signing under ‘Recommendation Accepted’¹⁸³ at the foot of the said document Vedalankar alone approved the so-called second round interview panel’s recommendations of Senior Litigator candidates who’d already been selected and recommended by selection panels. Neither the ROEs nor the NOE were involved in ‘approv[ing] the final appointment’ – in the case of the ROEs correctly so; in the case of the NOE, irregularly and unlawfully.

169. It may be, however, that ‘in the case of the Durban and Pietermaritzburg positions’ it was intended that ‘the ROE for KwaZulu-Natal’ was to have the power to ‘approve the final appointment ... together with the NOE and CEO’ because his covertly preferred candidate for Pietermaritzburg was Ngcamu, the candidate the selection panel had disqualified and rejected; and ‘the NOE and CEO’ were unlawfully permitting him to vet and reject the duly selected and recommended candidate. This will be dealt with in Chapter Four.

LASA’S SEVERAL SPURIOUS JUSTIFICATIONS FOR FAILING TO COMPLY WITH, FOR RADICALLY DEVIATING FROM, AND FOR CONTRAVENING ITS INTERNAL REGULATIONS PRECISELY PRESCRIBING SENIOR LITIGATOR RECRUITMENT AND APPOINTMENT PROCEDURE

170. In past legal pleadings and affidavits, LASA’s lawyers and executives have strained to justify their gross flouting of the Recruitment code and Approval Framework by purporting to demonstrate, in oleaginous legalese possibly quite impressive to legally uneducated persons, that their so-called second round interview scheme actually accords with these regulations. In their likely endeavour to put down this complaint about the general corruption of Senior Litigator recruitment and appointment procedure at LASA; about their illegal non-compliance with these legal instruments, LASA’s lawyers and executives are

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likely to advance the same or similar contentions they've advanced before. To anticipate this, their past spurious justifications are quoted below in italics, without source attribution, and refuted.

The Chairperson took particular interest in the interviews of senior practitioners as their experience would directly affect and impact on [LASA's] public image which has, for the most part, been negative due to a perception of incompetence and lack of vital court skills.

171. The 'particular interest' that the chairperson took 'in the interviews' of shortlisted Senior Litigator candidates did not vest him with any powers not accorded him by law, *i.e.* by the LASA Act, the Legal Aid Guide/Manual, the Recruitment code and the Approval Framework – none of which empowered him to interview, select and/or recommend and practically approve such candidates selected and recommended by selection panels duly constituted under section 1.2.2 of the Recruitment code, or select and/or recommend and practically approve a candidate not selected and recommended by a selection panel.

172. The only officers with a direct lawful 'interest in' the professional 'experience' of applicants for Senior Litigator posts are the members of the selection panel appointed under section 1.2.2 of the Recruitment code¹⁸⁴ to interview them about it and assess it.

173. The only officers with a direct lawful 'interest in the interviews' are those delegated by section 8.2.2(b) of the Approval Framework¹⁸⁵ to approve or disapprove a selection panel's recommendation of 'the most suitable candidate for appointment'¹⁸⁶ under section ... of the Recruitment code, *i.e.* 'appointment recommendation',¹⁸⁷ namely, in the case of Senior Litigator appointments, the NOE and CEO.

¹⁸⁴ B1, pp 230–2.

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174. Mlambo JP's 'particular interest in the interviews of senior practitioners' was legally irrelevant, and his interference in prescribed recruitment procedure was illegal.

175. On Nair's version, stated in his 'Report to Board' of November 2011,¹⁸⁸ which he swore in court to be the truth in mid-2013,¹⁸⁹ the 'particular interest in the interviews of senior practitioners' that non-executive chairperson Mlambo JP showed by taking it upon himself, *ultra vires* and illegally, to decide who should be appointed to LASA's Senior Litigator posts or not, *did not* in the result ensure that only competent, skilled litigators were appointed to alleviate LASA's 'public image which has, for the most part, been negative due to a perception of incompetence and lack of vital court skills'; because in his report, confirmed in court under oath, Nair alleged that the competence and court skills of LASA's six incumbent Senior Litigators – all approved by Mlambo JP – urgently needed to be professionally audited by a special 'national quality review panel' including 'possibly a retired judge' 'before the end of this financial year'.¹⁹⁰ (To be discussed in Chapter Four, Nair was brazenly manufacturing a bogus new justification for not filling LASA's three remaining vacant Senior Litigator posts, following the collapse of the lying budgetary insufficiency one. A subsequent PAIA request exposed Nair's perjury about this.

176. If Mlambo JP's concern was LASA's 'public image which has, for the most part, been negative due to a perception of incompetence and lack of vital court skills', he wouldn't have participated in blocking the appointment of eminently competent Senior Litigator applicants with demonstrated 'vital court skills'¹⁹¹ thus depriving LASA of specialist legal professional expertise and thereby contributing to LASA's 'negative' 'public image' 'due to a perception of incompetence.' This will be dealt with in Chapter Four.

¹⁸⁸ B2, pp 869–70.

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¹⁹⁰ B2, p 870., section 4.

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[T]he interview process [that LASA] adopted was necessary, reasonable and fair, given the seniority of the positions involved herein, to ensure that it satisfies itself about the persons to be employed in those positions.

177. In truth and in fact, LASA didn't adopt the two-round interview procedure; it was Nair, Vedalankar and Clark and/or Mlambo who did so – 'verbally', off the record, without authority, without Board approval, and illegally. The two-round interview procedure for Senior Litigator candidates consequently features nowhere and is not sanctioned by the Recruitment code and Approval Framework.

178. Like the SMS Handbook, the Board's Recruitment code contains finely detailed provisions governing staff recruitment operations, precisely to ensure that only the most suitable and best possible candidates are selected for and employed in Senior Litigator positions. An illegally constituted second interview panel has no power and is in no better position to achieve this, more especially since most of its members are legally untutored and therefore entirely unqualified and completely incompetent to re-assess recommended candidates.

179. If the Board thought it 'necessary, reasonable and fair' that recommended Senior Litigator candidates be interviewed again by the chairperson and some mostly legally unqualified national management executives, it would have amended its Recruitment code to provide for this.

180. Under the Approval Framework and the Recruitment code, the only officers required to be 'satisfie[d] ... about the persons to be employed in [Senior Litigator] positions' are the senior lawyers appointed to the duly constituted and delegated professional selection panel, and thereafter the 'executive[s] delegated for approval', namely the NOE and CEO, and no one else. Anyone else intruding into these decision-making processes acts *ultra vires* and illegally. And any member of the professional selection panel or any 'executive delegated for approval' who abdicates his decision-making authority by sharing it with such unauthorised persons acts equally illegally. As shown above, instead of approving or disapproving the candidate recommendations as required of him by

the Approval Framework, Nair participated in another interview and selection process, disregarding the selection panel's determinations of 'the most suitable candidate' for each vacant post.

[The second round interview] process adopted was further rationally connected to the objective sought to be attained[.]

181. As said, the double-decker interview process wasn't adopted by LASA but by Nair, Vedalankar, Clark and/or Mlambo JP – illegally for the several reasons enumerated above. The just-quoted justification meretriciously echoes the language of section 6(2)(f)(ii) Promotion of Administrative Justice Act 3 of 2000, without quoting other pertinent provisions of section 6 contemplating the judicial review of an administrative action 'not authorised ... by the empowering provision'; where 'a mandatory and material procedure ... prescribed by an empowering provision was not complied with'; 'the action was procedurally unfair'; the action 'is not authorised by the empowering provision'; and so forth, as in the 'process adopted' illegally by Nair, Vedalankar, Clark and/or Mlambo JP to hold a second interview for recommended Senior Litigator candidates and even for shortlisted and interviewed candidates not recommended.

182. The 'objective[s] sought to be attained by [LASA]' are set by the Board. If the Board thought it 'rational..' that some legally unschooled management executives together with one of its non-executive members with no executive power, *i.e.* no authority to involve himself in management operations, should interview and vet or veto the 'appointment recommendations' of professional selection panels, and even consider for appointment a shortlisted and interviewed but not recommended candidate, even a disqualified and rejected one, it would have amended its Recruitment code and 'adopted' this absurd 'process' accordingly.

183. Manifestly the so-called second round interview 'process adopted' by Nair, Vedalankar, Clark and/or Mlambo JP is not 'rationally connected to the objective

sought to be attained' by LASA's Board when it set recruitment policy at LASA in its Recruitment code.

[LASA's] Recruitment Policy (Version 2) merely provides guidelines within which [LASA] is to conduct itself in recruiting people for its positions. ... It is not prescriptive.

184. The claim that the Board's 'clear guidelines to be followed when a vacancy exists ... aim[ed] at ensuring appropriate recruitment procedures are followed' (per the language of the Recruitment code) are 'not prescriptive'; are not binding on LASA's management executives in their conduct of recruitment operations; and can be ignored and/or radically deviated from at will, has only to be stated to be rejected. Quite obviously, to the contrary, any regulation promulgated by the Board is indeed 'prescriptive'.

