

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

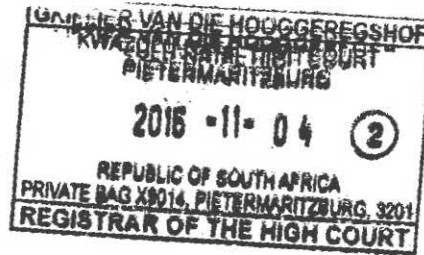
Case No:12124 /2016 P

In the matter between:

LEGAL AID SOUTH AFRICA

Applicant

and



ANTHONY ROBIN BRINK

Respondent

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BRAAMFONTEIN

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TO: THE REGISTRAR OF THE HONOURABLE COURT
PIETERMARITZBURG HIGH COURT

AND TO: **ANTHONY ROBIN BRINK**
RESPONDENT
23 BAKER ROAD
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"FA.

25 Baker Road
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30 November 2010

The Honourable Mr Justice Dunstan Mlambo
Judge President: Labour Court
Chairperson: Legal Aid South Africa

Labour Court
6th and 7th Floors, Arbour Square Building
Cnr. Juta & Melle Streets
Braamfontein
Johannesburg

And to:

The Board of Directors: Legal Aid South Africa

Mr M Makume, Mr J Maree, Ms N Mgadza, Prof P Kruger, Mr V Jarana,
Prof Y Vawda, Adv P du Rand, Ms E Gandhi, Mr M Moabi, Ms M Naidoo,
Judge E Molahlehi, Ms S Monaledi, Ms A Mosidi, Ms N Memka, Ms A Rhoda,
Dr D Konar, Ms T Mhlungu, Ms J Luthuli, Mr E Moolla, and Mr I Ramdas

Legal Aid South Africa
29 De Beer Street
Braamfontein
Johannesburg

And to:

Ms Chantal Kisoona
Head: PAIA Unit
South African Human Rights Commission
29 Princess of Wales Terrace
Houghton
Johannesburg

N. N 109

Dear Judge Mlambo

Pietermaritzburg Senior Litigator post:

• Illegal political / racial discrimination – covered with false reasons advanced to justify it, and two African candidates selected and recommended for similar posts sacrificed to effect it; • failure by members of the Management Executive Committee to execute a key component of Legal Aid South Africa’s Strategic Plan, concealed from the Board of Directors and from the Parliamentary Portfolio Committee for Justice and Constitutional Development; • multiple contraventions of the Public Finance Management Act, including the presentation of false financial information in Legal Aid South Africa’s 2009/10 Annual Report; • and refusal to comply with a request for records in terms of the Promotion of Access to Information Act on bogus legal and factual grounds

1. When a year ago I told my partner, my sons, my brothers, and a couple of my closest friends that my interview for the Pietermaritzburg Senior Litigator post had gone extremely well and that I was certain I’d been selected for it (confirmed to me last month), I was met with unwelcome scepticism: ‘They’ll never appoint you, you’re too politically controversial.’ ‘They’re going through the motions formally, but behind the scenes they’ll just do whatever they want.’ One even suggested that ultimately I’d be disqualified for being white.
2. These disagreeably pessimistic predictions sprung from the fact that to many people whose opinions are informed by the newspapers I’m indeed a ‘politically sensitive person’, to cite the lingo of PW Botha’s State Security Council and its operatives, with the extreme prejudice such an appellation attracted. And indeed I’m indubitably a white person too.
3. I remember rebuking their cynicism vehemently: ‘No, you don’t understand. The process is transparent, it’s clean. Things have changed. We’re not living



under apartheid anymore, we have a constitutional democracy now.’ Words and sentiments along those lines.

4. By ‘clean’ I meant the recruitment process was being managed by honourable and honest executives of impeccable and unquestionable integrity who would never do anything illegal and who would never think of telling lies.
5. I really believed it and I insisted, even as the months passed by, but I could not convince them.
6. As things turned out, I was to be sorely disappointed in my absolute confidence and conviction that the recruitment process was being managed by honourable and honest executives of impeccable and unquestionable integrity who would never do anything illegal and who would never think of telling lies.
7. I found that in fact the recruitment process was not transparent and clean; that the executives managing it were not honourable and honest; and that they didn’t stint at acting illegally and telling lies to cover up the illegal things they’d done.
8. The ‘Introduction’ to ‘Corporate Governance Arrangements’ in Section 4 of LASA’s Annual Report 2009/10 states that ‘processes and practices are reviewed on an ongoing basis to ensure compliance with the legal obligation to use funds in an economic, efficient and effective manner and to adhere to good corporate governance practices’.
9. It assures us: ‘Processes are underpinned by the principles of openness, integrity and accountability.’
10. And it explains: ‘Corporate governance is concerned with structures and processes for decision making, accountability, control and behaviour. It starts at the Board of the organisation and this sets the tone for behaviour down to operational level at Justice Centres.’
11. Finally the ‘Business Conduct’ subsection records that ‘Legal Aid South Africa has an ethics programme which promotes ethical behaviour in the workplace. This is supported by a written business conduct policy dealing with ethics,



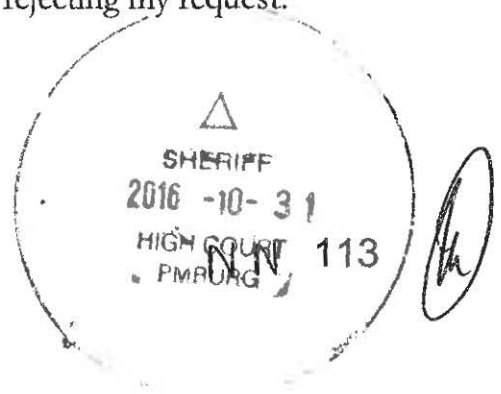
which is applicable throughout Legal Aid South Africa. The continued focus on the business conduct policy has raised awareness of the need for ethical behaviour across the organisation. Employees are required to maintain high ethical standards and to ensure that Legal Aid South Africa's business practices are conducted in a manner that is above reproach.'

- 12. And it's relevant to mention that section 50(1) (b) of the Public Finance Management Act 1 of 1999 ('PFMA') stipulates that 'The accounting authority for a public entity must act with fidelity, honesty and integrity and in the best interests of the public entity in managing the financial affairs of the public entity.'
- 13. Having regard to the Board of Directors' oversight responsibility to ensure that 'good corporate governance practices' based on 'principles of openness, integrity and accountability' are observed by the Management Executive Committee in 'decision making, accountability, control and behaviour', and the Board's concern about 'ethical behaviour in the workplace', that 'high ethical standards' be observed, and that 'business practices' should be 'above reproach' – which is why their 'processes and practices are reviewed on an ongoing basis' – I write to report gross, in fact illegal, breaches in this regard by certain individuals on the Management Executive Committee.
- 14. The basic history is set out in my letters to CEO Vidhu Vedalankar and to COO Jerry Makokoane at pages 1–17 and 21–39 of the Document Bundle appended hereto, read with NOE Brian Nair's and CEO Vedalankar's responses at pages 19 and 101–108. (I will henceforth refer to all LASA officers simply by their surnames.)
- 15. One might even conclude from the 'behaviour' described in these letters, compounded by the dishonest cover-up that followed it (to be detailed and exposed below) that far from respecting 'the rights enshrined in our constitution' (per LASA's 'Vision') and 'principles of openness, integrity and accountability' in 'decision making' (per LASA Annual Report 2010), the



executives in question have no respect for these rights and principles and that they actually despise them.

- 16. In my letters to Vedalankar and Makokoane mentioned above, I'd assumed political prejudice against me – something I'm accustomed to. (Bundle, page 11, paragraphs 5.1–14 and pages 93–99 (a letter to Adv Paul Hoffman SC, director of the Institute for Accountability in Southern Africa, including information intended for the unwritten 'Postscript' mentioned in paragraph 58 of my letter to Makokoane)). I've recently appreciated, however, though I doubt it, that the prejudice may simply be racial, albeit no less illegal, inasmuch as my selection and recommendation for the appointment in question might have been inconvenient for the targets set out in LASA's 'Employment Equity Plan for 2010-2015'.
- 17. Arising from the 'behaviour' in question, I filed an extensive request for records under the Promotion of Access to Information Act ('PAIA') with Vedalankar as LASA's information officer ex officio on 30 August. (Bundle, pages 49–69)
- 18. On 29 September, the day before the end of the month provided by the Act for compliance with my request, and not having received any response to it, not even an acknowledgement of receipt, I approached the South African Human Rights Commission ('SAHRC') with a plea for assistance.
- 19. Kindly taking the matter up for me, the director of the SAHRC's PAIA Unit Chantal Kisoon ably negotiated an undertaking from LDE Patrick Hundermark to deal with my records request. Although Vedalankar was out of time for compliance (there was a mix-up over the computation of the period prescribed), I didn't mind, I was just glad that my request would be given attention at last.
- 20. On 18 October I received a letter from Vedalankar rejecting my request. (Bundle, pages 101–108)



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21. Although the letter bears Vedalankar's electronic signature (a scanned image of it is pasted above her name at the end, identical to the image at the end of her CEO report in the 2009/10 Annual Report) it's unimaginable to me that she actually wrote it, and indeed it seems doubtful that she even read it with any attention. I say this having regard to the letter's contents, which are irreconcilable with my understanding of her personal integrity, noted in my letter to her of 12 July. (Bundle, page 10, paragraph 1.1) The letter is replete with false statements, deceptive red herrings, deceptive non-disclosures, and a breathtakingly brazen false statement of the law in regard to the application of PAIA, advanced as a justification for not complying with her obligations under the Act and for refusing my request for records.
22. Vedalankar seems to have authorized the letter drawn in her name trusting that it was in order. I therefore hold her clear of culpability for its disgraceful contents and hope you will too. Although I accept that Vedalankar never actually wrote the letter, for reference sake I must continue referring to it and its contents as if she did. I apologise to her in advance for the hard criticism to follow: it's directed at the real author of the letter, and not at her as the nominal author only.
23. The letter begins with a fraud. Numbered paragraph 1 claims:

The test to be applied to a request for information in terms of the PAIA, as laid down by the court in the case of *National Teachers Union v Superintendent General: Department of Education & Culture, KwaZulu-Natal and Another (D38/08) [2008] ZALC 18*, is as follows:

- a) *In dealing with a request in terms of the Act, the question is not whether the requester is entitled to information but about whether the information is relevant for the purpose of enabling the requester to exercise a right that maybe breached, rendered unenforceable or weakened by the non disclosure.*



24. (There is no paragraph 'b)' and the phrase 'is as follows' is italicized in the original as above.)
25. The use of indented block paragraphs is a universal writing convention to distinguish quoted text from the writer's own prose. One understands, therefore, that the indented block quote is an excerpt from the judgment. This impression is further emphasized by the use of distinguishing italics in the indented paragraph. Indeed, the indented, italicized block paragraph is preceded by the explicit claim that the 'test to be applied ... as laid down by the court ... is as follows':
26. To read the National Teachers Union case is to discover that in truth no such 'test to be applied' was 'laid down by the court'. The judge said nothing of the sort. He said precisely the opposite. The alleged 'test to be applied' is pure invention, with the lie compounded by dressing it in fake legal authority, even putting words in the judge's mouth that he never spoke. From the CEO of Legal Aid South Africa. Magnificent!
27. In paragraph 32 of his judgment Pillay J pertinently noted to the contrary: 'Unlike access to information from another person, access to information from the state is manifestly not constrained by the requirement that information should be for the exercise or protection of any rights.' (The judgment is online at <http://j.mp/dxh3sZ>. (All shortened internet URLs in this letter will henceforth be given simply as 'j.mp [.....]'))
28. Having sucked this so-called 'test to be applied' out of her thumb, pretending that a 'court ... laid [it] down', Vedalankar proceeds to apply her false test to my records request. Paragraph 2 commences: 'In considering your request for information we were guided by this principle, together with Section 32 of the Constitution and the relevant provisions of the PAIA.'
29. Decorating her decision in bits of the Constitution and PAIA quoted at me at some length, in a manner possibly quite impressive-looking to legally unschooled persons, Vedalankar concludes by refusing my records request on



wholly unrelated grounds, namely '(i) your request for information [sic: for records] goes beyond your individual circumstances and extends to information on third parties, (ii) the information on third parties does not fall within the section 46 category above'. (Bundle, page 102, paragraph 5)

- 30. Of course, this reason given has nothing to do with the fake 'test' or 'principle' that I'd only be entitled to the records requested if 'the information is relevant for the purpose of enabling the requester to exercise a right that maybe breached, rendered unenforceable or weakened by the non disclosure'. And as hard as one looks, nowhere in PAIA does one find entitlement to records of a public body excluded by reason of being 'beyond [the requestor's] personal circumstances'. It's just made up out of thin air, once again.
- 31. The so-called 'principle' by which 'we were guided' bobs up at the very end of the letter in paragraph 8. My request for records is 'declined' for the further reason given that 'it is not relevant to you exercising any right you may have in law' – only it's a 'test', a 'principle' that has no bearing on a request for records from a public body, as PAIA makes clear, and the court in the National Teachers Union case plainly stated.
- 32. And as the Supreme Court of Appeal underscored in *Mittalsteel SA Ltd v Hlatshwayo* [2006] SCA 94 (RSA): 'The issue before us is ... whether the appellant at the relevant time and in creating the requested documents was a "public body" as that term is to be understood in PAIA. If it was then the respondent is entitled to the documents requested by it in terms of s 11 of PAIA. The section is headed "Right of access to records of public bodies". Subsection 11(1) provides that a "requester *must* be given access to a record of a public body if" (emphasis added) [in the judgment] (a) the requester complies with all the procedural requirements of the Act and (b) access to the record is not refused in terms of any ground set out in the provisions of PAIA dealing with the records of public bodies. None of these provisions is applicable to the

respondent's request, and compliance with procedural requirements is not in issue.' (j.mp/bKUmcW)

33. Despite the obstacles I encountered due to (a) LASA's failure to publish a PAIA manual on its website (a stale version of the manual was stuck under a bright new cover and posted on the website some weeks after I'd raised this problem with the SAHRC), and (b) CE Mpho Mphasha's failure to respond to my emailed enquiry about the identities of LASA's information officer/deputy information officer, I duly complied 'with all the procedural requirements of the Act' (per Mittalsteel) and I was and remain accordingly entitled to the records I requested.
34. As to the first excuse manufactured for not complying with the Act – '(i) your request for information [sic: for records] goes beyond your individual circumstances and extends to information on third parties, (ii) the information on third parties does not fall within the section 46 category above' – a glance at the list of records that I seek will show I wasn't asking for 'information on third parties'. (Bundle, pages 59– 68). This is because I have no interest in any 'information on third parties' whatsoever.
35. What I require – and it's a relatively small part of my request – are records of communications with certain third parties or sworn confirmation, as PAIA requires, that such records don't exist, showing that contrary to what has been suggested to me such communications never took place.
36. To protect their privacy – if privacy really was the issue rather than a false pretext for refusing my request – records of communications to and from third parties have only to 'be edited by blanking out the name of any third party whose privacy would otherwise be infringed by disclosure', as Brand JA put it in *Unitas Hospital v Van Wyk* [2006] SCA 32 (RSA). (j.mp/cHDY5D)
37. The particular records of communications with third parties or lack of them will be probative in establishing that my constitutional rights have been violated. By a public legal body professing to serve the Constitution.

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38. And since the ramifications of this are awesome to contemplate, it seems this is why Vedalankar should have strained to seize upon this most peculiar, manifestly untenable pretext for refusing my entire request for records, the great majority of which have nothing to do with third parties by any stretch of the imagination.
 39. Since Vedalankar's provision of the records I requested could not conceivably 'involve the unreasonable disclosure of personal information about a third party', as Section 34 (1) of PAIA puts it, the provisos in Section 46 cited and discussed in paragraph 3 of Vedalankar's letter are perfectly irrelevant.
 40. But even if it were relevant, Section 46 would anyway require my access to the records for the reasons that '(a) the disclosure of the record would reveal evidence of ... a substantial contravention, or failure to comply with, the law ... and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question'.
 41. The fundamental premise of my records request, supported by the evidence I present, is that the disclosure of the records would indeed reveal further documentary 'evidence of ... a substantial contravention of, or failure to comply with, the law'.
 42. Here I'm referring to the Constitution and to the Acts I've cited prohibiting discrimination on unlawful grounds in the democratic era, including by reason of 'conscience and belief' and because, motivated by these, I 'campaign for ... a cause'. (Bundle, pages 2-4, paragraphs 6-15 and pages 34-36, paragraphs 56-65) And by reason of race, unless justified by the provisions of the Employment Equity Act 55 of 1998 and the reported cases elucidating its practical application. I'm referring also to Acts and regulations, mentioned below, governing the operation of public bodies.
 43. As for 'the public interest' - proviso (b) of Section 46 - the public have a clear interest in the disclosure of the records in this case, because they have a fundamental interest in having the certain assurance that they will not be



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subject to illegal discrimination of any form when applying for employment with a public entity responsible through Parliament to the people of South Africa. It's clearly in the public interest that any breach of constitutional rights by publicly accountable institutions, especially those within the sphere of justice and constitutional development, be exposed. The hard won political gains of justice and human rights for all citizens of our country are jeopardized if a major public entity whose purpose is to secure justice for those citizens can subvert and undermine those very principles of justice and human rights without being held accountable.

44. With the 'tone' of Vedalankar's letter 'set' in the first half of it (cf. paragraph 10 above), it will not surprise you to learn that the second half only goes downhill.
45. In paragraph 6 of her letter, Vedalankar alleged the 'explanation' of why, after I'd been selected and recommended by the KwaZulu-Natal regional professional selection board on 12 November 2009 for appointment as Senior Litigator at the Pietermaritzburg Justice Centre, she and Nair moved to terminate the recruitment process – 'immediately' was the word used – in July, eight months later, thereby preventing your assessment and approval or disapproval of my selection and recommendation. (Bundle, page 103, paragraph 6.7 and page 104, paragraph 7)
46. Vedalankar's statement of the alleged financial reason for the abortion of my recruitment just prior to the confirmation or otherwise of my recommended appointment was 'provided to clarify the position and to definitively address your suspicion that your right to a fair administrative process is threatened, breached or may be rendered unenforceable'. (Bundle, page 104, paragraph 8)
47. It was intended to allay my conviction – founded on the evidence already available, weighed with the probabilities – that certain members of LASA's Management Executive Committee have illegally discriminated against me for exercising my basic civil liberties motivated by my 'conscience and belief' and guaranteed in the democratic era by the Bill of Rights in Chapter Two of the

Constitution, and indeed 'encouraged' in Chapter 10 (Section 195(1)(e)). (Bundle, page 11–16, paragraphs 5.1–5.14 and pages 93–99) If not just for being a white.

- 48. Vedalankar's stated 'explanation' for aborting my recruitment is, however, inconsistent with and contradicted by the known facts. It's inconsistent with LASA's budget and operations over the relevant period. It's inconsistent with and contradicted by information given, and not given, to the Parliamentary Portfolio Committee for Justice and Constitutional Development. It's inconsistent with and contradicted by prior communications to me by other management executives. It's inconsistent with and contradicted by LASA's communication with Legal Aid attorney Bongani Mngadi. The letter furthermore contains a number of demonstrably false and misleading statements, aside from the fraud with which it begins.
- 49. Quoted in italics for clarity, I'll deal with paragraphs 6.1 to 6.7 of her letter *seriatim*.
- 50. '6.1 *A defined number of Senior Litigator positions were created linking to particular High Courts.*' Indeed so. This took place within a few months of a question posed to you on 30 May 2007 at a meeting of the Parliamentary Safety and Security Select Committee, at which 'Dr van Heerden asked if the LAB appointed senior litigators'. This was in view of 'a complaint' conveyed by Mr Moseki about 'service delivery to the effect that LAB lawyers were inexperienced', and 'the issue,' as Mr Mzizi put it, 'of lawyers being seen as apprentice lawyers'. There'd obviously been prior discussion of this concern in committee.
- 51. You replied that 'The LAB was aware of the constant criticism that they employed inexperienced lawyers to do the work.' And you 'reported that candidate attorneys made up 45% of the total component of the LAB staff'.
- 52. 'Mr Shiceka also insisted that LAB needed to push the issue of salaries. There was a perception being created that the best lawyers would leave government and that the private sector was better. Mr Shiceka was of the opinion the LAB

must be involved in a campaign of changing the perception of their profession and said that it was necessary to obtain a view independent from the government.' You confirmed this real problem of the 'migration of lawyers to magistrate's offices' for better salaries and career prospects.

53. Vedalankar attended the meeting with you and addressed it too. (j.mp/9eK6rd)

54. It's noteworthy that as recently as the 3rd of this month, at a meeting of the Portfolio Committee on Justice and Constitutional Development for briefings inter alia by LASA on 'Delays impacting on Remand Detention population', 'The Chairperson remarked that public perceptions of Legal Aid SA were important. It was perceived as being embedded in government. He asked how it was marketed as an entity that could render fair assistance. Mr Hundermark replied that all practitioners were members of law societies. If service rendered was inferior, or people were being forced to plead guilty or if there was collusion with the state, they could be struck from the roll. He conceded that there were still remnants of the perception that one had to plead guilty.'
(j.mp/hC2UpE)

55. This is to say, negative public 'perceptions' still endure that LASA delivers second rate legal services, and since Parliament considers it 'important' to address and clear these it is concerned that LASA should 'market' itself as an 'entity' offering top-deck legal expertise, particularly in the courts.

56. On her return from the May 2007 meeting, and undoubtedly after discussion with you, Vedalankar moved decisively to address these perceptions, quell these criticisms, and surmount these shortcomings. Even though the 'Summary of the minutes' recorded her (or your) complaint that LASA's 'total budget of R5674 million [sic: R574 m.] was inadequate', and even though no provision had been made in its budget for that year for the substantial new operating cost, nine new Senior Litigator posts were created shortly afterwards and advertised just a few months later in September. The intention was that seasoned lawyers with advanced expertise and experience would 'do the work'

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- in the upper courts, where such advanced expertise and experience are required.
57. Presumably this major initiative, with its substantial strategic, business, human resources and budgetary implications was carried out under the provisions of Section 1.1 of the Approval Framework*, and was accordingly originated by Vedalankar as CEO, with the whole Management Executive Committee and all Board Committees consulted, and the Board of Directors finally approving it. (*Bundle, pages 105–7) And not just by Vedalankar and Nair acting on their own. (Cf. Bundle, page 103, paragraphs 6.6 and 6.7)
58. LASA had considerable trouble finding a suitably qualified Senior Litigator for Pietermaritzburg, however, (for other centres too) and had to advertise and readvertise in search of suitable applicants at least four times to my knowledge before finding me more than two years later.
59. Vedalankar explained the reason for this difficulty in an interview by the Legal Resources Centre, conducted on 10 November 2009, two days before mine. Asked, ‘What is the biggest obstacle that human right lawyers face today ...?’, she replied, ‘To attract and retain lawyers committed to human rights litigation ... Legal Aid cannot match the remuneration packages and working environments offered by the corporate law firms.’ (Bundle, page 16, paragraph 6) This is to say, most skilled and experienced lawyers aren’t attracted by the salaries LASA offers, other than those very few lawyers driven by a public service ethos rather than the usual commercial one.
60. It’s remarkable that on 12 October, during the discussion following LASA’s presentation of its Annual and First Quarter Reports to the Portfolio Committee on Justice and Constitutional Development, Nair diametrically contradicted Vedalankar’s manifestly truthful statement, on both scores, thereby misleading and misinforming the Committee, in claiming falsely that ‘LASA had no problems with regards to recruiting lawyers and the salary levels were an indication of this’. (j.mp/aXPna7)



61. '6.2 Noting the seniority of these positions, it was decided to implement a two stage interview process in the appointment to these posts.' This is exactly what I understood from the beginning, and it was confirmed to me by both KwaZulu-Natal RHRM Baboo Brijlal and national HRE Amanda Clark, and recorded in my correspondence. (Bundle, page 5, paragraph 21 and page 6, paragraph 28)
62. '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.' This statement is a farrago of truth, half-truth and untruth. In the first instance, apart from Brijlal, who kept the minutes and put a few formal questions, the professional selection board was constituted of six senior legal professionals, all advocates and attorneys, whose delegated function was to screen all the applicants, shortlist the pick of them, interview them, interrogate their legal experience and expertise, assess and debate it, and make a selection and recommendation of the single best candidate – not 'candidates' plural – for appointment to the position, subject to your approval following a second interview by you.
63. This was the procedure followed in the case of LASA attorney Ashok Kaloo several months before me – selected and recommended for appointment to the Pietermaritzburg Senior Legal Litigator post but disapproved by you following his second interview.
64. There were only four candidates shortlisted for the two Senior Litigator positions at Pietermaritzburg and at Durban respectively. I was selected and recommended for the Pietermaritzburg post as the best candidate, and no one else. This is because the regional professional selection board's job was precisely to select and recommend a particular candidate for appointment from among the several candidates it had shortlisted and interviewed.
65. In both Kaloo's case and later on mine, the professional selection board made a specific single selection and recommendation for the Pietermaritzburg Senior Litigator position accordingly. Cape Town's Senior Litigator was likewise the



single candidate selected and recommended by the regional selection board which interviewed and assessed her; there were no 'candidates', plural, for confirmation at a second interview (on the same day as Kaloo's), and no other 'candidates' went up for a second interview.

66. The KZN professional selection board did not recommend several 'candidates' for appointment as Pietermaritzburg Senior Litigator, as sub-paragraph 6.3 falsely implies, it selected and recommended me as the best candidate alone. This deplorable misrepresentation of the true facts is a repetition of Clark's false claim to me on 30 April. (Bundle, page 6, paragraph 28)
67. One is struck by the persistent, determined straining to distract from the grating fact that at the conclusion of my interview I was selected and recommended for appointment.
68. '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.*' Although Brijlal informed me that the regional professional selection board's selection was subject to your approval following 'a final interview by the chairman, a Judge of Appeal [sic]*, I've since heard from Kaloo that he and the applicant selected for the Senior Litigator position in Cape Town were interviewed by a triumvirate of you, Nair and Clark – and no one else, not the CEO, COO, and LDE as well. (*Bundle, page 5, paragraph 21) This is to say, their second interview was not conducted in the manner Vedalankar claims is prescribed – opening another can of worms.
69. From the outset I've been aware that my selection and recommendation by the professional selection board was subject to your approval at a second interview, and I was content to abide myself by this – even as I pulled up sticks in January, painfully separated from my sons, and relocated from Cape Town to Pietermaritzburg in optimistic anticipation (having been asked at the

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interview, 'If appointed, when can you begin?'), passing up not one but two other professional offers made to me after I arrived so as to remain available. But since no second interview was held, because it was blocked, Vedalankar's detailing of the approval process in this paragraph in the context is more than irrelevant, it's misleading.

70. Likewise: '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.*' The pitifully inarticulate and muddled contradictions herein aside, all this is immaterial given that the recruitment process was aborted after my selection and never reached the second interview and final approval stage alleged here.
71. 'The relevant extract of the approval framework ... made available' contradicts and exposes the lie in Nair's claim to me in his letter of 3 August that 'the person responsible for the final approval of the Senior Litigator appointments in our organization would be the line function executive, which in this case is myself. (Bundle, page 19 and pages 22–23, paragraphs 10–16) The lies just pile up.
72. '6.6 *The NOE, as the executive responsible for operations may also motivate a change in the organisational structure, including the freezing of positions, for discussion and finalisation with the CEO (refer S.8.1.2 (b) of the Legal Aid SA Approval Framework).*' In this subparagraph Vedalankar (significantly referred in the third person as 'the CEO', further suggesting she's not the real author of the letter) (a) quotes an inapplicable and irrelevant section of the Approval Framework; (b) anyway misrepresents its empowering provisions; and (c) deceptively implies that, even



had it been applicable, the section of the Approval Framework cited was duly complied with.