The said Policy also makes provision for other methods of assessing a prospective employee i.e. written examinations / assessment, etc.

185. Contrary to this dishonest invention, the Recruitment code contains no such provisions whatsoever. What the Recruitment code does provide is that after his or her selection and recommendation by a selection panel for appointment, 'a prospective employee' may in 'certain' cases be 'require[d]' under section 1.2.3.5 to 'undergo ... psychometric assessment to supplement the interview results'¹⁹² – in other words be assessed by a psychologist. And section 1.2.3.7 requires that the selected and recommended 'candidate's personal particulars including but not limited to qualifications, security checks, and credit checks must be verified in compliance with the LAB Recruitment Check Procedure.'¹⁹³ Section 1.3.1 explains: 'The purpose of the LAB-RC [Recruitment Check] for the Legal Aid Board is to ... ensure that the LAB will consider the best suited candidates for positions in the organisation; ... safe guard and limit the LAB's exposure to possible fraud; and ... provide guidelines in terms of rehabilitation.'¹⁹⁴ None of

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these specific additional ‘other methods of assessing a prospective employee’ authorise the so-called second round interview scheme.

The [Recruitment] Policy does not preclude [LASA] from following or engaging in other different methods of assessing a prospective employee.

186. On the contrary, the Recruitment code comprehensively prescribes the ‘recruitment procedures’ to be ‘followed’, which the Board has decided are ‘appropriate’, and which conform to recruitment procedures prescribed by the PSR and the SMS Handbook. The ‘methods of assessing a prospective employee’ are precisely defined by the Recruitment code, and obviously they don’t allow a second interview of an applicant for a Senior Litigator post to be conducted by mostly legally unqualified and professionally incompetent national executives and the non-executive Board chairperson with zero executive power and zero authority to intervene in and interfere with LASA’s recruitment operations and appointment decisions. Nor does the Recruitment code permit these persons to disregard the selection panel’s selection and recommendation, and to interview and consider for appointment an applicant not selected and recommended, even positively disqualified and eliminated by the selection panel.

[LASA] denies that it acted contrary to the Recruitment Policy document and avers that it was guided thereby when dealing with the positions of the Senior Litigator.

187. The vacancy of this false denial and of this false averment is apparent from a consideration of the so-called second round interview scheme in light of the cold print of the Recruitment code and the Approval Framework. In conducting their second interviews of duly selected and recommended Senior Litigator candidates, Mlambo JP, Nair, Hundermark, Clark and Makokoane unlawfully breached the Recruitment code’s ‘clear guidelines to be followed when a vacancy exists ... aim[ed] at ensuring appropriate recruitment procedures are followed’.¹⁹⁵

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[T]he two-stage interview process may be necessary to ensure that suitably qualified people are employed, particularly in senior positions[.]

188. Had the Board considered a ‘two-stage interview process ... necessary’ for any of LASA’s level 13 (now LP10) posts, it would have amended its Recruitment code to provide for this.

189. Like the PSR and the SMS Handbook, the Recruitment code contains an array of detailed provisions to ‘ensure that suitably qualified people are employed, particularly in senior positions’.

190. Nair’s, Vedalankar’s, Clark’s, and/or Mlambo JP’s opinion that a ‘two-stage interview process may be necessary to ensure that suitably qualified people are employed, particularly in senior positions’ is legally irrelevant, inasmuch as it’s not shared by LASA’s Board.

191. Moreover, the ‘two-stage interview process’ was a failure and didn’t achieve its alleged intended purpose, namely to ‘ensure that suitably qualified people are employed, particularly in senior positions’ such as Senior Litigator posts.

According to Mlambo JP deposing on affidavit via attorney Mtati:

[M]any of the senior litigators have failed to live up to the required expectations as they, despite many years in practice, lacked the required Court experience.¹⁹⁶

Legal Aid SA conducted a quality assurance in respect of the existing senior litigators and it was out of concern from the results of such exercise that the concerns around these officials were noted.¹⁹⁷

The Recruitment Policy referred to herein is a guide within [LASA] and is used to recruit staff.

192. Indeed it is, and section 1.1.3 requires LASA executives and managers to comply with it and apply it: ‘This policy and procedure provides the Legal Aid

¹⁹⁶ B3,

¹⁹⁷ B3,

Board with clear guidelines to be followed when a vacancy exists.’¹⁹⁸ And any deviation from these ‘clear guidelines to be followed when a vacancy exists’, drawn in conformity with the PSR and SMS Handbook, and prescribed by the Board, is plainly unlawful.

[The Recruitment code] does not in peremptory terms proscribe the use of more than one interviewing methods. On the contrary, clause 1.2.3.5 ... indicates that there are other possible methods that may still be utilised to complement the interview process adopted by the selection panel.

193. This brazen disingenuity is exposed by a glance at the quoted section: ‘The selection committee may require certain short listed candidates undergo for psychometric assessment to supplement the interview results.’¹⁹⁹ It certainly doesn’t ‘indicate... that there are other possible methods that may still be utilised to complement the interview process adopted by the selection panel’ in the sense dishonestly implied, namely a second interview by a non-executive Board director and some mostly legally unqualified management executives, including one of the executives ‘delegated for approval’. Clearly section 1.2.3.5 does not support and authorize a so-called second interview to be conducted by another panel comprising some national executives and the Board chairperson ‘to complement the interview process’, as dishonestly alleged. Nor does the section permit a selection panel’s recommendation as to the ‘most suitable candidate’ to be disregarded. Nor does it permit an unsuccessful applicant for a Senior Litigator post, who has not been selected and recommended by a selection panel, and who has even been disqualified, rejected and eliminated from the running, to be interviewed again by this so-called second round interview panel and considered for appointment.

194. Section 1.1.3 is unequivocal: ‘This policy and procedure provides the Legal Aid Board with clear guidelines to be followed when a vacancy exists.’²⁰⁰ And the Recruitment code indeed precisely circumscribes ‘the interviewing method...’ to

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be followed by executive management. The twelve subsections of section 1.2.2 comprehensively provide for the appointment of a suitably qualified, competent ‘Selection Committee/Panel’;²⁰¹ and the eight subsections of section 1.2.3 precisely govern the preparation of ‘Selection Criteria’ to be applied by the selection panel in making its selection and recommendation of ‘the most suitable candidate’.²⁰² The double-decker interview scheme is completely at odds with this.

195. Under the heading ‘Interviewing’, section 8.6 of the SMS Handbook permits three different ‘interviewing methods’ as LASA puts it, namely ‘structured’ (with a ‘pre-determined questionnaire’), ‘semi-structured’ (‘provides flexibility to add questions depending on the situation and to probe deeper depending on the answers provided’) and ‘unstructured’ (‘normally not suitable for selection purposes’)²⁰³ – but all in the context of ‘the interview’, not a second repeated interview, including of candidates not selected and recommended by the selection panel.

196. LASA’s management executives, and Board members, may not lawfully disregard the Board’s Recruitment code by inventing and implementing policies and procedures of their own making, as and when they choose. They are required to comply with LASA’s internal regulations, which is to say with the law.

The Recruitment Policy document does not determine which persons who shall sit in the selection panels and the number of interviews that one candidate, may be subjected to. Clauses I.2.2.2.; I.2.2.5.; and I.2.2.6. of the Recruitment Policy ... gives the Human Resources department wide discretion to constitute a selection panel.

197. *First*, these mentioned provisions are framed to ensure that only suitably qualified persons are appointed to conduct the interview. *Second*, just as the PSR and SMS Handbook do, the Recruitment code unequivocally stipulates a single interview of shortlisted applicants by a duly constituted, competent selection

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panel; and (per section 1.2.3.4), ‘After the selection committee has identified the most suitable candidate for appointment in a post, procedures will be followed to appoint the individual into a position or a temporary one.’²⁰⁴

198. The Recruitment code does not provide for a further interview by a non-executive Board member sitting in committee with some mostly legally uneducated national management executives to repeat and even disregard the work of the selection panel.

199. Sections ‘I.2.2.2.; I.2.2.5.; and I.2.2.6.’ of the Recruitment code don’t give ‘the Human Resources department’ the ‘discretion to constitute a selection panel’ by such legally and/or professionally incompetent persons.

200. To the contrary, section I.2.2.2 imposes on the ‘Human Resources Department and the relevant line manager’ the obligation ‘to jointly ensure that a diverse and knowledgeable selection committee/panel is appointed.’²⁰⁵ Section I.2.2.5 mandates the presence on the panel of ‘the manager who would manage the incumbent filling the vacant position’.²⁰⁶ Section I.2.2.6 mandates the minimum number of panel members, and the presence of a union representative for non-SMS posts.²⁰⁷

201. LASA’s dissimulation that these three sections justify the so-called second round interview procedure is transparently insupportable.