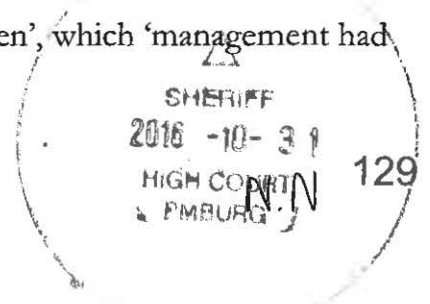
73. In providing for the 'Establishment of new positions, regrading existing positions and abolition of posts', section 8.1.2 (b) of the Approval Framework manifestly refers to individual posts. It could hardly have been contemplated that Vedalankar and Nair should have the power, on their own, to establish or abolish any number of posts, be it one or one hundred.
74. Any radical restructuring exercise affecting LASA's 'Strategy Plan' (or at least its 'Business Plan'), in which 30% (3/10) of LASA's Senior Litigator posts are 'frozen', including both in KwaZulu-Natal – in a marked deviation from a strategic resolution taken at the highest level in 2007 in response to concerns expressed by Parliament to equip all Justice Centres at seats of the High Court with Senior Litigators to render a variety of critical professional and mentoring services – would plainly be governed, not by section 8 of the Approval Framework for 'HR MATTERS', but by section 1 of the Approval Framework for 'STRATEGY AND PLANNING'.
75. Section 1 requires that (a) the Board of Directors and all Board committees be consulted before such a decision is made, and (b) that the entire Management Executive Committee approve it.
76. It follows that Vedalankar and Nair had no power in terms of the Approval Framework to 'freeze' the Senior Litigator positions, and acted unlawfully.
77. If I'm wrong about this and section 8.1.2 (b) indeed rules, and Vedalankar and Nair do have the power on their own to effect the 'Establishment . . . , regrading . . . , and abolition' of Senior Litigator and equivalent level posts, and, they say, 'freeze' them too, be it one such senior post or one hundred such senior posts, Vedalankar omits to mention that section 8.1.2 (b) peremptorily requires consultation with the HRE before any such drastic action is carried out. And there wasn't any.

78. A full five months after my interview and selection, and after my recruitment had very obviously already been 'put on hold' (Nair's expression) or 'frozen' (Vedalankar's), I telephoned HRE Clark on 14 April to find out what was going on. She told me she'd never heard of me, didn't know about my pending recruitment for the position in question, and wasn't yet involved in it. Hence the need to have 'looked into the matter' after my call. (Bundle, page 5, paragraphs 19–20)
79. It remains to be discovered who Clark asked when she 'looked into the matter', and who briefed her to 'confirm it is still in progress and has not been concluded', leading her to assure me, 'I will endeavour to expedite the process in which I am not directly involved at this stage', because I've recently discovered that Vedalankar and Nair were both with you in Cape Town on that day briefing the Justice and Constitutional Development Portfolio Committee on LASA's Strategic Plan. (j.mp/ffjVZ3) In my letter to Makokoane I'd (probably) incorrectly surmised Clark 'likely' spoke to Nair. (Bundle, page 25, paragraphs 23–25) Although a Blackberry email exchange during the briefing session, or a phone call before it began, is not precluded.
80. Clearly Clark was not consulted before the decision was taken to 'put on hold' or 'freeze' the Pietermaritzburg position for which I'd been selected and recommended, and the twin Durban post too.
81. It remains to be discovered whether COO Makokoane formally agreed to the freezing of the Senior Litigator posts, as section 8.1.2 (b), if indeed applicable, requires. Since he's not mentioned in paragraph 6.6 of Vedalankar's letter, one presumes not.
82. It follows therefore that even on Vedalankar's version of the applicable section of the Approval Framework, she and Nair failed to comply with its provisions, and thus acted beyond their powers and unlawfully.
83. If my successful application had indeed been 'put on hold' for genuine financial reasons that were evident from 'early this year', Clark wouldn't have

told me on 14 April that the 'process' to finalize it and appoint me was still on the go and that I could expect it to be concluded 'soon'.

- 84. Nor would the Mthatha Senior Litigator post have been advertised two days before my call to Clark, on 12 April (application cut-off date 7 May), with shortlisted applicants interviewed several weeks later in July. (Interviews for the Pietermaritzburg and Durban Senior Litigator posts took place about two months after the advertised closing date for applications, so I presume there was a similar interval in respect of the Mthatha post. And I established from a call to the Mthatha Justice Centre earlier this month that interviews were indeed conducted.)
- 85. It's also evident from what Clark wrote to me on 14 April that as at that date she hadn't been party to any Management Executive Committee discussion of budgetary constraints requiring 'staff reduction' affecting her critical senior staff component.
- 86. Even when Clark unpleasantly wrote to me again on 30 April, two weeks later, there was still no mention, no suggestion even, that vacant Senior Litigator posts had been 'put on hold' or were going to be 'frozen' for any reason at all. (Bundle, page 5-8, paragraphs 23-36) To the contrary, after five months of silence, Clark said nonchalantly, 'I think you should allow us to complete our process at the pace we have decided.' (Bundle, page 7, paragraph 33)
- 87. Inconsistent with Vedalankar's allegation - 'since early this year, management has had to identify positions which could be frozen' - Clark evidently knew nothing about any alleged process to reduce her staff budget and establishment, notwithstanding her attendance at regular Management Executive Committee meetings with Vedalankar, Nair and other MEC members. She hadn't even heard any corridor talk or rumour that Nair was (allegedly) engaged in a lengthy investigation to determine which of her vacant staff posts could be frozen, including critical senior professional posts.

- 88. Not once had the subject of ‘freezing’ Senior Litigator posts come up for discussion at Management Executive Committee meetings before the end of April, or Clark would undoubtedly have responded differently to my telephone call, and then to my email about a week and a half later, when I tried reaching her again repeatedly over several days but she was avoiding and not returning my calls. (Bundle, pages 5–7, paragraphs 19–20 and 22–36)
- 89. Instead, after taking a week to think about what to tell me, how best to put me off, Clark replied that my application was still in the works, and would be finalized whenever she and her fellow executives felt like getting around to it. This time, unlike the last, she pointedly discouraged me from making further enquiries for information as to the state of play. And indeed I got none until I wrote to Vedalankar two and a half months later on 12 July and Nair replied on 3 August, nearly nine months after I was interviewed and selected and recommended, announcing his decision to abort my successful application. (Bundle, pages 5–7, paragraph 23–34 and page 19)
- 90. It’s evident therefore that by 30 April Clark had learned that the process for finalising my approval and appointment had practically been ‘frozen’ (‘put on hold’ in Nair’s language); but having been ‘frozen’ illegally on illegal political (or racial) grounds, she didn’t want to tell me it had been ‘frozen’, let alone that it had been ‘frozen’ illegally in a violation of my constitutionally protected civil rights.
- 91. Nor was the alleged ‘freezing of posts’, of vacant Senior Litigator posts, general and across the board: as mentioned above, on 12 April, five months after the particular post I’d been selected for had very obviously been ‘frozen’, inasmuch as my successful application for it had been dropped to die in the bottom drawer, ‘management’ was advertising a Senior Litigator post for the Mthatha Justice Centre. (Bundle, page 31, paragraph 32)
- 92. Clearly then, ‘early this year’ vacant Senior Litigator positions were not among the contemplated ‘positions which could be frozen’, which ‘management had



He

to identify', as alleged in Vedalankar's letter, or 'management' wouldn't have advertised to recruit a Senior Litigator for Mthatha as late as April and proceeded with interviews for it in July.

93. It remains to be discovered when the 'Establishment of [this] new [single] position' at the Mthatha Justice Centre, per section 8.1.2 (b) of the Approval Framework, was effected – before or after the announcement of the national Budget allocations on 17 February. But whatever the case, the Budget announcement made no difference to the situation: in full knowledge of LASA's budgetary allocation and available financial resources for 2010/11, the Management Executive Committee advertised for a Senior Litigator for Mthatha in April, offering R60 000 more a year than the advertised salaries for the Pietermaritzburg and Durban posts. (Bundle, pages 45 and 46) And after the applicants were screened and shortlisted, interviews were conducted in July, with a candidate selected and recommended for appointment.
94. Which also means that well into the 'recession' (see below) there's sufficient 'funding' for a further Senior Litigator post (for higher pay), possibly not even part of the original budgeted staff establishment, depending on when the post was created and established.
95. *'6.7 Due to the effects of the recession, anticipated funding for the 2010/11 financial year did not materialise. This had the effect of cutting our baseline funding by a significant amount. It was accepted that this required a reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall. Since early this year, management has had to identify positions which could be frozen. In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would be immediately frozen.'*
96. Vedalankar's claims are contradicted by the figures in the First Quarter Report 2010/11 presented to the Portfolio Committee of the Justice Department on 12 October, six days before her letter to me:

- 97. On page 23 of this April to June 2010 report, total budgeted establishment posts are shown increasing by 82 posts to a total of 2595. The number of staff recruited is shown increasing by 82 people to a total of 2434.
- 98. No less than seventeen additional Principal Attorneys and Professional Assistants were employed, i.e. admitted attorneys paid professional salaries not that much below those of Senior Litigators. (This increased the total number of LASA attorneys to 798, still 3% below the 96% incumbency target of 854.)
- 99. Eleven further Legal Supervisory managers were employed (raising their total to 263).
- 100. Forty-Nine more Candidate Attorneys were articled (raising their total to 618).
- 101. As a government BuaNews report of the meeting summed up, 'The organisation was also on track to achieve its objectives for the period under review by completing the expansion of its national footprint. This included the establishment of six new Justice Centres and 27 satellite offices in the past three years, as well as the launch of a client call centre in June 2010. ... CEO of Legal Aid South Africa, Vidhu Vedalankar, said key programmes had been implemented and delivery increased during the year.' (j.mp/apINMF) The minutes of the meeting record Nair's assertion to the Committee that 'LASA had no problems with regards to recruiting lawyers ... and LASA would definitely expand from where it was right now.' (j.mp/aXPna7).
- 102. Nothing 'frozen'; on the contrary, operations expanding tremendously, lots of new posts and lots of new staff hired to fill them.
- 103. The official news report has it that you 'told the committee that one of the challenges Legal Aid South Africa faced was its limited response to civil matters because of financial constraints'. Vedalankar didn't intervene to inform the Committee that she had 'frozen' three critical Senior Litigator posts a couple of months earlier, posts duly budgeted for, thus greatly inhibiting

LASA's ability to render professional services in 'civil matters' in the upper courts, particularly in KwaZulu-Natal.

- 104. It's not alleged in LASA's report to the Portfolio Committee, as it was alleged to me, that LASA had run into a funding emergency 'early this year' requiring 'management ... to identify positions which could be frozen' and that 'In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would immediately be frozen.' On the contrary, the Portfolio Committee was told how 'management' was hiring plenty of new staff, including qualified attorneys, at an impressive rate.
- 105. This reassuring information to the Portfolio Committee may have been spurred by the Committee's concern, expressed at its meeting on 4 May to discuss national Budget Vote 23, about the high vacancy rate in the Justice Department and public bodies subject to its oversight:
- 106. The report of this 4 May meeting recorded in paragraph 7.4 on page 13: 'The Department has acknowledged that a high vacancy rate remains a challenge. This is an ongoing problem, of which the Committee is well aware. It has several times previously expressed its concern about the negative consequences that vacancies can have for the delivery of justice services. Also, the committee believes that although the use of savings from vacant posts to fund other projects (such as the implementation of the OSD) may be understandable, the practice is potentially risky as it may discourage the filling of posts. While the Committee welcomes the Department's aim to reduce the number of vacant posts from the present 14% to 5% in the next two years, it believes that this is a formidable task. It seems to the Committee that the Department is struggling to fill its vacancies. The Department reported in its 2008/09 Annual Report that its vacancy rate was at 13.6%. The Department's aim to reduce this to 5% in the next two years indicates that there has been no progress in the meantime. The Committee recommends that all critical posts be filled as soon

as possible, especially given the fact that the Department has the budget for the posts. It intends to continue to monitor progress closely.’ (j.mp/9mG5pZ)

107. And indeed ‘the Department has the budget for the posts’ including and especially for such ‘critical posts’ as Senior Litigator posts, because these positions were budgeted for in terms of Section 53 (1) of PFMA, which requires: ‘The accounting authority for a public entity listed in Schedule 3 must submit to the executive authority responsible for that public entity at least six months before the start of the financial year or another period agreed to between the executive authority and the public entity, a budget of estimated revenue and expenditure for that year, for approval by the executive authority.’

108. The 17 February Budget for the Department of Justice was based on LASA’s estimates, and obviously included provision for salaries for Senior Litigators at Pietermaritzburg and Durban, and presumably Mthatha too. Or these posts wouldn’t have been advertised, and the applicants shortlisted wouldn’t have been interviewed, and the best selected and recommended.

109. In fact the Pietermaritzburg and Durban Senior Litigator posts had long been budgeted for. Following concern expressed in 2007 by the Parliamentary Safety and Security Select Committee, quoted above, about the perceived low quality of legal services LASA was offering the public arising from the inexperience of most of its lawyers ‘doing the work’, and the need to appoint Senior Litigators accordingly, an advertisement was placed in Legal Brief in October 2007 seeking nine Senior Litigators for all seats of the High Court besides Mthatha. The Pietermaritzburg and Durban posts were readvertised in late 2008 (attracting attorney Kaloo for Pietermaritzburg). The two posts, as well as Kimberley’s, were readvertised again in June 2009, and the Pietermaritzburg and Durban posts yet again in September 2009.

110. These nine Senior Litigator positions, including Pietermaritzburg and Durban, had therefore been fully budgeted for in the annual estimates up to

2009/10 presented to the Department of Justice before the 2010/11 national budget allocations of 17 February.

111. According to LASA's First Quarter Report, 2434 posts were filled out of a staff establishment of 2595 – a 93.7% occupancy, and a vacancy rate of 6.3%, which is lower than the Department of Justice's but still below its 5% target.