The Regional Selection Panel did not have any authority to recommend ... anyone ... for “appointment”.

202. Contrary to this false allegation, the selection panel’s legal mandate is derived from and circumscribed by the Recruitment code, and, quoted below, it explicitly invests the selection panel with the authority to recommend the most suitable candidate for appointment.

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²⁰⁵ B1, p 231.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

203. Section D1 in the ‘Selection’ chapter of the PSR applicable at the time provided precisely:

An executing authority shall appoint a selection committee to make recommendations on appointments to posts.²⁰⁸

Section 67 of the current PSR with effect from 1 August 2016, last amended on 11 April 2019, repeats this exactly.²⁰⁹

204. As section 8.5(1) in Chapter 2, ‘Recruitment’, in the SMS Handbook defines it:

The role of a selection committee is to –

establish the suitability of a candidate who complies with the job requirements;

determine the relative suitability of the various candidates as objectively as possible;

render justifiable and valid advice to the final decision maker; and

formulate and record the reasons for specific recommendations.²¹⁰

205. Consistently with this, section 1.2.3.4 of the Recruitment code explicitly authorises:

the selection committee [to] identif[y] the most suitable candidate for appointment in a post²¹¹

– after which the panel’s ‘appointment recommendation’²¹² must be considered for approval ‘in line with the approval framework.’²¹³

206. So contrary to the above-mentioned utterly false allegation, the selection panel indeed had the ‘authority’ delegated to it under the Recruitment code ‘to

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²¹¹ B1, p 233, section 1.2.3.4.

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recommend' suitable candidates for 'appointment' to LASA's Senior Litigator posts.

207. No one else had this authority to recommend suitable candidates for appointment – not Mlambo JP, not Nair, not Hundermark, not Clark, and not Makokoane.

208. Nobody in LASA's national office or on its Board had the power to derogate and arrogate the delegated authority of 'the selection committee [to] identif[y] the most suitable candidate for appointment in a post[.]'²¹⁴

The second round of interviews is, in fact, the brain-child of the Chairperson together with the executive management after it was realised that most of the senior practitioners who were recruited without having undergone a second interview were lacking experience in vital areas like High Court litigation skills and also given the seniority of the position involved herein.

209. Drawn in accordance with the PSR and the 'Recruitment' provisions of the SMS Handbook, the Board's comprehensive Recruitment code is directed precisely at 'attracting and appointing the best possible candidates for employment into suitable positions within the Legal Aid Board with the purpose of enhancing high performance in the business'²¹⁵ and at 'ensuring that appropriate recruitment procedures are followed'²¹⁶ to achieve this.

210. The allegation that 'most of the senior practitioners who were recruited without having undergone a second interview were lacking experience in vital areas like High Court litigation skills', which is to say, 'most of the senior practitioners' appointed before April 2008 should never have been recommended and appointed, because they're not fit for 'the seniority of the position involved', has never been made to the Board, or it would have amended its Recruitment code to prevent this reoccurring.

²¹⁴ B1, p 233, section 1.2.3.4.

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211. Quite the contrary, LASA has consistently reported good professional performance at all levels. Chapter Four will address this.

212. Until such time as the Board decides that it's necessary to amend its 'clear guidelines to be followed when a vacancy exists ... aim[ed] at ensuring appropriate recruitment procedures are followed',²¹⁷ its comprehensive Recruitment code aimed at 'attracting and appointing the best possible candidates for employment into suitable positions within the Legal Aid Board with the purpose of enhancing high performance in the business'²¹⁸ remain in force and govern recruitment practice at LASA; and any substantial departure from it is *ipso facto* illegal.

It is noteworthy that other senior litigators appointed long before the Applicant's [i.e. my, the complainant Brink's] interview all underwent the two-stage recruitment process. The Applicant is aware of an applicant who, after having succeeded in the first round of interviews, failed at the second round. That amply demonstrates that it is not a foregone conclusion that an interviewee who is successful in the first round of interviews will make it in the second.

213. That the Recruitment code and Approval Framework were flouted in the appointments of LASA's six incumbent Senior Litigators and in the rejection by the so-called second round interview panel of a candidate who'd been duly selected and recommended by a selection panel (actually, dealt with below, three such candidates were illegally rejected) does not render the illegalities lawful. Just as the participation of the Board chairperson in the so-called nationally constituted second round interview panel and second interview and reselection process did not legitimate this panel and process; on the contrary Mlambo JP's participation exacerbated their illegality, given his fiduciary duty to LASA as a Board member to oversee the lawful and constitutional conduct of LASA's operations.

214. The only thing 'noteworthy' about the fact 'that other senior litigators appointed long before the [my] interview all underwent the two-stage

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recruitment process' is that the second round interview process was illegal, just as the second round interview panel's rejection of three duly selected and recommended candidates was illegal also.

[The Recruitment code] does not preclude Legal Aid SA from adopting any interview method and procedure it prefers at any given time.

Any novel 'interview method and procedure' 'adopt[ed]' by executive management that substantially deviates from the 'interview method and procedure' precisely prescribed by the Board's Recruitment code ('in line with all relevant statutory legislation and business practices')²¹⁹ is unlawful. Mlambo JP is not the Board. Neither he nor any management executives have the power to 'adopt..' whatever different 'interview method and procedure' they whimsically 'prefer.. at any given time', and doing so is unlawful.

²¹⁹ *Ibid.*

CHAPTER TWO: THE GROSSLY IRREGULAR AND ILLEGAL APPOINTMENTS OF PERSONS NOT RECOMMENDED BY SELECTION PANELS TO THE BLOEMFONTEIN AND MAHIKENG SENIOR LITIGATOR POSTS

215. As discussed and vouched in paragraphs 25–28 of Part One of this complaint, and mentioned in paragraphs 21–2 above, the Board approved executive management’s proposal for the creation of a new layer of expert litigation specialist positions on 24 November 2006, and the nine new Senior Litigator posts at ‘Johannesburg ... Pretoria ... Pietermaritzburg ... Durban ... Port Elizabeth ... Bloemfontein ... Cape Town ... Kimberley ... [and] Mafikeng’ were advertised together in October 2007 (‘Closing Date: 9 November 2007’).²²⁰

216. And as discussed and vouched in paragraph 59 of Part One of this complaint, LASA’s records show that four selected and recommended candidates, namely Herman Alberts for Pretoria, Lilla Crouse for Port Elizabeth, Mornay Calitz for Cape Town, and William Karam for Johannesburg were ‘Recommended for the position’ by the so-called second round interview panel; were approved by Vedalankar on 8 December 2008; and were appointed.

217. The ‘Summary of the Scoring for Senior Litigator Positions’ by the so-called second round interview panel records that although candidates Wilson Rambau, Patrick Loots and Ashok Kaloo were all found to be ‘Meeting the required standard’ when re-examined by the so-called second round interview panel for their ‘Level of Competency’, they were now ‘Not recommended for the position’.²²¹

218. For which positions at which centres – Mahikeng, Bloemfontein, Durban or Kimberley – the record doesn’t say, but it’s common cause that Kaloo, an internal candidate employed at LASA’s Pietermaritzburg Justice Centre, who’d been selected and recommended for the Pietermaritzburg post, was ‘Not recommended for the position’ at Pietermaritzburg by the so-called second round interview panel. I’d heard that Mlambo JP had rejected him before I applied for the readvertised post in 2009, and Kaloo himself later confirmed it to me

²²⁰ B1, p 537.

²²¹ B3, pp 1094–7.

(responding, when I told him his rejection had been irregular, that he didn't wish to pursue it).

219. As to which posts Rambau and Loots had been selected and recommended for, the Kimberley post seems to be excluded, because then Western Cape and Northern Cape ROE Maduba's 'Motivation to Move the Senior Litigator Position at the Kimberley Justice Centre to Another Justice Centre' on 17 November 2009 records that the Kimberley 'position had been advertised 3 times already, both internally and externally and the adverts could never attract candidates who meet the minimum criteria to fill up the position.'²²² If this is true, neither Loots nor Rambau could have been selected and recommended for the Kimberley post, because the so-called second round interview panel found both of them to be 'Meeting the required standard', *i.e.* did indeed 'meet the minimum criteria to fill up the position' that they'd been selected and recommended for.

220. Since neither Loots nor Rambau have practiced in KwaZulu-Natal as far as I can see, it's unlikely that either of them applied for and were selected and recommended for the Durban post. That leaves the Mahikeng and Bloemfontein posts.

221. At all events, after the appointments of the again 'Recommended' four Senior Litigators – Alberts at Pretoria, Crouse at Port Elizabeth, Calitz at Cape Town, and Karam at Johannesburg – after Vedalankar approved their appointments on 8 December 2008, five Senior Litigator posts remained vacant at Pietermaritzburg, Durban, Kimberley, Bloemfontein and Mahikeng.

222. The Pietermaritzburg, Durban, Kimberley posts are still vacant, now nearly fourteen years since they were created. This grave breach of the PFMA is the principal subject of Part One of this complaint.

223. The Bloemfontein and Mahikeng posts were filled sometime between February 2010 and February 2012 – as appears from a comparison of LASA's monthly budget for February 2010, showing *five* Senior Litigator posts still

²²² B2, p736, Background, second paragraph.)

vacant,²²³ and its monthly budget for February 2012, showing *three* Senior Litigator posts vacant.²²⁴

224. LASA's Senior Litigator employment statistics for March 2012 show that whereas the Pietermaritzburg, Durban and Kimberley Senior Litigator posts were still vacant, the Bloemfontein and Mahikeng Senior Litigator posts had been filled by Pieter Nel and Nzame Skibi respectively.²²⁵

225. It appears the Bloemfontein and Mahikeng posts – or at least the Bloemfontein post – was filled sometime after 27 May 2010, because the minute of the Legal Services Technical Committee ('LSTC') meeting on that date records in its paragraph 5.1.3 Nair's complaint that the Port Elizabeth Justice Centre had referred a matter in the Supreme Court of Appeal ('SCA') to the Bloemfontein Justice Centre ('JC') to handle:

[B]ecause of capacity issues, Bloem HCU [High Court Unit] got a JC PA [Professional Assistant] to attend to this matter. The NOE indicated that it was inappropriate for a JC PA to have been allocated a SCA matter ... It was further noted that all SCA matters must be done by the region where it originates from and that our senior litigators should preferably be requested to attend to them. HCU PAs should also be provided opportunities to do SCA matters, provided that they are properly supported by our senior litigator[s] and/or HCU managers.²²⁶

Had Nel already been appointed Senior Litigator at Bloemfontein by that stage, he would likely have handled the case.

226. Nel's CV on the National Forum of Advocates' website records that he was 'Head of Bloemfontein Justice Centre (Legal Aid SA) 1999–2009'.²²⁷ (As LASA's

²²³ B3, pp 1073 and 1076.

²²⁴ B3, pp 1077 and 1080.

²²⁵ B3, p 1093.

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recruitment statistics show, the Senior Litigator post at Bloemfontein was still vacant as at February 2010.)²²⁸

227. Skibi looks certain to have been appointed by 5 November 2010, because the judgment in an appeal he argued on that day records the appellant's attorney as 'Legal Aid South Africa Mahikeng Justice Centre';²²⁹ and on 17 October 2011 a news report about a bail application he brought describes him as 'Advocate Nzame Skibi of Mahikeng Justice Centre'.²³⁰

228. I can't be more exact about the date of Skibi's and Nel's appointments to the Mahikeng and Bloemfontein posts, because although I've duly requested²³¹ copies of their appointments under the Promotion of Access to Information Act 2 of 2000 ('PAIA') in order to ascertain these dates, LASA (Hundermark) is determinedly obstructing my access to them. I've sued to compel their production, among many other illegally and unconstitutionally suppressed documents, and the case is pending; see illegal-aid.co.za/PAIA.

229. On 8 December 2015, I telephoned Vincent Mayisela, who'd been Free State and North West ROE at the time that LASA was conducting its first recruitment process to fill its nine new Senior Litigator posts. (His CV, emailed to me, notes that he held office as ROE for that region between 1 January 2008 and 1 May 2010.)²³²

230. When I mentioned the cancellation of Mahikeng Senior Litigator Skibi's transfer to Mthatha following his selection and recommendation for the post in May 2010 (discussed in Chapter Three), Mayisela responded that he'd chaired the selection panel that interviewed shortlisted candidates for the Mahikeng Senior Litigator post after the advertisement of the post (and the other eight posts) in 2007, and that although Skibi had been one of the shortlisted candidates interviewed by his panel for the post, 'Skibi was not the

²²⁸ B3, pp 1073 and 1076.

²²⁹ B2, p 908.

²³⁰ B2, p 912.

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recommended candidate for the Mahikeng SL post, but Mlambo JP forced his appointment to it' – so I contemporaneously noted.

231. It appears that the so-called second round interview panel rejected the candidate selected and recommended as 'the most suitable candidate for appointment' (per section ... of the Recruitment code)²³³ by Mayisela's selection panel from among the shortlisted and interviewed candidates for the Mahikeng Senior Litigator post.

232. As said, the fact that Skibi was subsequently appointed to the Mahikeng Senior Litigator post is shown by LASA's Senior Litigator Recruitment statistics for March 2012 which name him.²³⁴

233. That Skibi was appointed instead of the candidate recommended by Mayisela's selection panel, as Mayisela alleged to me, is borne out by the fact that Skibi wasn't one of the seven recommended candidates listed in the so-called second round interview panel's 'Summary of the Scoring' record.²³⁵

234. It appears then that after the so-called second round interview panel rejected the 'most suitable' candidate recommended by Mayisela's selection panel in the discharge of its mandate under the Recruitment code, Skibi was later called to an interview by the so-called second round interview panel; interviewed by it; and recommended for appointment, which is why he was appointed instead of the candidate Mayisela's selection panel recommended.

235. Consistent with this, Nair testified in the Labour Court in mid-2013 that the panel has sat on three occasions.²³⁶

236. The gross irregularity – the so-called second round interview panel calling a person not selected and recommended, even rejected, by a selection panel to a second interview – tallies with Nair's peculiar evidence in case, quoted above, that:

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²³⁴ B3, p 1093.

²³⁵ B3, pp 1094 and 1096.

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[The second round panel] is free to make the decision it wants to make and to interview whoever it wants to interview. ... [W]e do not only interview the recommended candidates ... [T]he panel does not confine itself to only the person that is recommended. The panel, [h]as in the past, requested to see other candidates who were interviewed.²³⁷

237. In other words, the so-called second round interview ‘panel [h]as in the past requested to see other candidates who were interviewed’ but not recommended by a selection panel – an unsuccessful candidate like Skibi, who was then interviewed again and approved and appointed, instead of the recommended one. All grossly irregularly and illegally.

238. If, as she did in the case of the Pretoria, Johannesburg, Cape Town and Port Elizabeth Senior Litigator appointments, Vedalankar also approved Skibi’s appointment, she did so without the power to do so vested in her by the Approval Framework, which delegates to her the power only to agree or not agree with the ‘Final approval’ decision taken by NOE Nair. In other words, if she also acted alone in approving Skibi’s appointment, as she did the appointments of the other Senior Litigators she approved on 8 December 2008, she did so *ultra vires* and unlawfully.

239. The shortlist of candidates to be interviewed for the Mahikeng Senior Litigator post by Mayisela’s selection panel; the record of its interviews; and its recommendation report will likely bear out Mayisela’s information to me about this. (I’m unable to access these records and produce them to the Auditor-General myself, because, as said above, LASA (Hundermark) is wilfully obstructing my corruption investigation by routinely refusing my PAIA requests for access to LASA’s records.)

240. On 28 July 2020, I telephoned Mayisela again. He reiterated that he and his selection panel interviewed but rejected Skibi for the Mahikeng post – the post to which he was nonetheless appointed, as LASA’s Senior Litigator

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employment statistics naming him show.²³⁸ He couldn't remember the name of the candidate his panel had recommended for the post.

241. Since both the Mahikeng and Bloemfontein Senior Litigator posts were in the Free State and North West administrative region headed by Mayisela at the time, I asked him about the interviews for the Bloemfontein post. He replied that as far as he could recall his selection panel interviewed for the Bloemfontein post on the same day that it interviewed for the Mahikeng post, adding that he recalled sitting only once not twice to interview shortlisted candidates for the two posts in his region. (Discussed below, the KwaZulu-Natal selection panel likewise interviewed for the readvertised Pietermaritzburg and Durban posts on the same day.) Mayisela told me he was aware that Nel had been appointed to the Bloemfontein post (as LASA's Senior Litigator employment statistics indeed reflect),²³⁹ but he couldn't recall whether he interviewed him for the post, or who the recommended candidate was.

242. Since neither Skibi appointed to Mahikeng, nor Nel appointed to Bloemfontein, were interviewed by the so-called second round interview panel along with the other Senior Litigator candidates mentioned in the 'Summary of the Scoring' record, and they were appointed several months after Vedalankar approved the appointment on 8 December 2008 of the four candidates 'Recommended for the position' by the so-called second round interview selection panel, it appears that the latter panel rejected the Senior Litigator candidates that Mayisela's selection panel recommended.

243. I've found no record that the Mahikeng and Bloemfontein Senior Litigator posts were readvertised and that a new shortlist of applicants were interviewed, from whom Skibi and Nel were selected and recommended by another selection panel chaired by Mayisela or by his successor as ROE of the Free State & North West region. (Mayisela left the post on 1 May 2010.)²⁴⁰

²³⁸ B3, p 1093.