112. The main point voiced at the 4 May meeting in this regard was that 'the Committee ... has several times previously expressed its concern about the negative consequences that vacancies can have for the delivery of justice services. ... The Committee recommends that all critical posts be filled as soon as possible, especially given the fact that the Department has the budget for the posts.'

113. Vedalankar and Nair's alleged decision that 'we will not be proceeding with the filling of any of these posts'* flies in the face of Parliament's repeatedly expressed concerns that 'all critical posts be filled as soon as possible' in view of 'the negative consequences that vacancies can have for the delivery of justice services'. (*Bundle, page 19)

114. Despite the classification of Senior Litigators as critically necessary professional personnel, Vedalankar and Nair claim to have decided sometime in July, no doubt after my letter arrived, to have 'immediately frozen' the Pietermaritzburg post for which I'd been selected and recommended, and the Durban and Mthatha posts too.

115. At the 12 October presentation of LASA's 09/10 annual report and 10/11 First Quarter report to the Portfolio Committee, the top four management executives Vedalankar, Makokoane, Nair, and Hlabatau assured the Committee that LASA was increasing the number of its in-house lawyers, had no difficulty in recruiting them, and was expanding its coverage in both criminal and civil matters with increasing emphasis on the quality of legal services provided.

116. This assurance was given to the Committee in full knowledge that 'management' had purported to 'freeze' three critical Senior Litigator posts in

July in possibly the two poorest provinces, two of which posts had remained vacant for over two years. (CFO Hlabatau was also in the know, having been copied in when I wrote to Makokoane (Bundle, page 42))

117. Not only did these four management executives fail to report this important information to the Parliamentary Portfolio Committee, they also failed to report this major violation of, and failure to implement, LASA's strategic policy to the Board of Directors, four of whose members, yourself included, were also present at the 12 October briefing.

118. LASA's 'Strategic Plan 2009-12' submitted to the Minister of Justice and Constitutional Development in September 2009, two months before my interview, and furnished in updated form* to the Portfolio Committee on Justice and Constitutional Development on 14 April records LASA's strategic policy under 'Programme P23: Review legal staffing/business models', inter alia to 'recruit specialist skills', and under 'Programme P24: Increased people capacity to deliver', 'Recruitment and retention of competent staff ... increased capacity of LAB ie more legal specialists ... capacitate civil unit ie more staff and more supervision'. (*j.mp/fFjVZ3)

119. Vedalankar, Nair, and the two other executives failed to report to the Portfolio Committee that three Senior Litigator candidates selected and recommended by professional selection boards were prevented from assuming their key post occupations by Vedalankar's and Nair's unlawful decisions taken ultra vires without consulting the full Management Executive Committee, the Board of Directors, or the Department of Justice. This behaviour was a grave breach of their fiduciary responsibilities and the trust invested in them by the authorities to whom they are accountable.

120. According to the Vote 23 Estimates of National Expenditure for 2010/11 contained in the Budget of 17 February, LASA was allocated R991.9 m. in grant funding, an increase of 8% on 2009/10, which, added to the R16 m. in interest revenue, covered expenditure of R725.8 m. for employees costs, an



increase of 9.3% on 2009/10; R261.7 m. for goods and services; and R20.4 m. for depreciation. (j.mp/eLcRks)

- 121. According to page 3 of LASA's 2010/11 budget presented to the Portfolio Committee on 14 April, the grant received had increased to R1045.7 m., resulting from new funding of R40 m. plus an additional allocation of R13.6 m. for the carry through costs of employee compensation in terms of salary agreements and the appointment of additional public defenders, as recorded on page 477 of Vote 23.
- 122. According to page 4 of the 2010/11 budget presented on 14 April the total budget was R1083.7 m., an amount R38 m. higher than the grant at that date. This budget covered expenditure of R740.2 m. for salaries and related costs; R25 m. for case backlog; R90.7 m. for direct expenditure; R207.5 m. for operating expenditure; and R20.2 m. for capital expenditure.
- 123. On page 9 of the budget report it is recorded that OSD Phase 1 funding of R23.8 m. for 2010/11 had not yet been allocated. In addition to this assured funding there was budgeted interest income of R16 m., making a total of R39.8 m. accrued revenue to meet the estimated shortfall of R38 m. at 14 April.
- 124. According to page 13 of the First Quarter Report dated September presented to the Portfolio Committee on 12 October, the total grant had increased to R1069.9 m. as a result of the transfer of the outstanding OSD Phase 1 funding.
- 125. The total 2010/11 budget, as reported on page 14, had risen to R1167 m., an increase of R83.3 m. over the budget reported on 14 April. This total covered expenditure of R740.5 m. for salaries and related costs; R25 m. for case backlog; R174.1 m. for direct expenditure; R207.1 m. for operating expenditure; and R20.2 m. for capital expenditure.
- 126. All of the R83.3 m. increase in the budget in the six months from April to October had resulted from the increase in direct expenditure. The budget estimates for salaries had remained exactly the same.

- 127. The total employees costs (staff salaries) budget presented by 'management' on 14 April – three months before they allegedly decided to 'freeze' three Senior Litigator posts – was precisely the same as the employees costs budget presented on 12 October by the leading members of the Management Executive Committee, seated before the Portfolio Committee and members of the Board of Directors.
- 128. One understands why the Management Executive Committee members present didn't disclose Vedalankar's and Nair's decision to 'freeze' three critical Senior Litigator posts. It had nothing to do with achieving a saving to meet a 'significant ... shortfall' in 'baseline funding' which 'did not materialise' as 'anticipated' in 'the 2010/11 financial year'. Obviously.
- 129. According to page 16 of the First Quarter Report presented on 12 October the total 2010/11 budget for compensation of employees was R759.9 m. including provision for case backlog. The total allocated and transferred by the Department of Justice was the original Vote 23 estimate of R725.8 m., plus R13.6 m. for carry through costs, plus R23.8 m. for OSD Phase 1 funding, making a total of R763.2 m. which was R3.3 m. more than the budget presented on 12 October.
- 130. There was no shortfall in funding for the employees costs budget. There was a shortfall in funding for direct expenditure, which had been underestimated by R83.3 m. in the budget presented on 14 April.
- 131. The Management Executive Committee members expressed no concern about this shortfall in funding for direct expenditure during their report to the Portfolio Committee on 12 October. They reported an increase in the grant of 21%.
- 132. By the end of June the government had committed to a clear timetable to provide outstanding OSD Phase 2 funding, and the Minister of Finance had given an assurance that money was available for it. Vedalankar and Nair claim to have 'frozen' three critical senior legal posts without waiting for the



outcome of the negotiations and without informing the LASA Board, the Portfolio Committee or the Executive Authority that they had done so in contravention of the formally presented Strategic Plan.

- 133. By 14 April baseline funding had increased from R895 m. in 2009/10 to R1020.7 m. in 2010/11, a 14% increase considerably above the current inflation rate. This was before the transfer of OSD Phase 1 and 2 funding raised the increase to 21%. The salaries budget had likewise increased by 14% from R664 m. in 2009/10 to R759.9 m. in 2010/11. Contrary to Vedalankar's allegation in her annual report of 19 August these allocations don't disclose any 'cut... our baseline funding', either in 'a significant amount' or at all, nor do they disclose any 'cutting' of financial provision for employee remuneration.
- 134. According to page 8 of the 14 April budget and page 15 of the 12 October budget, the salaries budget for 2010/11 was calculated to have increased by 19% over the previous year. 6% of this was attributed to cost of living increase, 3% to performance progression increase, 1% to the new Legal Aid Advice Line, 5% to OSD Phase 2, and 3% to a recruitment rate increase which is not explained. By 14 April it was known that consumer price inflation had decreased below 4%. It was expected that the Department would fund the Advice Line and provide the projected OSD Phase 2 funding of R30 m. which the Department and the Committee had discussed at their meeting of 4 May.
- 135. According to the estimates in Vote 23 on page 477, expenditure on employee remuneration 'is set to increase as a proportion of total expenditure, mainly due to LASA's strategy to reduce the outsourcing of legal representation [i.e. to reduce the briefing of expensive senior-junior and senior advocates in private practice]. This is expected to be achieved by appointing more staff and implementing the special occupational specific dispensation for legally qualified professionals.' Which is to say, by attracting and hiring highly and widely experienced senior trial lawyers like me to conduct litigation in-house.
(j.mp/eLcRks)

- 136. Indeed, according to the Finance Minister's 'Medium Term Budget Policy Statement' presented on 27 October, LASA will receive millions in extra OSD funding for 2010/11. (j.mp/bt1jR1, page 23)
- 137. Under the heading 'Administration', which includes LASA, Table 23B on page 478 of Vote 23 shows the number of Level 13 to 16 personnel posts filled/planned for on funded establishment rising from 62 posts in 2009/10 to 77 in 2010/11 – a 24% increase.
- 138. As mentioned above, the Portfolio Committee on Justice and Constitutional Development met to consider Budget Vote 23 on 4 May, three weeks prior to Parliament's vote on the 26th to approve it. The Committee's report of the meeting noted that "The Committee held separate briefings for the National Prosecuting Authority and Legal Aid South Africa on their respective strategic plans and budgets for 2010/11" – LASA's being held on 14 April.
- 139. Section 5 on page 9 of the Committee's report records that you and Vedalankar 'gave details of LASA's Strategic Plan 2009–12. LASA aims to provide quality, professional legal services to ensure effective access to justice for the poor and vulnerable. ... LASA identified the negative growth of the overall budget as a challenge. Additional challenges include the need to ensure that there is one practitioner per court, especially at busy Regional courts, and the potential cost to LASA of complying with court orders that have directed that it provide legal aid in certain matters to defendants who have means.' And that was it.
- 140. It was not alleged to the Committee, as it was alleged to me, that 'the negative growth of the overall budget' 'required a reduction to our staff establishment in the 2010/11 financial year to meet this shortfall' and that this included 'a reduction to our staff establishment', even at the critical Senior Litigator level, but strangely to no other part of the 'staff establishment', just the Senior Litigator part of it, and in respect of vacant Senior Litigator positions that had been repeatedly advertised, in the case of Pietermaritzburg and Durban, and



for whom suitably qualified and experienced applicants had been shortlisted, interviewed, selected and recommended, or in the case of the Mthatha applicant was about to be. (Nair makes clear in his letter that selections and recommendations were made not only for the Pietermaritzburg Senior Litigator position, but for the Durban and Mthatha posts too: he speaks of ‘the recruitment process to finalise the appointments for all vacant senior litigator posts’. (Bundle, page 19))

141. In fact, even as Vedalankar alleged to me that ‘It was accepted that this required a reduction to our staff establishment in the 2010/11 financial year to meet this shortfall’ overall budgeted staff establishment was increased by 3.2% in the first quarter of 2010/11, including the hiring of many admitted attorneys.

142. On Vedalankar’s version of events stated in her letter, despite having only three other vacancies among the 98 critical staff (namely for JCEs, which vacancies, being critical, were therefore filled by acting JCEs), she and Nair needed five long months from the date of the Budget announcement to ponder and to finally decide that the vacant Senior Litigator posts should ‘immediately [be] frozen’ – all three of which had been part of the original budgeted and funded national establishment of Senior Litigators categorized by LASA as a critical occupation. All this is unexplained and inexplicable.

143. The report records that 99.5% of the 2009/10 budget was spent, which means R4.5 m. of the budget remained unspent.

144. The annual cost of three Senior Litigators amounts to R1.8 m. (~R600 000 p.a. x 3).

145. So there was no reason before the 17 February Budget announcement to have ‘put’ the Pietermaritzburg and Durban Senior Litigator posts ‘on hold’, because three combined Senior Litigator salaries represent well under half of the R4.5 m. that ‘management’ underspent in 2009/10 and had lying around spare.

- 146. R1.8 m. is a miniscule 0.24% of total employee expenditure of R740 m. in 2010/11.
- 147. The combined salaries of three Senior Litigators is thus a negligible amount relative to budget; and reducing LASA's wage bill by the one quarter of a percent that these salaries represent would hardly resolve a genuine 'funding ... shortfall ... cutting our baseline funding by a significant amount'.
- 148. Yet Vedalankar alleges that 'Since early this year, management has had to identify positions which could be frozen. In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would immediately be frozen.' She mentions no others. Which is to say, after prolonged deliberation she decided to resolve her alleged budgetary problems by 'freezing' these three posts, these three critical posts, saving a paltry R1.8 m. a year relative to a budget of R740 m. for salaries alone – an insignificant drop in the ocean.
- 149. And it's not as if not hiring Senior Litigators saved LASA the sum of their salaries, because Justice Centres lacking such senior in-house lawyers are bound to brief senior-junior and senior advocates in private practice, and this substantially reduces the already picayune salary saving in real terms.
- 150. What's more, Vedalankar's and Nair's decision to put three major Justice Centres to the cost of briefing private advocates, for want of in-house counsel, contradicts LASA's declared strategy to reduce the outsourcing of legal representation. (j.mp/eLcRks, page 477 of Vote 23)
- 151. I know the Pietermaritzburg Justice Centre's attorneys, and without meaning to offend I can absolutely confirm without fear of contradiction that with the level of expertise currently at the Centre's disposal it does not have the capacity to conduct any major litigation in-house.
- 152. Depriving Justice Centres of the professional advisory and training capacity that Senior Litigators are intended to provide their junior lawyers impoverishes

them inestimably and has a corresponding negative impact on the quality of legal services rendered to the poor:

153. The advertisement for the Pietermaritzburg and Durban Senior Litigator positions specifically envisaged that Senior Litigators would ‘Assist with in-house legal training sessions as identified/agreed by the ROE or LDE’ and ‘Develop the litigation expertise within the LAB by providing individual mentoring and coaching to legal staff as identified by ROE, involving other LAB practitioners to assist in legal matters and other means.’ (Bundle, page 45) The 2009/10 Annual Report similarly contemplates that Senior Litigators will ‘provide support for practitioners in more complex matters’. (Report, page 34)

154. Vedalankar’s and Nair’s decision to deprive Justice Centres in the poorest provinces of Senior Litigators also violates the Batho Pele Principles, which require the ‘alignment of staffing plans, human resources development processes and organisational capacity building with the needs of citizens’* – ‘needs of citizens’ the Management Executive Committee itself recognized when creating Senior Litigator positions in 2007 and persistently sought to fill, until my name came up, when suddenly, ‘immediately’, three years later, ‘we will not be proceeding with the filling of any of these posts’. And only when I approached Vedalankar directly for information, following eight months of silence after I was selected and recommended for appointment.