²³⁹ B3, p 1093.

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244. If like Skibi, Nel was called to an interview by the so-called second round interview panel, interviewed by it, and recommended for appointment, which is why he was appointed without having been recommended by a duly constituted selection panel chaired by Mayisela or his successor as ROE, his appointment was grossly irregular and illegal.

245. And if Nel's appointment was approved by Vedalankar, this was further irregular and illegal in that Vedalankar didn't have final approval power in Senior Litigator appointments.

246. It seems clear on the evidence already available to me that Skibi and Nel were grossly irregularly and illegally appointed to the Mahikeng and Bloemfontein Senior Litigator posts without having been duly selected and recommended by a selection panel as required by the Recruitment code. In the situation, their appointments offended the principle of legality and violated the rule of law, and were therefore unconstitutional, and they stand to be set aside.

247. If needs be, I can provide Mayisela's cellphone number and email address to the officer investigating the gross procedural recruitment corruption in Skibi's and Nel's irregular and illegal appointments to the Mahikeng and Bloemfontein Senior Litigator posts.

248. The abovementioned records which Hundermark is suppressing can be accessed by the Auditor-General under section 15 of the PAA. It provides:

When performing an audit under section 11, the Auditor-General or an authorised auditor has at all reasonable times full and unrestricted access to—

- (a) any document, book or written or electronic record or information of the auditee which or which reflects or may elucidate the business, financial results, financial position or performance of the auditee;
- (b) ... or

(c) any staff member or representative of the auditee.

249. The following further records, if they exist, will be revealing: Skibi's and Nel's applications for the Mahikeng and Bloemfontein Senior Litigator posts; the shortlists for the two posts; the selection panel's evaluation of the shortlisted candidates and its candidate recommendations for the two posts; the readvertisement, if any, of the two posts, after the so-called second round interview panel rejected the candidates selected and recommended by the selection panel chaired by Mayisela; the record of the so-called second round interview panel's interviews of Skibi and Nel; the record of Vedalankar's approval of Skibi and Nel; and Skibi and Nel's employment contracts reflecting the date(s) on which they assumed their posts.

CHAPTER THREE: EXTENSIVE PROCEDURAL CORRUPTION IN THE MTHATHA SENIOR LITIGATOR RECRUITMENT, INDICATING ETHICAL CORRUPTION

250. The recruitment process for the Mthatha Senior Litigator post in 2010 was so shot through with gross procedural irregularities that it reeks of ethical corruption. It appears to have been a pre-determined sham to create a formal appearance of procedural compliance to cover a rigged process in favour of a covertly earmarked internal candidate to give him an equivalent posting closer to his home.

251. As discussed and vouched in paragraph 60 of Part One of this complaint, the re-advertisement of the Kimberley post in May 2009²⁴¹ failed to attract a suitable applicant,²⁴² and since it was claimed that there'd 'never been a demand for'²⁴³ it and it was 'redundant',²⁴⁴ LASA's LSTC resolved on 24 March 2010 to abolish it and to transfer its budget to a second Senior Litigator post to be created for the Eastern Cape at Mthatha.²⁴⁵ The Eastern Cape ROE's²⁴⁶ motivation for this was that:

We currently have one Senior Litigator who is stationed at Port Elizabeth. It is a huge challenge for this one person to provide support to the whole Region [with its] 'four High Court seats [at] Port Elizabeth, Grahamstown, Bhisho and Mthatha[.]'²⁴⁷

252. The LSTC directed that an 'update of the recruitment reports', 'transfer of the budget', and 'recruitment for this position' were all to be effected 'immediately'. All were for 'Immediate' implementation by the 'Legal Services Delivery' secretary and by the Eastern Cape ROE.²⁴⁸

²⁴¹ Bundle 2, p 732.

²⁴² Bundle 2, p 736, 'Background', second paragraph.

²⁴³ Bundle 2, p 736, 'Background', first paragraph.

²⁴⁴ Bundle 2, p 738, paragraph 1.

²⁴⁵ Bundle 2, p 709, paragraph 4.1.7.

²⁴⁶ Bundle 2, p 738, header; and p 740, final entry.

²⁴⁷ Bundle 1, p 739, paragraph 2.2.

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253. Indeed, all this was ‘immediately’ done: the budget was transferred to Mthatha, as Nair later confirmed repeatedly in evidence,²⁴⁹ the recruitment statistics were ‘updated’ to reflect the vacant Mthatha post,²⁵⁰ and it was advertised within a couple of weeks of the resolution, in April.²⁵¹

254. As with the abolition and/or creation of any new post, the abolition of the Kimberley Senior Litigator post and the establishment of a new such post at Mthatha required approval under the Approval Framework. In this regard, section 1.2.1.2 of the Recruitment code prescribes:

New positions and position profiles will only be created after it has been motivated and approved as per the LAB approval framework and signed off by the Chief Operations Officer.

255. Approval authority regarding the ‘Establishment of new positions’ and the ‘abolition of posts’ at Senior Litigator level, level 13 (now LP10) is delegated by section 8.1.2(b) the Approval Framework; and it required that HRE Clark ‘Must be consulted before’ the decision, and that CEO Vedalankar must grant her ‘Final approval’ subject to NOE Nair’s concurrence; he ‘Must agree’.

256. It’s unlikely that any record exists to vouch that Clark was ‘consulted before’ the LTSC decided to abolish the Kimberley post and create the Mthatha one, and that the motivation for this was ‘signed off by the Chief Operations Officer’, because according to Nair (quoted just below) Vedalankar didn’t approve the LTSC’s decision; quite the contrary, she positively refused to do so, and it’s unlikely that she would have opposed executive management’s otherwise unanimous support for the seemingly well-motivated move.

257. In his evidence in mid-2013 at the trial of my miscarried labour action (the illegal suppression of crucial information in a heavily redacted document I’d requested under PAIA misled me to sue on the wrong cause of action), Nair

²⁴⁹ Nair’s E, p 493, lines 19–25

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testified on oath that no matter how he tried, he couldn't persuade Vedalankar to approve:

[Reflected by] the minutes of the Legal Services Technical Committee, LSTC, a decision was taken to transfer that position from Kimberley to Umtata [spelling *sic*]. However the Legal, the LSTC cannot, it can only make a recommendation. In terms of the approval framework, I still needed to obtain the consent of the CEO in order to effect that move. And post that meeting, I did have discussions with the CEO who indicated that she would think about it ... to move the post from Kimberley, which would involve abolition of the post in Kimberley and creating a new post in Umtata. ... Which would in terms of our approval framework require the CEO's and my agreement. Whilst I was in support of it, the CEO was not immediately in support. She, whilst we discussed it once or twice she finally decided that she was not happy with that post. ... So she did not approve it. So that decision had to be aborted.

[Question: *'She was not agreeable to the transfer of the post?'*]

Yes. ... I could not persuade her.²⁵²

And we spent time, I was trying to convince her and I failed. And as a result we had to reverse this decision. Legal Services does not have the power to take such a decision. In the approval framework, the Committee does not have that power.²⁵³

[Question: *'[W]hat was her objection? Mr Mtati you will recall had made a compelling case for the creation of a second SL post at Umtata given the vast distances that the PE SL had to cover to service the four High Courts in that province, and he made out [sic: made other] arguments too. Now, what was her objection because it is an imminently [sic: eminently] strong case for a new post in the Eastern Cape, what was her problem?'*]

²⁵² B3, Nair's E, pp 365–6:

²⁵³ NE, p 401, lines 1–4.

[O]ne of the primary considerations of the CEO at the time dealt with the purpose of this position. And that is to also support High Court Unit practitioners in their handling of complex cases. Eastern Cape already had a senior litigator, on Lila Crouse, who was based in PE and whose function was to support all the High Court practitioners in the province. In the CEO's view, Kimberley, which ... also has a High Court division, also needed a person. And because we are having recruitment difficulties, it was not a good enough reason to move the post. So she felt that province must not be neglected in terms of taking away budget because we could not find someone at that time who was important [*sic: semble: appropriate*]. So that was the (indistinct) [*semble: reason*].

258. To be discussed in Chapter Four of this Part Two of the complaint to follow, this explanation is absolutely contrary to what Vedalankar alleged to me in October 2010 and January 2011, and to what she, Nair, and Clark soon after confirmed to me under oath in April 2011, in regard to the reason for the cancellation of the Mthatha, Pietermaritzburg and Durban Senior Litigator recruitments after applicants for the posts had been selected for them; and it's absolutely contrary again to what Nair told the Board totally differently in November 2011, and (contradictorily) also confirmed under oath in giving evidence in mid-2013.

259. Since the Eastern Cape ROE had made a compelling case for the creation of a second Senior Litigator post at Mthatha, and the Northern Cape ROE had reported the long-vacant Kimberley post unnecessary and 'redundant', it's difficult to imagine that presented with these considerations Vedalankar would have unreasonably refused to approve the abolition of the Kimberley post and the transfer of its budget to a new Senior Litigator post at Mthatha – unless she understood that the motivation for the abolition of the one post and the creation of the other was merely pretextual, a ploy to oblige Skibi in his wish for a posting closer to home.

260. Whether it's true that Nair tried but failed to persuade Vedalankar to approve the abolition of the Kimberley Senior Litigator post and the creation of a second Senior Litigator post for the Eastern Cape at Mthatha, as he alleged in evidence under oath – contrary to what Vedalankar stated in her correspondence with me and she, Nair and Clark all confirmed on affidavit, Vedalankar can say either way. (If she supports Nair's new story that he couldn't persuade her etc, it follows that she lied on affidavit in April 2011 in corroborating Nair's sworn confirmation of he story to me in her October 2010 and January 2011 letters that the Mthatha post was frozen on account of budgetary insufficiency.) Now that Vedalankar has left LASA, her contact particulars are likely obtainable from current CEO Mantiti Kola at LASA's national office in Braamfontein, telephone number 011 877 2000.

261. It's relevant to mention here that in correctly dismissing my wrongly founded labour action against LASA, the judge found Nair to have been 'not generous with the truth' 'a number'²⁵⁴ of times, which is to say broke his oath to tell the truth, the whole truth and nothing but the truth on several occasions. Indeed, to be shown in Chapter Four to follow, Nair lied freely under oath at trial. His evidence quoted above, about not persuading Vedalankar etc, is consequently unreliable. (As said, it also contradicts his version advanced on affidavit in April 2011.)

262. Notwithstanding that Vedalankar hadn't approved, and indeed, according to Nair on oath in court, later positively refused to approve the abolition of the Kimberley post and the creation of the new post at Mthatha, as decided on by the LSTC, the Kimberley Senior Litigator budget was transferred to the new Mthatha post, and the ostensible recruitment process was commenced immediately. That is, the formal recruitment process for the prospective Mthatha Senior Litigator post was commenced²⁵⁵ – and, discussed below, completed with the selection of Mahikeng Senior Litigator Skibi for transfer to it²⁵⁶ – before the post existed in LASA's staff establishment. Nair was open about

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²⁵⁵ B3, p 1121.

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this irregularity in his evidence in mid-2013: '[W]hile the recruitment was going on the post was not in effect authorised.'²⁵⁷

263. The transfer of the budget is reflected by LASA's June 2010 recruitment statistics now showing two Senior Litigator posts in the Eastern Cape, one filled, one vacant, both budgeted.²⁵⁸

264. Note 17 of the Approval Framework emphasizes (boldface in the original):

It is the responsibility of the **line function Executive** to ensure that such is provided for in the budget and MTEF **and that a vacancy exists in respect of the post concerned. The HRE to confirm budget and vacancy and EE statistics with regard to JC/region/dept.**

265. Since the new Mthatha post hadn't been (and according to Nair never was) approved, no vacancy then (or ever) existed for it, both Nair and HRE Clark contravened Note 17 of the Approval Framework by failing to ensure that the vacancy existed and was budgeted.

266. On his own version, quoted just above, Nair knowingly unlawfully contravened Note 17.

267. The gravity of Nair and Clark's dereliction of their responsibilities under Note 17 is underscored by the emphatic bold typeface in the Note imposing them, and by the fact that not one but two national executives were charged with the responsibility of making sure that no recruitment operation ever be conducted unless the post was both vacant (and existed in LASA's staff establishment) and budgeted.

268. The result of Nair and Clark's deliberate disregard for their obligations to LASA imposed by Note 17 was 'substantial harm to a public sector institution or the general public' as the PAA's definition of 'material irregularity' puts it: the shortlisted applicants for the job were put to the wasted expense of travelling to

²⁵⁷ NE, p 509.

²⁵⁸ B2, p 1066.

Port Elizabeth for the interviews, and LASA's time resources were wasted in attending to the transfer of the budget, the change in the recruitment statistics, preparation of and publication online of the advertisement, organisation of the interviews, conduct of the interviews, etc.

269. As appears from 'Ref: Mthatha 20/4/2010' and 'Closing date – 07 May 2010' in the advertisement for the post, it was briskly advertised within a couple of weeks of the LSTC's resolution to create it.²⁵⁹

270. Section 1.2.1.5 of the Recruitment code requires that:

Vacant posts should be advertised in a wide a range of media as possible, including but not limited to, the Legal Aid intranet, newspapers and other print media. However, when at the discretion of management, an appropriate pool of candidates are available within the organisation, the post may be advertised on an internal basis only.²⁶⁰

271. In regard to level 13 posts, as Senior Litigator posts at LASA then were (now LP10), section 6.4(1) of Chapter 2 of the SMS Handbook is explicit:

In accordance with the PSR any vacant post of senior manager (level 13 or higher) shall be advertised nation-wide.²⁶¹

272. Section 7.1 following it repeats this:

Any vacant post of senior manager must be advertised nation-wide.²⁶²

273. As a member of LASA's topmost 'Senior professional staff' establishment, a Senior Litigator is a not a 'senior manager', but such specialist litigation lawyer occupies the same senior 'level 13' rank (now LP10).

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²⁶¹ B2, p 791, repeated in section 7

²⁶² B2, p 793.

274. That Senior Litigator posts are equally required to be ‘advertised nation-wide’ is borne out by LASA’s original advertisement in 2007 in the ‘newspapers and other print media’ in compliance with section 1.2.1.5 of the Recruitment code,²⁶³ for its nine newly created Senior Litigator posts,²⁶⁴ and then its readvertisements in 2009 in the ‘newspapers and other print media’ of the Kimberley,²⁶⁵ Pietermaritzburg and Durban²⁶⁶ posts.

275. The SMS Handbook provides the rationale for proper advertising, namely to:

attract the widest possible number of people within the target groups²⁶⁷ ... Advertising should encourage competition between internal and external applicants to promote labour mobility and cross-fertilisation of energy and experience.²⁶⁸

276. Like section 65(1) of the current PSR,²⁶⁹ section C.2.1 of the ‘Advertising’ provisions of the Regulations in force at the time prescribed:

An executing authority shall ensure that vacant posts in the department are so advertised as to reach, as efficiently and effectively as possible, the entire pool of potential applicants ...²⁷⁰

277. Although paragraph 2.1 of the Mthatha selection panel’s recommendation report claims that the Mthatha post ‘was advertised internally and externally’,²⁷¹ it appears not to have been advertised in the ‘newspapers and other print media’, as prescribed by section 1.2.1.5 of the Recruitment code,²⁷² and categorically and repeatedly prescribed by the SMS Handbook for level 13 posts without

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²⁶⁷ Bundle addendum, p 794, section 7.2 (3).

²⁶⁸ Bundle addendum, p 794, section 7.2 (5).

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exception.²⁷³ (Discussed below, this wasn't the only false information contained in the recommendation report.)

278. A physical search of archived copies of the Eastern Cape *Daily Dispatch* in the Durban library newspaper archive published in the month before the cut-off date for applications found no advertisement for the Mthatha Senior Litigator post. (The collection was not perfectly complete, so the negative outcome of the search can't be definitive.)

279. If the post was indeed advertised in the newspapers and law journals, HRE Clark will be able to produce proof of this to the investigator. (Under PAIA, I'd myself request proof of the advertisement of the Mthatha post in the 'newspapers and other print media', but as said, to obstruct my corruption investigation Hundermark is routinely blocking all my record requests.)

280. It appears therefore that the advertisement for the post was published only on LASA's website; and that it was to this desultory, inconspicuous, non-compliant advertising on the internet that the recommendation report referred in claiming the post 'was advertised internally and externally'. This online advertising obviously didn't constitute advertising the post 'as efficiently and effectively as possible',²⁷⁴ as the PSR put it.

281. It's highly unlikely for three reasons that 'management' decided to dispense with the usual public advertising in the 'newspapers and other print media' as prescribed for the top post, and mandated by the SMS Handbook, on the basis that there was 'an appropriate pool of candidates ... available within the organisation',²⁷⁵ as the Recruitment code allows.

282. *First*, the Pietermaritzburg,²⁷⁶ Durban²⁷⁷ and Kimberley²⁷⁸ posts had been duly advertised in the newspapers and law journals just a few months earlier,

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clearly showing that there wasn't an 'an appropriate pool of candidates ... available within the organisation' to fill LASA's Senior Litigator posts.