(*j.mp/fTyfeD)

155. In her CEO report dated 19 August at the start of LASA’s Annual Report 2009/10, Vedalankar mentioned, ‘Our strategic shift also incorporated changes to our support platform to support the delivery of quality legal services. ... our priority continued to be increasing access to quality legal aid services. ... The revised civil legal aid strategy mentioned above will to a certain extent increase capacity to assist clients in civil legal aid matters.’ (Report, pages 10–11)

156. She remarked that ‘The impact of the recession is significant for us, with no new government grants, cuts in our budget in real terms and an actual budget

Constitution, and indeed 'encouraged' in Chapter 10 (Section 195(1)(e)). (Bundle, page 11–16, paragraphs 5.1–5.14 and pages 93–99) If not just for being a white.

- 48. Vedalankar's stated 'explanation' for aborting my recruitment is, however, inconsistent with and contradicted by the known facts. It's inconsistent with LASA's budget and operations over the relevant period. It's inconsistent with and contradicted by information given, and not given, to the Parliamentary Portfolio Committee for Justice and Constitutional Development. It's inconsistent with and contradicted by prior communications to me by other management executives. It's inconsistent with and contradicted by LASA's communication with Legal Aid attorney Bongani Mngadi. The letter furthermore contains a number of demonstrably false and misleading statements, aside from the fraud with which it begins.
- 49. Quoted in italics for clarity, I'll deal with paragraphs 6.1 to 6.7 of her letter seriatim.
- 50. *'6.1 A defined number of Senior Litigator positions were created linking to particular High Courts.'* Indeed so. This took place within a few months of a question posed to you on 30 May 2007 at a meeting of the Parliamentary Safety and Security Select Committee, at which 'Dr van Heerden asked if the LAB appointed senior litigators'. This was in view of 'a complaint' conveyed by Mr Moseki about 'service delivery to the effect that LAB lawyers were inexperienced', and 'the issue,' as Mr Mzizi put it, 'of lawyers being seen as apprentice lawyers'. There'd obviously been prior discussion of this concern in committee.
- 51. You replied that 'The LAB was aware of the constant criticism that they employed inexperienced lawyers to do the work.' And you 'reported that candidate attorneys made up 45% of the total component of the LAB staff'.
- 52. 'Mr Shiceka also insisted that LAB needed to push the issue of salaries. There was a perception being created that the best lawyers would leave government and that the private sector was better. Mr Shiceka was of the opinion the LAB

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cut in the MTEF 2010-2013 cycle period.' Consequently, she stated, 'The major challenge will be minimizing the cutting back of our services in response to the cuts in funding. Reduced funding will result in an increased workload for our staff and inevitably a reduced service to our clients.'

157. There is no mention in her CEO report of the need to have 'frozen' three critical Senior Litigator posts just one month earlier.
158. In her letter to me of 18 October, pleading poverty, Vedalankar didn't tell me that earlier in the month LASA had just received a large 14% increase to its baseline funding, plus a firm commitment of further OSD funding.
159. As for the 'impact' of the overdue provision by the government of further OSD funding on LASA's operations, Vedalankar identified the extent of this 'impact' in her CEO report: 'The non-implementation of Phase 2 of the Occupation Specific Dispensation for our legal professionals due to lack of funds continues to impact negatively on staff morale.' Long faces, and nothing more. (Report, page 12)
160. Vedalankar's letter implies that LASA's 'anticipated funding for the 2010/11 financial year' was R1.8 m. short of what LASA was actually allocated, and that the cost saving achieved by 'freezing' three Senior Litigator posts enabled LASA to stay in budget. It's a patently ridiculous proposition.
161. All these facts and figures contradict the allegation that the post I was selected and recommended for was 'frozen' (along with two similar others) in order for LASA to operate within budget.
162. It's hugely telling that there's no mention anywhere in LASA's 2009/10 Annual Report of the alleged need to 'freeze' any posts, and that three critical Senior Litigator posts had just been frozen accordingly.
163. Nor was it alleged in LASA's briefing of the Portfolio Committee on its Annual and Quarterly Reports on 12 October, six days before Vedalankar's letter to me, that in view of budgetary constraints three Senior Litigator posts had been frozen in July – posts that Government is particularly concerned



should be filled. (LASA's report: j.mp/bD7VUn; minutes of the briefing: j.mp/aXPna7)

164. And accordingly, there was no mention of this alleged fact in the Portfolio Committee's 'Budgetary Review and Recommendation Report' on 26 October. (j.mp/aXPna7)

165. According to Vedalankar's letter to me of 18 October, 'Since early this year management has had to identify posts which could be frozen' as 'It was accepted that [the 'cutting [of] our baseline funding by a significant amount'] required a reduction to our staff establishment in order to meet this shortfall.' But when meeting with the Portfolio Committee 'early this year' – in fact well into it – on 14 April, she made no reference to the need for 'a reduction to our staff establishment' nor for the 'freezing' of posts.

166. Vedalankar did not tell the Committee that 'management' had been engaged in a cost-cutting exercise 'Since early this year', and that 'management' had resolved its alleged critical budgetary problems by taking 'the decision that all senior litigator posts that were vacant would immediately be frozen'.

167. Particularly because, as the First Quarter Report for 2010/11 shows, both staff establishment and recruitment substantially increased from April to June.

168. Only after Vedalankar had committed herself to her decision to 'freeze' the post I'd been selected and recommended for, did she first raise the question of the need to possibly 'freeze' posts – impliedly at a future stage – if OSD funding was not built in to baseline funding, as recorded in the audio recording of the 12 October meeting with the Portfolio Committee and in the Committee's recommendations in their report of 26 October. (Audio recording: j.mp/f6mFSU; 'Budgetary Review and Recommendation Report': j.mp/aXPna7) This was a week before Vedalankar's letter to me, and at the time it was being cooked up.

169. Vedalankar's deliberately vague and non-specific allegation to me – 'It was accepted that this [the alleged 'cutting [of] our baseline funding by a significant



amount] required a reduction to our staff establishment in the 2010/11 financial year to meet this shortfall' – conceals by whom 'It was accepted'. It would have been a simple matter to have stated that 'It was accepted' by the Board of Directors, the entire Management Executive Committee or by specified executives to show that the formally regulated process of authorisation, accountability and decision-making was observed. The reason Vedalankar doesn't say by whom 'It was accepted', is because in truth no 'reduction to our staff establishment' was 'accepted' for this alleged financial reason. And this is why Parliament has never told any such thing at any stage.

170. Certainly it's inconceivable that you and the Board of Directors 'accepted' that KwaZulu-Natal – the second most populous province after Gauteng, and home to more than ten million people, 85% African, mostly poor – should be discriminated against vis a vis every other province by being deprived of the services of a Senior Litigator.

171. In their contriving to shut me out, Vedalankar and Nair have demonstrated a stunning disregard for the needs of the majority poor in KwaZulu-Natal.

172. Nor is the 'shortfall' quantified: on Vedalankar's version, the shortfall was necessarily equivalent to the sum of three Senior Litigator salaries, and it sufficed to 'meet' it by 'freezing' these posts. I've disposed of this ludicrous suggestion above.

173. Vedalankar's letter speaks of 'a reduction to our staff establishment in the 2010/11 financial year ... required ... to meet this shortfall'. A 'reduction to our staff establishment' means 'abolition of posts' (to cite the phrase used in the Approval Framework). But it's not alleged that posts have been abolished, merely 'frozen' – in July, all of a sudden, 'immediately'.

174. If 'It was accepted that this required a reduction to our staff establishment', why was 'our staff establishment' not in fact 'reduc[ed]'? Why was 'our staff establishment' kept intact? Why did 'management' only abort the recruitment of professional personnel for the 'staff establishment', leaving it unchanged

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without any 'reduction'? There are no intelligent, honest answers to these questions.

175. On top of this internal contradiction, there's another: In his letter to me Nair implied two decisions were made about this, not one.
176. First 'the recruitment process to finalize all vacant Senior Litigator posts were [*sic*] put on hold due to various reasons'. (Bundle, page 19)
177. Since he says 'all', not both (Pietermaritzburg and Durban), this means that when this first decision was allegedly taken interviews for the Mthatha post had already been conducted and a selection made, because 'all' means at least three posts. And since the cut-off date for applications for the Mthatha post was 7 May, and the interviews were likely conducted a couple of months later in July, this implies that the decision to 'put on hold ... the recruitment process to finalize all vacant Senior Litigator posts', according to Nair, was first taken in July. Just as Vedalankar expressly alleges in her letter.
178. Of course this is inconsistent with the fact that the Pietermaritzburg post had already been 'put on hold' for eight months – with no decision ever taken, on Nair's version, to 'put [it] on hold'. As if for a period of eight months no decision had been taken in regard to the finalization of the critical Senior Litigator post for which I'd been selected and recommended, namely a decision to practically 'freeze' it. As if this was some minor assistant filing clerk job application overlooked and forgotten about. It's plain, even to the most childlike intelligence, that a decision had been taken off the record, unofficially, but practically very effectively (so far), to kill my recruitment, and that the decision was taken 'immediately', as soon as my unliked name (or my CV with its odious annexure*) surfaced in Johannesburg after my selection and recommendation for appointment following my interview in Pinetown.
(*Bundle, pages 80 – 82)
179. Nair's version is also inconsistent with the fact that as early as 'April/May', attorney Mngadi who'd applied for the Durban post had already been informed

by email that vacant Senior Litigator posts weren't going to be filled – so he told me when I telephoned him earlier this month on the 12th, on the sad anniversary of our interviews, to ask him what he'd heard about his application. (I didn't meet Mngadi in the waiting room, as I did the two other candidates; Kaloo identified him to me a couple of months ago at a chance social meeting.) Mngadi was certain of the time period when I queried it: it was 'in April/May' that he was notified. (When I spoke to him again on 22 November, he wasn't so sure and volunteered to hunt down the relevant email.) Mngadi told me he'd been given no reasons; he'd assumed an 'internal restructuring' had taken place.

- 180. This raises important questions: Why was Mngadi told that bets were off, but I wasn't? Why did 'management' treat one candidate differently from the other? And why were Mngadi and I given contradictory information – Mngadi told that the Durban post he'd applied for wasn't going to be filled and that the recruitment process had been ended; whereas I was told it was still on the go? Why was the Durban Senior Litigator post frozen 'in April/May' according to 'management's' communication with Mngadi, but according to Vedalankar's letter it was frozen in July, along with the Pietermaritzburg and Mthatha posts?
- 181. After alleging that 'the recruitment process to finalize the appointments of all vacant Senior Litigator posts were put on hold due to various reasons' – necessarily in July – Nair alleged in his letter that a second final absolute decision was taken: 'I can now confirm that we will not be proceeding with the filling of any of these posts'.
- 182. Vedalankar makes no reference to any such two-stage process; she claims a single sudden, 'immediate' decision was taken after many months of deliberation over the question of what senior, critically important positions to 'freeze'. And she suggests that she and Nair may decide to 'unfreeze the positions in the future'. (Bundle, page 104, paragraph 7.5)



183. The whole story is a shambles, but this is what happens when you begin with a crooked story in bad faith and with something to hide, and you try maintaining it as it's persistently tested. We trial lawyers see this in court every day.

184. The probable explanation as to why there was no communication with me, until I forced it many months after my interview and selection, is because only the Pietermaritzburg and Durban posts were 'put on hold' – off the record, unofficially, and unlawfully. The reason is that when my repugnant name came up as the applicant selected and recommended, 'management' didn't know quite what to do. They couldn't act legally to kill my successful application, so they did nothing, very effectively. They couldn't very well arrange a second interview for the Durban candidate selected but not for me, so they were compelled to practically 'freeze' both the Pietermaritzburg and Durban posts expecting me to conclude I'd been unsuccessful at my interview, to lose interest in the post, and to walk away. The gambit failed. In April, after a five-month wait for information, I pressed for it. After Clark was informed I wasn't wanted by fellow 'management', and given the whispered reason why, she tried putting me off with her disgracefully unprofessional snarling email of the 30th. At this point 'management' acted, 'in April/May', by telling Mngadi (and maybe the other two applicants interviewed with us, but not me) that the posts weren't going to be filled. But complicating 'management's' scheme, the Mthatha Senior Litigator recruitment project was already underway by this time. Still waiting in the dark, I pressed for information again in July, this time approaching Vedalankar directly. A suitable candidate for Mthatha had just been selected and recommended. My shock letter to Vedalankar on the 12th brought things to a head: Clark's endeavour to put me off in April evidently hadn't worked. Vedalankar's and Nair's unlawful 'freezing' of the Pietermaritzburg and Durban posts was catching up with them. The problem needed fixing with a bold stroke. Vedalankar and Nair now 'froze' Mthatha

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post too, and tried shaking me off with Nair's allegation that 'I can now confirm that we will not be proceeding with the filling of any of these posts'. No reasons given. But this trick fails too: I'm not shaken off; I appeal to COO Makokoane to intervene to set things right (he doesn't) and I ask for copies of relevant records, inter alia, records supporting Nair's claims. Naturally my request for records is refused. And in her letter refusing my request, Vedalankar concocts the most transparently feeble and unconvincing reason to cover what has happened, the unlawful things she and Nair have done.

185. A further contradiction: According to Nair, the decision to abort the recruitment of Senior Litigators was 'due to various reasons', i.e. a variety of at least three; in Vedalankar's letter these 'various reasons' have shrunk to a single one: an alleged 'shortfall' in 'funding'. (Bundle, page 19 and page 103, paragraph 6.7)
186. And another: Nair's letter made no mention, as Vedalankar did, of the story, 'Should we decide to unfreeze the positions in the future, the positions will be readvertised'. (Bundle, page 104, paragraph 7.5) Nair's message was a final 'we will not be proceeding with the filling of any of these posts'. He did not say the posts had merely been 'frozen' until better days. (Bundle, page 19)
187. In truth my application had practically been 'frozen' eight months before Vedalankar and Nair claim to have 'frozen' all three vacant Senior Litigator posts. After I was interviewed and selected, no action was taken to finalize my recruitment, and I was even denied information about the outcome of my interview* and any other information about the progress of the matter – total inaction and silence until Nair's letter in August, nearly nine months after my interview and selection, responding to mine to Vedalankar in July, telling me blankly that 'due to various reasons ... we will not be proceeding with the filling of any of the three vacant Senior Litigator positions. (*Brijlal seems to have been specifically instructed not to tell me I'd been selected. (Bundle, pages 4–5 , paragraphs 17–18 and 20–21))

188. What's clear is that it was only when Vedalankar got my letter in July asking when I might meet you to enable you to approve/disapprove my selection and recommendation by the regional professional selection board, and it was evident to her that Clark had failed to discourage me, even with her unbelievably insolent but revealing proposal that I 'withdraw'* my application for the position, that she claims to have 'immediately frozen' it on financial grounds – in a peculiar coincidence, the same month as my letter arrived, eight months after my successful interview, and nothing else to spur her sudden decision at the time. (*Bundle, page 6, paragraph 25 and page 19)

189. Once it had become plain from my letter to Vedalankar in mid-July that I was pursuing my appointment, and the prospect of appointing me as a political (or racial) undesirable was too dreadful to contemplate, it became necessary to announce a 'freeze' of all the vacant Senior Litigator posts, including the Durban and Mthatha posts, for the time being to create a cover with a semblance of due planning, in a strategy contrived to anticipate and rebuff any legal challenge by me.

190. I was singled out for special treatment: deliberately kept in the dark as to the outcome of my interview with the intention that I should assume I'd been unsuccessful. This was the cynical game-plan to avert a legal showdown over the real illegal reason for 'freezing' my recruitment, the calculated endpoint being that I would grow tired of waiting, and that I would pull out of my own accord. Their problem solved for them. By me.

191. LASA 'management's' failure to communicate with reasonable promptness with applicants interviewed for its advertised Senior Litigator positions in Pietermaritzburg and Durban (in Mngadi's case he was kept waiting five or six months, in mine nearly nine) is so strikingly unprofessional, so at variance with what one might expect from a properly managed public body with 'Best Employer' status, that the inaction of the responsible management executive(s) in this regard itself speaks to something seriously out of order.

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192. It wasn't only me that Vedalankar and Nair, and, after my email on 22 April, Clark, didn't want to inform that the Pietermaritzburg and Durban Senior Litigator posts had been unlawfully 'frozen'. Immediately before telephoning Clark on 14 April, I telephoned Pietermaritzburg Justice Centre Executive Bertus Appel, asking whether he'd heard anything. He said he'd no idea of the reason for the delay in the finalization of the recruitment process and told me that whenever he asked at meetings with KZN ROE Vela Mdaka, a member of the Management Executive Committee, when he could expect to get his Senior Litigator, he draw a blank response. (Appel suggested I enquire from Mdaka. I chose to approach Clark instead, assuming that as national HRE she was managing the recruitment process. In fact, as she told me, she didn't even know about it.)
193. As at mid-April, Management Executive Committee member Mdaka evidently hadn't heard any discussion of budgetary constraints requiring that his province's vacant Senior Litigator positions had been or might be 'frozen'. Or he would have informed Appel, when Appel repeatedly enquired about progress in the appointment of his Senior Litigator.
194. It remains to be discovered when Appel was notified, if at all, of Vedalankar's and Nair's purported 'freezing' of his Justice Centre's Senior Litigator post after mid-April, and why. And similarly, it remains to be discovered when, if at all, the Durban JCE was told the same in regard to his centre's equivalent post.
195. Finally, concerning paragraph 6.7 of Vedalankar's letter and her claim that LASA is too skint to hire three Senior Litigators, the matter of executive bonuses:
196. The minutes of the 12 October meeting of the Portfolio Committee record its member Mrs DA Schäfer's dismay that LASA's Annual Report had not been made available to the Committee timeously. Had the Committee had more time to examine it before the meeting, they might have made some shocking discoveries.



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- 197. Table 3 in section 4.1 at page 106 of LASA's Annual Report for 2009/10 provides the basic analysis of the executive management's remuneration. This table presents false totals of the individual components of total remuneration, misleading the reader to understand that basic salaries, total bonuses and incentives, expenses/allowances and other unspecified payments are considerably less than they actually are.
- 198. The basic salary total is shown as R5 469 566 when the true total is R8 248 588.
- 199. The bonus and incentives total is shown as R1 704 062 when the true total is R2 780 127.
- 200. The expenses/allowance total is shown as R2 825 767 when the true total is R4 473 045.
- 201. The unspecified 'other' payments total is shown as R673 639 when the true total is R849 552.
- 202. It's a serious criminal offence under PFMA for the accounting authority of a public entity to present false and misleading figures in its published annual financial statements. Especially false and misleading figures claimed to be 'a true and fair presentation'. (Report, page 115)
- 203. Section 51 (1) (a) of PFMA prescribes that 'An accounting authority for a public entity must ensure that that public entity has and maintains ... effective, efficient and transparent systems of financial and risk management and internal control.'
- 204. A glance at executive bonus and related payments jars against Vedalankar's claim that LASA has been low on funds for salaries during the recession. There's no evidence of belt-tightening by management executives at all, instead during these allegedly hard times their girths have steadily swelled:
- 205. For 2009/10 the bonuses for the top five management executives was 39.2% of basic salary. Expenses/allowances and other unspecified payments is 62.6% of their basic salaries.

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206. The global recession reached South Africa in about October 2008*, yet in that year bonuses for the top five executives goes up to 42.5% of basic salary. This is after Parliament challenged but ultimately allowed bonuses of 30% in 2007, which is to say, bonuses of 30% of salary were the upper limit of what Parliament considered acceptable – and this was before the recession.
(*).mp/aiLIAF)
207. And in this recession, total salaries for the top five executives increase 14.1% in 2009/10.
208. The true totals show total basic salaries for executive management increased by 29.3% from 2008/09 to 2009/10; bonus and incentives by 23%; expenses/allowance by 33%; ‘other’ payments received by 32%; and total remuneration by 29.5% – the increases partly a result of an additional two executive members.
209. Basic salaries for the top five executive members increased by 15.5% from 2008/09 and total remuneration by 14.1%.
210. And as mentioned, top five executive members’ total bonus/incentives were an increased 39.2% of their basic salary, considerably higher than the figure of 30% about which you were interrogated in Parliament in October 2007.
211. The false understated totals presented in respect of executive bonuses, expenses, allowances, and other payments misled the Committee not to query these.
212. While Nair was allegedly engaged in a lengthy process to cut costs in the teeth of the recession, which he finally resolved by ‘freezing’ three critically necessary Senior Litigator posts in two of the poorest provinces, he was enjoying a 19.6% increase of his basic salary and a 16.6% increase in his total remuneration.
213. Just the increase alone in total executive bonus/incentives, expenses/ allowance, and ‘other’ payments from 2008/09 to 2009/10 was greater than the saving from ‘freezing’ three Senior Litigator posts.

214. More specifically, the cost of the three Senior Litigator posts was just 22% of the total executive bonus/incentives, expense/allowance, and 'other' payments taken home by the members of the Management Executive Committee.

215. I deal now with the statements and allegations in Vedalankar's paragraph 7. The paragraph is drenched in disingenuity and low cunning.

216. '7.1 You were interviewed together with other candidates in the first round of interviews.' Of course I was interviewed with other candidates. What's omitted is the hard and inconvenient fact that I was interviewed eleven months prior to the date of this seemingly neutral statement, on 12 November 2009.

217. '7.2 You were recommended together with other candidates, for the second round of interviews. As explained above that however was not a guarantee that you would get the position. We have instances in the past when our nationally constituted panel has not recommended for appointment any of the recommended candidates from the first phase interviews conducted by the region.' The first part of the first sentence – that I was recommended for appointment, subject to approval at a second interview – is true at last, but the rest is false, and the senior advocates and attorneys on the KwaZulu-Natal regional professional selection board who interviewed and selected me will all confirm that the allegation that I was 'recommended together with other candidates, for the second round of interviews' is a lie. As will the minutes of the selection interviews I attended, a copy of which Vedalankar is reluctant to provide to me.

218. In truth I was the only candidate they selected and recommended for the Pietermaritzburg Senior Litigator position.

219. This disgraceful subterfuge tellingly epitomizes and exposes the mala fides which have characterized 'management's' dealing with me.

220. It's consistent with Clark's false claim to me in her email of 30 April that 'At this stage it is not even clear which applicants will be considered in the second or if indeed we will proceed with a second round.' (Bundle, pages 6–7, paragraphs 28–31)



221. It's also consistent with the false implication of Nair's letter on 3 August, and of Mdaka's substantially identical letter three weeks later on the 23rd, to the effect that I was on equal terms with the other candidates interviewed for the Pietermaritzburg Senior Litigator position, when the truth of it is that they'd been rejected by the professional selection board and were out of the running. I was the sole successful candidate chosen and recommended for appointment to the Pietermaritzburg post, subject to your approval at my final interview. (Bundle, pages 19 and 20) Mdaka well knew this because as an attorney he was on the professional selection board which interviewed me.

222. The question arising is why Vedalankar, Nair and Clark were reluctant to confirm that I'd been selected and recommended. And why, when Vedalankar finally did so, nearly a year after my interview, she smudged this fact with the lie that I was still on equal terms with the other candidate(s) who'd been interviewed for the same position but rejected.

223. Apropos the second statement – 'As explained above that however was not a guarantee that you would get the position' – Vedalankar parrots precisely the utterly irrelevant platitude Clark intoned in her email of 30 April. (Bundle, page 7, paragraph 32) Of course there was no 'guarantee that [I] would get the position', and I've never claimed or suggested otherwise. But I was convinced that I'd been selected and recommended as the best qualified applicant (Vedalankar finally confirmed it, nearly a year later) and I was confident that you would approve my selection and recommendation if given sight of my exceptional CV*, and, after interviewing me, satisfying yourself that my personal and social values** are aligned with LASA's mission and vision, and that with my extensive experience I'm eminently up to the professional and mentoring tasks expected of a Senior Litigator – in sum, that LASA couldn't have hoped for a better incumbent for the position. (Bundle, *pages 71–82 and **pages 83–92)



224. This is why it was essential for Vedalankar and Nair to intervene to prevent my final interview by you. 'Freezing' my application after I'd been selected and recommended was their only certain 'guarantee' that I would not be approved, confirmed and appointed.

225. Concerning the third statement – 'We have instances in the past when our nationally constituted panel has not recommended for appointment any of the recommended candidates from the first phase interviews conducted by the region' – I know this full well, and Vedalankar knows I know, because I was interviewed for the Pietermaritzburg Senior Litigator position precisely because Kaloo, selected for appointment in late 2008, had been disconfirmed by you following his second interview. I knew this from the beginning, and mentioned it in my email to Clark in April. (Bundle, page 26, third bullet point) But again the statement is totally irrelevant. It's totally irrelevant because Vedalankar and Nair acted 'immediately' to prevent the 'nationally constituted panel' headed by you from evaluating my application and from deciding whether I was the right man for the job or not.

226. *'7.3 The NOE and CEO took the decision that all senior litigator posts that were vacant would be frozen. Therefore, the three vacant Senior Litigator positions for Durban, Pietermaritzburg and Mthatha have been frozen.'* Insofar as 'the decision' by Vedalankar and Nair is alleged to have been financially motivated, I've comprehensively addressed and refuted the allegation above. I've also exposed her allegation as to the date of the decision as false.

227. *'7.4 You were sent a final letter of regret from our Regional Operations Executive dated 23 August 2010 indicating that Legal Aid SA will not be proceeding with the filling of the Senior Litigator post. A copy of the aforementioned letter is also attached for your reference.'* This pointless statement of the steps Vedalankar and Nair took to create a patina of due process to cover their illegal discrimination against me hardly forms any part of 'the ... explanation ... provided in so far as it relates to your individual application for the senior litigator position and the circumstances

that followed'. Still it's interesting that Vedalankar speaks here of not filling a single 'Senior Litigator post', not three.

228. It's most significant that despite Nair's claim to me that he'd be instructing 'our HR department to send out regret letters to all persons who were interviewed during the first round of interviews', Mngadi told me (on 22 November) that he never received any such 'regret letter' in August like I did. (Bundle, page 19) The reason is simple. Mngadi at least, and possibly the others too, had already got their 'regret letters' 'in April/May', and Nair knew it perfectly well. It was only me he had in mind for a mollifying 'regret letter' to create a fake appearance of due process, after my letter to Vedalankar had cranked up the pressure.

229. This would explain Vedalankar's reluctance to provide me with copies of the 'regret letters' allegedly sent to the three other candidates interviewed in August, or confirm on oath that these alleged 'regret letters' were never sent and don't exist, because doing so would expose Nair's insincerity and disingenuity in his dealing with me.

230. A copy of the email sent to Mngadi 'in April/May' will prove the untruthfulness of the statement in Vedalankar's letter that 'In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would immediately be frozen.'