Second, that there was no 'appropriate pool of candidates ... available within the organisation' to justify not advertising the top post properly in compliance with the Recruitment code is borne out by the fact that, as executive management had urged the Board in their 'Report to Board' in November 2006, with the aim of 'Increasing Senior Litigation capacity', LASA's Senior Litigator posts had been created precisely to:

to increase the capacity of the LAB to deliver legal services, as well as to address gaps in its current service delivery programme.²⁷⁹ ... The LAB often has cases of a highly complex nature. However, we do not have professional staff that are senior enough to take on ... cases of a highly complex nature ... It is proposed that we build up such capacity at each province linked to a high court unit. Such senior litigators would be able to undertake more complex work as well as support and mentor our other High Court staff.²⁸⁰

283. *Third*, only two of the five shortlisted candidates for the Mthatha post meeting the qualifying criteria were internal candidates; three were external.²⁸¹ A mere two internal candidates don't comprise an 'appropriate pool of candidates ... available within the organisation'.

284. Certainly the LSTC didn't exercise any such major 'discretion' to dispense with proper advertising for the Mthatha post, because the minute of its March 2010 resolution to create it and to 'immediately' recruit for it records nothing of this.²⁸²

²⁷⁹ B2, p 989.

²⁸⁰ Bundle 2, pp 990–1, paragraph 2.7.

²⁸¹ B3, pp 1122 and 1123. C.f. long- and shortlists.

²⁸² B1, p709.

285. The patent reason the post was almost certainly not properly advertised in the ‘newspapers and print media’ appears from the minute of the said LSTC resolution: the new post was to be filled ‘immediately’.²⁸³

286. The reason for the urgency – even as the Pietermaritzburg and Durban Senior Litigator recruitments, completed several months earlier in November 2009, had quietly been put on permanent ice – was not disclosed.

287. Not only was the post not duly approved, budgeted, and advertised, but in addition the constitution of the selection panel and its conduct was grossly irregular, non-compliant with the Recruitment code, and unlawful in three material respects.

288. *First*, section 1.2.2.2 requires that:

[T]he selection committee or panel should include at least one official who has been fully trained in recruitment and selection process and procedures of the organisation and whose function is to ensure that the interviewing process and the deliberations take place in a fair manner. A trained official must be included in the selection committee or panel irrespective of the position.²⁸⁴

289. The Regional Human Resources Manager (‘RHRM’) was on the panel to perform this function; but then in addition to doing so, incompetently and unlawfully scored the interviewed candidates,²⁸⁵ despite having no legal training or competence to do so.

290. In contradistinction, the recommendation report following the interviews for the Pietermaritzburg and Durban Senior Litigator posts in 2009 shows that the RHRM for KwaZulu-Natal on the panel duly stayed out of the professional evaluation.²⁸⁶

²⁸³ B1, pp 708–10.

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291. The Mthatha recommendation report shows that the legally unqualified, ignorant and therefore professionally incompetent RHRM scored the successful candidate much more highly (40/55) than the Justice Centre Executive on the panel, an attorney,²⁸⁷ did (32.5/55), thereby spuriously inflating his final combined score to 68%.²⁸⁸

292. The participation of the RHRM in the assessment and scoring of the professional acumen of the candidates interviewed for the Mthatha post was illegal, and it rendered the selection panel's recommendation invalid.

293. *Second*, section 1.2.2.6 prescribes:

Irrespective of the level of the position, the manager who would manage the incumbent filling the vacant position must also be on the selection committee, since this manager would know the exact requirements of the job, the expectations attached to the position to be filled and the key performance areas that would attach to the incumbent filling the vacant post.²⁸⁹

294. The 'manager who would manage the incumbent filling the vacant position' would be the Mthatha Justice Centre Executive ('JCE').

295. Section 1.2.2.7 is specific about the necessity for the JCE of the Justice Centre where the Senior Litigator is to be stationed to be on the selection panel:

For Professional Assistants, irrespective of level, the JCE should always form part of the panel.²⁹⁰

296. The shortlist for the Mthatha Senior Litigator post accordingly records that the 'Umthatha JCE' was intended to be a 'Panelist'.²⁹¹

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²⁹¹ B3, p 1123.

297. Identified in the advertisement for the post,²⁹² and included as an addressee in the ROE's email notifying the date and place of the interviews for the post,²⁹³ the JCE at Mthatha at the time was Leslie Gwele.

298. Gwele resigned, however, just before the interviews took place – so he told me after I traced him to his new office as an acting magistrate. (He was 'still seething with anger', he said, at the corruption at LASA he'd run into that caused him to quit; but the shocking gross 'material irregularity' he described to me, in which Nair and Mtati were both involved, is beyond the scope of this complaint.)

299. The Acting JCE who took over from Gwele ought therefore to have been on the selection panel, but as the recommendation report for the Mthatha Senior Litigator post shows, he wasn't.²⁹⁴

300. The 'Justice Centre Executive' deceptively named as a panel member in the said recommendation report was in fact the JCE of the Port Elizabeth Justice Centre,²⁹⁵ many hundreds of kilometres away. She wasn't 'the manager who would manage the incumbent filling the vacant position', as required.

301. In short, in breach of both sections 1.2.2.6 and 1.2.2.7 of the Recruitment code, the JCE/Acting JCE of the Mthatha Justice Centre, a crucial, mandatory member of the selection panel, wasn't on it.

302. It follows that the panel wasn't properly constituted, was unlawful, and its recommendation was accordingly invalid.

303. *Third*, section 1.2.2.6 of the Recruitment code required prescribes:

The selection committee shall consist of at least three (3) members who are employees of a grading equal to or higher than the grading of the post to be filled.²⁹⁶

²⁹² B1, p 1121.

²⁹³ B3, p1122

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304. This conforms to section D1 in the ‘Selection’ chapter of the PSR applicable when LASA was recruiting for Mthatha in 2010 (and section 67(1) of the current Regulations echoes this with some elaboration):²⁹⁷

An executing authority shall appoint a selection committee to make recommendations on appointments to posts. The selection committee shall consist of at least three members who are employees of a grading equal to or higher than the grading of the post to be filled or suitable persons from outside the public service or in which both such an employee or employees and such a person or persons are represented.²⁹⁸

305. But besides the RHRM whose sole lawful function on the selection panel was to ensure the process was duly conducted, the selection panel comprised just two members, the ROE and the Port Elizabeth JCE.

306. It follows that in breach of section 1.2.2.6 of the Recruitment code, and similar provisions in the PSR, the panel wasn’t quorate, so its candidate selection was unlawful and invalid. This non-compliance was especially egregious in light of the top professional seniority of the post.

307. Unlike the recommendation report drawn by the selection panel for the Pietermaritzburg and Durban posts,²⁹⁹ the recommendation report recommending Skibi made no provision for any second interview before his appointment.³⁰⁰ Contrary to Mtati’s perjured allegation that Skibi was ‘shortlisted for a second round of interviews in Johannesburg’,³⁰¹ he wasn’t; he was the single candidate ‘recommended for this position’,³⁰² and no such shortlist was drawn. As an incumbent Senior Litigator, there would have been no need to interview him again after he’d been recommended, and this is why the

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²⁹⁹ Bundle, pp 244–8.

³⁰⁰ Bundle addendum, pp 994–7.

³⁰¹ B4, Application to subpoena Mlambo JP, Mtati’s answering affidavit, p 106, paragraph 81.9.3.

³⁰² Bundle addendum, p 995, section 4.1; and p 996 section 5.

recommendation report says nothing about putting him through any second interview.

308. Crowning all this utter lawlessness in the Mthatha recruitment, the foot of the selection panel's recommendation report provided for 'HRE: Amanda Clark' to record her approval of the candidate 'Recommendation' together with 'NOE: Brian Nair'.³⁰³ But the Approval Framework vests HRE Clark with zero approval authority in the case of Senior Litigator appointments – or any in other. Section 8.2.2(b) delegates the NOE and CEO – Nair and Vedalankar at the time – as executing authorities for Senior Litigator candidate approval and appointment, and nobody else.³⁰⁴

309. Under Note 17 of the Approval Framework, Clark's sole function and responsibility is 'to confirm budget and vacancy and EE statistics with regard to a JC/region/dept'.³⁰⁵

310. But in a further irregularity, unlike the recommendation report drawn by the selection panel for the Pietermaritzburg and Durban posts which contained detailed 'Employment Equity Status'³⁰⁶ statistics for both posts, the recommendation report recommending Skibi for the Mthatha Senior Litigator post³⁰⁷ contained no demographic 'EE statistics' for Clark to 'confirm'.

311. Although the copy of the Mthatha Senior Litigator candidate recommendation report that I eventually forced out of LASA by dint of persistent pre-trial discovery processes is unsigned by the selection panel and the executive authorities, the recommended candidate Skibi was certainly approved, because in response to my telephonic enquiry in November 2010, the Acting JCE at Mthatha told me that he'd been waiting for him to arrive, and that he'd been 'ready to start' work there, when he learned that his transfer had been cancelled. It follows that the Acting JCE had been informed that Skibi was on his way to begin work at Mthatha, or he would not have been expecting him. (The Acting

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³⁰⁴ B2, p 1036.

³⁰⁵ Bundle addendum, p 1040.

³⁰⁶ Bundle, pp 247.

³⁰⁷ Bundle addendum, pp 994–7.

JCE didn't mention Skibi's name; I learned it from LASA a year later,³⁰⁸ and then traced him to Mahikeng³⁰⁹ a couple of days after that.)

312. I telephoned Skibi on 28 October and again on 18 November 2011. In response to my enquiries, he disclosed to me that he'd been notified informally that he'd got the Mthatha post, but that before he could begin he'd received an email telling him his appointment had been cancelled.

313. Since the recommendation report designated Clark and Nair co-executive authorities for Skibi's approval, it's highly probable that they indeed co-approved Skibi's appointment at Mthatha, which is why he was set to begin there and was being expected there.

314. Only, Clark and Nair's approval of Skibi was illegal and of no legal force and effect, (i) because this was without CEO Vedalankar's agreement as required by section 8.2.2.(b) of the Approval Framework;³¹⁰ (ii) because Clark had no authority whatsoever to approve the appointment of a Senior Litigator, not even shared with NOE Nair, to whom the Approval Framework delegated 'Final approval' authority in such top-level professional appointments; and (iii) because Nair had no legal power to share his 'Final approval' authority with HRE Clark, instead of CEO Vedalankar.

315. There are two indications are that the Skibi transfer, albeit ultimately cancelled, was a manoeuvre conducted without Vedalankar's knowledge, either completely or initially.

316. *First*, Vedalankar's approval for the abolition of the Kimberley post and creation of the Mthatha post wasn't sought before the budget was transferred, the post was advertised, candidates were shortlisted and interviewed for it, and a selection and recommendation was made for it.

317. *Second*, it's clear from the way the approval box at the foot of the recommendation report was drawn, providing for Clark and Nair to record their

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co-approval, that it was intended to bypass Vedalankar in transferring Skibi from Mahikeng and appointing him to Mthatha – on the basis perhaps that his lateral transfer would be cost-neutral to LASA.

318. Before the trial of my labour action in July 2013, I sought a copy of the email Skibi told me he'd received cancelling his transfer. In its response, LASA told a slew of lies:

Mr Skibi was definitely orally informed that the Respondent had decided not to fill the Mthatha Senior Litigator post, and that his recommendation for the second round of interviews for the appointment to that position, would not occur. Whilst this may well have been recorded in writing, no such writing can be located by Respondent.³¹¹

319. *First*, Skibi himself told me he was *emailed* and not told orally that his transfer was off, so this allegation is false. (The *oral* information he likely got was the informal tip that he'd got the post.) Skibi would not have been mistaken in reporting to me how he received the surely crushing news that his transfer from a distant post to an equivalent one near his home had been cancelled.

320. *Second*, LASA never duly 'decided not to fill the Mthatha Senior Litigator post', which is why there's no record of any such alleged decision, as Nair, Vedalankar and Clark all confirmed under oath in April 2011.³¹²

321. *Third*, diametrically contradicting the lie that LASA 'had decided not to fill the Mthatha Senior Litigator post', Nair testified that Vedalankar had refused to approve the abolition of the Kimberley post and the creation of the proposed Mthatha one,³¹³ *i.e.* according to Nair, there was no Senior Litigator post at Mthatha to fill or not fill.

³¹¹ B2, p 1020.

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322. *Fourth*, unlike the Pietermaritzburg and Durban recommendation report,³¹⁴ the Mthatha recommendation report didn't mention any 'second round of interviews' for Skibi to undergo, and naturally not, because he was an appointed Senior Litigator at Mahikeng³¹⁵ and his appointment at Mthatha was going to be a 'lateral transfer'³¹⁶ only, as LASA has rightly put it. Also, he was formally selected and recommended *alone*, so there weren't other candidates for 'second round of interviews' (plural) as LASA falsely alleged here. So Skibi couldn't have been told, and wasn't told, that 'the second round of interviews for the appointment to that position would not occur'. This is a blatant lie, and LASA's email to him cancelling his transfer will confirm this.

323. *Fifth*, Skibi must have been approved and told so – informally, as he disclosed to me – or he wouldn't have been 'ready to start', and the Mthatha Justice Centre wouldn't have been expecting him to arrive for work there.

324. The several unctuous lies in this above-quoted pleading, told by the practised liar who invented them, destroy the credibility of the central claim that the email to Skibi couldn't be found. A search of LASA's email server of internal email sent to Skibi in 2010 will easily turn up the email telling him his transfer had been cancelled.

325. After going through the motions to create a patina of legality around the scheme to transfer Skibi 'closer to his family at Bizana'³¹⁷ in the Transkei, Clark and her HR department didn't think to inform the unsuccessful candidates that they hadn't been selected – thereby contravening section 1.5.1 of the Recruitment code:

Unsuccessful short listed external candidates should, as far as is reasonably practically [*sic*], be informed of the fact that they were not successful.³¹⁸

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³¹⁷ B2, p 996, para 5.

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Responding to my request³¹⁹ for copies of the regret letters sent to the unsuccessful candidates for the Mthatha post, Mtati confirmed on oath, ‘No such record exists.’³²⁰

326. Even though, according to Mtati in paragraph 53.2 of his answer to my pre-trial conference agenda for my labour action, ‘all the affected Regional Operations Executives had to send letters of regrets [*sic*] to the candidates’, and he repeats in paragraph 14 of his affidavit that Vedalankar and Nair:

resolved to terminate the recruitment of people to its senior litigator posts and send to those applicants that **made it to the second round of interviews** “regret letters”³²¹

– Mtati alleges in paragraph 96.12 of the same document that in Skibi’s case, the ROE didn’t send him any regret letter, he just got a phone call telling him his hoped-for transfer was off:

[Skibi] was informed by phone of [LASA’s off-the-record] decision not to proceed with the recruitment of Senior Litigator post for Mthatha between the months of June or early July 2010[.]³²²

327. So ‘No such record exists’, Mtati repeats in item G35 of the annexure to his affidavit, of LASA’s communication to Skibi of Vedalankar’s and Nair’s cancellation (also off the record) of its Senior Litigator recruitment for the Mthatha Justice Centre.

328. As said, contrary to Mtati’s lie about this on affidavit, Skibi himself told me on the telephone on 18 November 2011 that he’d indeed received an email informing him his transfer had been cancelled.

329. All this gross manifold unlawful recruitment irregularity, and mendacity about it when investigated, would suggest that the hurried, perfunctory,

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320 item G36.

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non-compliant Mthatha Senior Litigator recruitment process was just a sham to get Skibi a posting 'closer to his family at Bizana'.³²³

330. All this illustrates LASA's national management executives' cavalier disregard for prescribed advertising, selection, and approval procedures at LASA in which the provisions of the Recruitment code, Approval Framework, PSR and SMS Handbook are casually ignored – showing their contempt for the rule of law, the Constitution, and the truth when fixing jobs as favours to those they know.

331. Prior to Nair's novel claim in evidence in the Labour Court in mid-2013, quoted above, that the Mthatha recruitment was cancelled because Vedalankar refused to authorise the abolition of the Kimberley Senior Litigator post and the use of its budget to create a new one at Mthatha, multiple completely different, inconsistent, radically contradictory, and mutually destructive explanations had been advanced and confirmed under oath for the unrecorded decision to abort the Mthatha Senior Litigator recruitment, together with the Pietermaritzburg and Durban recruitments. Since this Chapter Three concerns corruption in the Mthatha recruitment, not its cancellation, all these contradictory explanations will be treated in Chapter Four to follow.

332. Whatever the true reason for the unrecorded abortion of the irregular Mthatha Senior Litigator recruitment and the cancellation of Skibi's irregularly approved transfer, the original Kimberley Senior Litigator salary budget was quietly transferred back to it by June 2010,³²⁴ and the post there has been recorded as vacant in LASA's budget and recruitment statistics ever since.³²⁵

333. Discussed in Part One of this complaint, LASA's failure to have applied the salary budget that it has received from the Treasury via the Justice Department for the vacant Kimberley Senior Litigator post since its creation in 2006 by filling it with a suitable senior lawyer has been and remains an seriously unlawful

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ongoing contravention of section 53 of the PFMA, confirmed in principle by the Constitutional Court in the *Zungu* case.

Signed at Eshowe on ... September 2020

ANTHONY BRINK

Signed before me at Eshowe on ... September 2020 by the deponent who has acknowledged that he knows and understands the contents of this affidavit and who affirms its contents to be true to the best of his knowledge and belief.

COMMISSIONER OF OATHS

Name:

Address:

Capacity:

Important to transfer funds to a different purpose Skibi cancelation 81.9.5