231. The first curiosity about the 'regret letter' I got from Mdaka on 23 August, three weeks after Nair had already written that 'we will not be proceeding with the filling of any of these posts', was that it told me the same thing. So what was the point of it? The second is that it was marked 'CONFIDENTIAL'. (Bundle, page 20) Since there was nothing confidential about its contents, it seems to me that it was hoped I'd keep it a secret, for the reason that it would be compromising and embarrassing if it was brought up. As indeed it is:

232. The heading of Mdaka's letter refers to both the Durban and Pietermaritzburg Senior Litigator posts. It asks me to 'Please be advised that



Legal Aid South Africa will not be proceeding with the filling of this post' – post, singular; he doesn't say which one. 'Thank you for your application and for attending the interview for the above advertised position.' He means the Pietermaritzburg Senior Litigator post, the problem one. And he adds: 'We apologise for the delay in informing candidates of the outcome of the interview process.' 1. The 'delay' is not explained, and it's not explained precisely because there is no honest explanation that 'management' wishes to give for it. 2. Mdaka was not notifying the 'outcome of the interview process'; I got the 'outcome of the interview process' from Vedalankar two months later, nine months after my interview. 3. Like Clark and Nair did, Mdaka also falsely made out as if I was still on equal terms with the other applicants after the interviews had been conducted. 4. Contrary to the false impression deceitfully contrived, namely that he was simultaneously 'informing' other 'candidates', he wasn't. As mentioned above Mngadi, who was interviewed for the Durban post on the same morning as me never received any such letter; he'd already been emailed 'in April/May' that the post he'd applied for wasn't going to be filled.

233. If one has regard to Vedalankar's version of events, to the actual history of the Pietermaritzburg Senior Litigator position, and her claim that her action to abort my successful application had nothing to do with my 'individual circumstances', Paragraph 7 concludes most oddly:

234. *'7.5 Should we decide to unfreeze these positions in the future, the positions will be duly advertised and you will be at liberty to submit your application for any of the positions.'*

LASA had already been to considerable trouble and expense advertising and re-advertising the position several times. At long last it had finally recruited an ideal candidate for the Capital of KwaZulu-Natal: an extraordinarily widely experienced and highly skilled trial lawyer, with a degree in isiZulu, and a history of progressive social commitment and selfless, intense political engagement at considerable personal risk and cost in the interests of the poor and the weak. At the very tail end of the recruitment process, just before his

final approval interview, the post had been 'immediately frozen'. After being informed of this, nine months after his interview, selection and recommendation for appointment to the post, this ideal candidate makes plain that he remains keen for the job. He's not told: 'If we unfreeze the post, we'll pick up where we left off and arrange for you to meet Judge Mlambo for him to decide whether you're the sort of extraordinarily widely experienced and highly skilled trial lawyer, with a degree in isiZulu, and a history of progressive social commitment and selfless, intense political engagement at considerable personal risk and cost in the interests of the poor and the weak, that we are after.' Instead he's told: 'Should we decide to unfreeze these positions in the future, the positions will be duly advertised and you will be at liberty to submit your application for any of the positions.'

235. Vedalankar appears to have overlooked Section 51 (1) (b) which requires that 'An accounting authority must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.' Such as the 'fruitless and wasteful expenditure' incurred in readvertising a position for which an outstanding candidate has already been found after a two-year search and has already been selected and recommended for appointment. And the further 'fruitless and wasteful expenditure' incurred in readvertising for the Durban and Mthatha posts.

236. Paragraph 7.5 of Vedalankar's letter supports the inference – the speculative inference – that 'management' is applying an undeclared unlawful racial bar in dealing with the recruitment of a Senior Litigator for Pietermaritzburg. Perhaps wishing to improve demographic representation in the ranks of LASA's lawyers – and this is an imperative I sincerely support, just as I whole-heartedly support the National Democratic Revolution – 'management' 'froze' my appointment, with a view not to 'unfreezing' it when there's allegedly enough money for it, but to keep readvertising the position and interviewing for it until

such time as a candidate of favoured ethnic origin shows up: an illegal approach to achieving otherwise legitimate employment equity targets, as the current Gouws case illustrates, backed by supportive legal precedent.

(Statement of Claim in the Labour Court: j.mp/b2TY62. The general legal principles applicable are well presented for lay readers in a recent online magazine article: j.mp/b3Mz8d)

237. Vedalankar's allegation that the Pietermaritzburg Senior Litigator position, and two others, were 'frozen' for financial reasons doesn't cover, much less does it explain, the fact that my application had already been 'put on hold' (as Nair put it) which is to say effectively 'frozen' (Vedalankar's term) for more than three months before the Budget announcement on 17 February that allegedly gave rise to financial reasons for 'freezing' it in July.

238. And if such alleged financial considerations really did arise with the announcement of the Budget on that date, why on Vedalankar's version did it take five months to 'immediately' 'freeze' the posts? (That is, the Pietermaritzburg and Durban posts only; the Mthatha recruitment proceeded in April, a candidate was interviewed, selected and recommended in July.) And why no word to me as the applicant selected and recommended for the Pietermaritzburg post, and, from my persistent approaches with Brijlal and Clark, clearly aching for information as to what was going on? More significantly, why no word to the Department of Justice and Constitutional Development, and to Parliament?

239. All this is unexplained and inexplicable. Obviously the game is up.

240. I hope I won't be thought rude for mentioning that sections 81 to 86 of PFMA cover criminal and disciplinary proceedings relating to 'FINANCIAL MISCONDUCT' and state in section 83 (2): 'If the accounting authority is a board, every member is individually and severally liable for any financial misconduct of the accounting authority.'

241. If this matter must be prosecuted further, rather than resolved by the Board of Directors now, then to surmount Vedalankar’s stated objection to providing me with the records I’ve requested, or confirming on oath that they don’t exist, I record that all and any identifying particulars of third parties may be blacked out from the records that I’ve requested – even if such particulars do not comprise ‘information on third parties’ in any meaningful sense, as Vedalankar puts it, or would ‘involve the unreasonable disclosure of personal information about a third party’, as Section 34 (1) of PAIA does.

242. And if I have to carry on, I’ll be amplifying my records request with a supplementary annexure to PAIA Form A, annexed to this letter. The records listed, or lack of them, will obviously further support my case.

243. For as Cachalia JA pointed out to President Zuma’s counsel in the latter’s appeal to the Supreme Court of Appeal on 22 November against an order directing the presidency to comply with the *Mail & Guardian’s* PAIA request for a copy of a report on the Zimbabwean elections in 2002 written at the request of former President Mbeki, ‘Surely there’s a letter of appointment, there’s a note, there’s a minute. Government does not operate like a glorified spaza shop ... In the absence of any paper trail must we just accept that [officers in the Presidency] are people of standing and they will never mislead, just like Colin Powell never misled the Security Council [in lying that Iraq had weapons of mass destruction]?’ And as Nugent JA remarked (per the *M&G* report), ‘in a democratic South Africa government officials have to justify their decisions on the basis of facts. “In the old days you used to get these affidavits that said ‘I’ve locked up Mr Cachalia because it’s in the public interest’. Boom. ‘Court, I don’t care what you think’ ... The point is we’ve now moved beyond that.”’ (j.mp/fNVphG) We require claims to be documented nowadays, even by CEOs and NOEs.

244. My records request is clearly lethal to ‘management’s’ position, because it exposes it for the lying sham it is. Vedalankar’s refusal to comply with it, in

contempt of the legal responsibilities PAIA imposes on her, is manifestly intended to conceal real evidence, or the absence of real evidence, that would support the evidence I've already presented – a conspectus of which establishes a reasonable and cogent basis for my 'suspicion that [my] right to a fair administrative process' has been 'breached' and that I've been illegally discriminated against. (Bundle, page 104, paragraph 8)

245. Unless this matter is resolved without further prevarication from the Management Executive Committee, it's to be hoped that Vedalankar will finally apply her mind properly to my records request as LASA's information officer, put aside her home-brewed completely wrong 'principle' by which 'we were guided', and give attention instead to the clear provisions of PAIA as spelt out in the National Teachers Union and Mittalsteel cases quoted above; and that in doing so she will at last respect and comply with her constitutional obligations.

246. As mentioned on its website, 'The SAHRC promotes, protects and monitors human rights in South Africa. It also has a specific responsibility to promote and monitor the implementation of PAIA.' (j.mp/fmzuVw) And indeed, section 84 of PAIA requires the SAHRC to report annually to Parliament on compliance by 'each public body'.

247. I've shown in this analysis that even irrespective of the alleged 'explanation' for 'freezing' my application, for 'freezing' the post I was selected and recommended for, the action taken was administratively unlawful. I've shown that the alleged 'explanation' given for 'freezing' my application is false and is contradicted by the available evidence. I've shown that it was followed by a dishonest cover-up in which a fake reason was invented for doing so many months afterwards. I've shown that I've been dealt with differently from at least one other applicant interviewed. I've shown that I've been treated not only without the candour expected from servants of a public body in a constitutional, open democracy but secretively and dishonestly,

notwithstanding LASA's claim that its 'Processes are underpinned by the principles of openness, integrity and accountability.' I've shown that the reasons given for refusing my records request are insupportable both in law and on the facts.

248. I've presented considerable circumstantial evidence of illegal discrimination against me in the handling of my application for the Pietermaritzburg Senior Litigator post thus far. My rights not to be discriminated against illegally on political (or racial) grounds and to apply my professional qualifications and experience gained by determined, dedicated application over many years is a fundamental human right, not only enshrined in section 22 of our Constitution's Bill of Rights, but in all other major human rights charters as well, viz: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the African Charter on Human and Peoples' Rights. The matter is accordingly extremely serious.

249. I believe – and as a seasoned lawyer yourself I'm sure you'll agree – that the available evidence establishes a prima facie case of illegal discrimination fit for trial.

250. All this said, I would very much like to see this ballooning problem deflated by way of a conciliatory meeting. I'm sure it would dispel the negative image Vedalankar and Nair harbour of me. My sharp words in this letter aside, I bear no ill will. Although it's been a hard year, with my children unnecessarily deprived, I understand very well that the prejudice that's been exhibited towards me is sprung from an irrational negative sentiment rather than any substantial, objectively justifiable opposition to me. It's a prejudice based on a caricature of me by pharmaceutical interests and their supporters as a political and moral ogre in an intensely contested public health controversy with deeply sunk ideological roots and massive competing interests in play in a hyper-saturated, intensely emotive, morally charged propaganda climate. But no one who knows me personally shares this antipathy. (As I've mentioned, although

Stamp: 2016-10-31 HIGH COURT Pietermaritzburg N.N. Includes a signature and a triangle symbol.

I'd surmised the prejudice against me has been political, it may be racial – or both: in his letter Nair speaks of 'various reasons', one of which may be an undeclared policy against hiring more whites.)

251. To illustrate my point: Last month I attended a two-day celebration of my law school's centenary, and after some years away I was greeted by all – by judges and lawyers from all ranks – with hugs (two from judges, both Indian) and warm handshakes; not a single cool reception. A hug from an African judge I ran into a couple of months ago as well. I had a lovely conversation with Board Director Ela Gandhi, reminding her that the colonial Natal Law Society had opposed her grandfather's admission to the Bar in 1894 solely because he wasn't 'of European extraction', and mentioning that I'd studied copies of the original papers in the Pietermaritzburg Archives. (Although she was banned and house-arrested for a decade for her moral, social, and political conscience, I didn't mention the deeply dispiriting discrimination I was currently suffering at the hands of LASA's Management Executive Committee for the same reason.) An Indian attorney colleague whom I met just before the law school function told my partner in my presence that I was 'the most loved advocate at the Pietermaritzburg Bar for his non-racialism and progressive attitudes'.

252. Like a helicopter, the truth must eventually land. My personal interest in this matter aside, constitutional principles of the first importance are involved. I admit that to some I'm an extremely politically controversial person for having contradicted the propaganda and exposed the abuses of the \$500 billion transnational pharmaceutical industry in our country, with all its massively funded lobbyists and interest groups serving it, and American foreign policy backed by the \$48 billion PEPFAR fund gushing behind it – a fool's errand against unimaginably powerful interests and forces (getting two South Africans killed, one president deposed and another threatened with his life*) – but this doesn't reduce me to a non-person without rights like a 'non-white' under apartheid. (*).mp/e6kn37) As Trengrove SC remarked earlier this month on



winning a case for a lowly prostitute, even 'the least of us enjoy the rights enshrined in the constitution'. (j.mp/cQGWg0) LASA's own motto proclaims, 'Justice for all!'

253. And I admit I'm white, but so was Bram Fischer, my role model for professional and political integrity and absolute personal commitment to social justice.

254. CEO Vedalankar's claims of fact in her letter to me have raised the stakes in this matter very considerably indeed, and if they are to be adjudicated and determined publicly in an unfriendly forum, following searching document discovery and equally searching cross-examination of all major actors under oath, the cost is likely to be considerable, quite irrespective of the costs of suit. Personally I would prefer to look ahead in a positive spirit, than to trawl through the sordid history of this case in court. None of the mistakes made thus far are irreversible, and they can easily be fixed. I accordingly hope very much that you and the Board of Directors of Legal Aid South Africa will act promptly to end this trouble amicably here and now.

Yours sincerely



ANTHONY BRINK

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A reminder: All documents on the internet to which I've referenced the facts and quotations in this letter with shortened URLs – e.g., [http:// j.mp/bjvgaJ](http://j.mp/bjvgaJ) – may be retrieved and read by typing the main code only into the address bar of an internet browser, e.g., j.mp/bjvgaJ.



PAIA records request: Supplementary Annexure to Form A

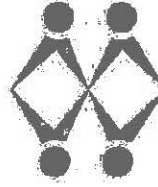
Note: All text quoted below originates from paragraphs 6.6 and 6.7 of LASA CEO Vedalankar's letter to the records requester Adv A Brink on 18 October 2010.

1. Records/relevant excerpt(s) from records reflecting the quantum of LASA's 'anticipated funding for the 2010/11 financial year'.
2. Records/relevant excerpt(s) from records reflecting the quantum of the lower 'funding' that actually 'materialise[d]'.
3. Records/relevant excerpt(s) from records reflecting the quantum of the 'funding ... shortfall ... cutting our baseline funding by a significant amount'.
4. Minutes reflecting NOE Nair's 'motivat[ion of] a change in the organizational structure', namely 'a reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall', alternatively the mere 'freezing of positions' without an actual 'reduction to our staff establishment to meet this shortfall' in 'funding' that was lower than 'anticipated' by a 'significant' amount.
5. Minutes reflecting NOE Nair's consultation with HRE Clark and noting her views, in terms of section 8.1.2 (b) of the Approval Framework, concerning his intended 'decision that all vacant senior litigator posts that were vacant would be immediately frozen'.
6. Minutes of 'management' meetings held 'Since early this year' recording its discussion that 'a reduction to our staff establishment' was 'required ... in order to meet this shortfall' in 'funding' lower than 'anticipated' by a 'significant' amount.
7. Minutes of 'management' meetings held 'Since early this year' recording the work 'management ... had' to perform 'to identify positions which could be frozen ... in order to meet this shortfall' in 'funding' that was lower than 'anticipated' by a 'significant' amount.



8. Minutes and/or notes kept/made 'Since early this year' in which 'positions which could be frozen' were 'identif[ied]' by 'management'.
9. Minutes reflecting COO Makokoane's agreement, in terms of section 8.1.2 (b) of the Approval Framework, with NOE Nair and CEO Vedalankar's 'decision that all vacant senior litigator posts that were vacant would be immediately frozen'.
10. The resolution passed by 'management' in terms of section 8.1.2 (b) of the Approval Framework, following consultation with HRE Clark and COO Makokoane's agreement, in relation to the claim: 'In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would immediately be frozen.'
11. Written notification of the Board Executive Committee of the 'decision ... the NOE and CEO took ... In July 2010 ... that all senior litigator posts that were vacant would immediately be frozen'.
12. Email to Durban Justice Centre attorney Bongani Mngadi notifying him (he says 'in April/May') that the Durban Senior Litigator post for which he'd applied wasn't going to be filled.





Legal Aid
South Africa

"FA"
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BY E-MAIL

Tuesday, November 09, 2010

Mr A Brink
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Dear Mr Brink

PIETERMARITZBURG SENIOR LITIGATOR POST

Your letter dated 30 November 2010 refers.

I have reviewed the actions of Legal Aid South Africa regarding your candidature for the Senior Litigator position in KwaZulu-Natal. I could find no unfairness or arbitrariness towards you as you allege or at all.

Regards

Judge Dunstan Mlambo
Chairperson

25 Baker Road
Prestbury
Pietermaritzburg 3201
24 January 2011

"FAE"
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Chairperson Judge Dunstan Mlambo and the Board of Directors
Legal Aid South Africa
29 De Beer Street
Braamfontein
Johannesburg

Per email: 13h45

Dear Judge Mlambo

BRINK/LASA
FINAL APPEAL TO THE BOARD
PIETERMARITZBURG SENIOR LITIGATOR POST

1. On Thursday last week, a concerned friend of mine, Christopher Rawlins, discussed our matter with Board Director Ela Gandhi at her home in Durban. A record of the meeting is annexed.
2. Chris, now 69, is South Africa's first conscientious objector, forced into political exile when he refused a call-up by the apartheid military in 1961 – finally coming home in 1994 immediately after the advent of democracy in our country.
3. And having paid a heavy personal price for his moral and political conscience, with some of his comrades killed for it, he's been especially outraged by LASA's illegal discrimination against me for exercising our newly won, constitutionally guaranteed rights of freedom of thought, opinion, research, expression, and participation in political discourse and public policy formulation.

N. N 197



4. Even if this means contradicting transnational pharmaceutical interests and their political/propaganda assets in the law, academia, media and political action groups.
5. Ms Gandhi is one of the Board members whose email address I'd been unable to find on the internet last year, and so had been unable to email her a copy of my letter to you and the Board of Directors of 30 November 2010.
6. My request to Board Secretary Bee-Mari Schoeman on 8 December 2010 to ensure that all Board Directors were apprised of my complaints of illegal discrimination and denial of access to LASA's records, and to place the matter on the agenda of the next board meeting, went unacknowledged. I therefore assumed, correctly, that Schoeman had disregarded my request and that Ms Gandhi was among the Directors deliberately kept in the dark.
7. Chris mentioned to me that Ms Gandhi lives near his house on the Durban Berea and volunteered to print and bind a hard-copy of my letter and Document Bundle annexed to it and deliver it to her.
8. He thought she would be concerned about LASA's unconstitutional, unlawful, and deceitful behaviour, given her promotion of her grandfather's absolute opposition to intolerance and discrimination and his absolute commitment to truth and justice.
9. With this in mind, I agreed; I also thought so.
10. Chris hand-delivered my letter and annexure to Ms Gandhi on 14 December 2010, and on 19 January 2011 phoned to follow up. He told me Ms Gandhi responded that she didn't see what I was concerned about because she'd been on the Board for four years with people she knew to be highly qualified, and there'd been unqualified audit reports for five years. Nonetheless, at his request, she agreed to meet him for a briefing about my case and invited him to her home for this.
11. At the meeting the following day, Ms Gandhi admitted having read my letter only 'quickly'; yet again she said she believed I had no cause for complaint.

12. During the meeting, Board member Yusuf Vawda telephoned her and spoke to her about my letter for some time.
13. Evidently her mind had been made up for her, and she'd been poisoned against me: Ms Gandhi concluded the meeting by slandering me as a libeller and extortionist. You can read what she said to Chris in his report of the meeting. I find it too perverse and disgusting to repeat.
14. It's obviously been decided to play dirty: instead of taking the trouble, for which they're paid, to apply their minds to evaluating and determining the merits of my complaints, and how to address and resolve them to avert remedial action in court, certain Board members and possibly executive managers have taken to assassinating my character and reputation by smearing me as an unconvicted criminal. Anything to avoid respecting the Constitution and the law of the land, when it comes to people they're politically prejudiced against.
15. This is the low mentality and viciously hostile animus I'm up against.
16. This is the quality and the level of the discussion currently taking place between certain Board members about my matter.
17. This is the shockingly irregular way in which my complaint is being dealt with at Board level: furtively; in cabals; behind the scenes; on the phone; off the record; dishonestly.
18. I'd be grateful if you'd direct the Board members and possibly management executives responsible for telling and spreading their foul lies about me to desist from doing so; and if you'd remind them that the proper place for a discussion of a matter as serious as mine is at a full Board meeting, on the record, with minutes taken recording the things they say. So that they can be reviewed by an independent judge if needs be.
19. Since she seems disinclined to do so, please also instruct Board Secretary Schoeman to place both this letter and my 30 November letter and its annexed Document Bundle on the agenda for discussion at the next Board meeting, and to prepare printed copies of both my letters and Document Bundle for the

Auditor General's staff, flagging for their attention the useless and wasted public expenditure caused by the abortion of my recruitment on illegal political grounds, and, as I discovered incidentally when investigating and exposing the false cover contrived for it, the presentation of false financial information in LASA's current annual report.

- 20. Like my first letter to her on 8 December 2010, Schoeman has not acknowledged my reminder to her on 10 January 2011 either. It seems plain, therefore, that she's been instructed to conceal the extraordinarily serious issues raised in my first letter and annexure from the Board as a whole, and to keep them off the agenda of the next Board meeting, thus concealing them from the Auditor General as well.
- 21. Who issued this illegal instruction to her, Schoeman will be compelled to reveal when she's cross-examined.
- 22. The Auditor General will be concerned to learn that my letter to CFO Rebecca Hlabatau on 1 September 2010, included in the Document Bundle, about the useless and wasteful expenditure issue went unacknowledged.
- 23. And that my letter to you and the Board of Directors about this and about the false financial information appearing in LASA's current annual report went unacknowledged by Audit and Risk Committee Chairperson Nonhlanhla Mgadza, whom I emailed on 30 November 2010.
- 24. And that no steps have been taken by the Board under its obligations as LASA's 'accounting authority' imposed by section 51(1)(b) of the Public Finance Management Act to 'take effective and appropriate steps to prevent ... fruitless and wasteful expenditure'. Such as re-advertising and re-interviewing for a senior professional post for which an eminently suitable candidate has already been recruited – per Vedalankar's letter to me of 18 October 2010.
- 25. And that those members of LASA's Board whom I've been able to reach are apparently unbothered about the serious contraventions of the Public Finance Management Act that I've brought to their attention:

- 26. Besides yourself as Chairperson, of the nine Board Directors whose email addresses I found by searching the internet, only Adv du Rand, Dr Konar, and attorney Maree acknowledged receipt of my first letter to you and the Board – and then did nothing about it. My follow up letter on 10 January 2011 to du Rand, copied to Konar and Maree, was again formally acknowledged by du Rand, but again has otherwise been ignored.
- 27. Your perfunctory one-line response that you emailed me on 30 December 2010 – although dated 9 November (sic: 9 December?) 2010 – did not address my opening complaint that Vedalankar, as LASA information officer, has unlawfully refused my request for access to LASA’s records under the Promotion of Access to Information Act.
- 28. I was hoping that as a senior judge you would appreciate the gravity of her refusal to comply with the Act and her disrespect for section 32(1)(a) of the Constitution behind it, and that you would instruct her to obey the law forthwith.
- 29. Did you actually write the letter? According to its PDF properties file, Vedalankar did – on 15 December 2010, while you were still away in the US. It’s even signed off with ‘Regards’, just as she does – a strikingly unconventional and inappropriate style for formal business letters. Moreover, a complaint I never made was dismissed, and those I did make weren’t addressed. All this suggests a legally unqualified person wrote your letter, and indeed Vedalankar has left her fingerprints on it.
- 30. In view of your and the Board’s indifference to Vedalankar’s defiance of the Promotion of Access to Information Act, just to start with, I’ve drawn draft papers for an application to compel in the South Gauteng High Court (Johannesburg); and I’m just waiting for her response to my supplementary request for records, which she undertook to give me by 29 January 2011, so as to include it in the papers.

- 31. Since she's already informed me that in her opinion I'm not entitled to access to any of LASA's records – grossly misquoting a reported case against her, which she claimed to support her position – I'm expecting her to refuse my second records request as well.
- 32. Given the malicious false interpretation of my repeated appeals for an amicable resolution of my illegal discrimination complaint, it seems futile, even dangerous, to repeat it.
- 33. Nonetheless I'm still faintly hoping that at least some Board members will have the presence of mind to appreciate their exposure in this looming scandal and will call for an urgent special meeting under section 5(2) of the Legal Aid Act to discuss and resolve my matter properly, on the record, before it spills into open court.
- 34. As you well know, the financial reasons given in Vedalankar's letter to me of 18 October 2010 for aborting my recruitment are lies.
- 35. (Who actually wrote her letter – she's mentioned in the third person as 'the CEO' – and who instructed the real author of the letter to tell these lies, will emerge in cross-examination.)
- 36. These lies are comprehensively interrogated and refuted in paragraphs 44ff of my first letter to you and the Board. And the records I've requested, or, more pertinently, Vedalankar's sworn confirmation they don't exist, will further reveal them for the lies they are.
- 37. As you also know, the Senior Litigator post for which I was selected and recommended has been budgeted for and funded as part of LASA's critical professional senior staff establishment since as far back as 2007/2008.
- 38. The issue of delayed OSD funding has never had anything to do with it – but in any event, this had already been resolved by the time Vedalankar wrote to me falsely claiming budgetary constraints as the reason for aborting my appointment.



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39. In her oral report to the Portfolio Committee on 12 October 2010, Vedalankar mentioned that 'the Minister' told you he didn't want any posts frozen. Yet in brazen defiance of his express wishes Vedalankar claims to have frozen my post.
40. Leaving the majority poor in KwaZulu-Natal, unlike all other provinces, without the services of a Senior Litigator for nearly four years now.
41. And again, this is in defiance of the express wishes of the Portfolio Committee's predecessor, the Parliamentary Safety and Security Select Committee, conveyed to you and Vedalankar at your meeting on 30 May 2007, namely that LASA should appoint Senior Litigators.
42. Topping which, in 'freezing' my post Vedalankar didn't even deign to comply with LASA's Approval Framework – such is the lawless breakdown of proper corporate governance at LASA.
43. As indicated in the conclusion of my appeal to COO Jerry Makokoane on 1 September 2010, failing the Board's prompt intervention and resolution of my illegal discrimination and unlawfully denied records complaints, I'll shortly be reporting them and the disgraceful manner in which they've been dealt with at Board level to the Portfolio Committee, to the Minister of Justice and Constitutional Development, and to the Deputy Minister. (Before granting interdictory relief, the courts require one to show that all available non-litigious remedies have been exhausted.)
44. To repeat once again, the solution to the catastrophe LASA is facing is quite simple: the illegal political prejudice against me must be put aside, the patently false cover invented for it must be abandoned, and my appointment to the senior professional post for which I was duly selected and recommended by a delegated expert panel of my professional peers must be finalised in the ordinary course.
45. Even if this is unpalatable to those in LASA who've unlawfully opposed themselves to me for political reasons – solely on account of my thoroughly researched, published criticisms of the safety and utility of certain patented

chemicals plied by enormously wealthy and powerful Western corporations on the African poor.

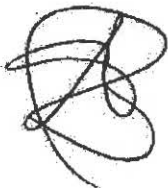
46. Unfortunately for those persons who've moved to oppose me politically, however, we have a progressive, enforceable Constitution these days; and as our own Navi Pillay, now United Nations High Commissioner for Human Rights has pointed out: 'More than pure aspirations, human rights are real rights that can be tested in courts of law.'
47. The draft papers in my preliminary PAIA application, testing my real right of access to LASA's records, are posted for your perusal at www.tig.org.za/LASA ; username: lasa ; password: LASA2010. The application is substantially ready for launching in February.
48. My main case to vindicate and enforce my other even more basic constitutionally guaranteed human rights, disrespected and trampled on by LASA, will follow once I have my records or Vedalankar's confirmation on oath that they don't exist.
49. Please let me have the Board's assurance that the Pietermaritzburg Senior post for which I was selected and recommended will not be readvertised until my pending claim for appointment to it has been resolved, either by settlement or by order of court. Without such assurance I'll be bound to act to protect my rights with an interim interdict application.
50. Would you ask Board Secretary Schoeman to forward this letter to all Board members so that they are all fully informed of the dangerously advanced state of play and the rapidly fading prospects of a sensible internal resolution? As mentioned above, she's ignored both of my requests to inform all members of the Board. I only have some Board members' email addresses, and the rest would presumably want to know about the rocks towards which LASA is currently headed, threatening to wreck its exemplary reputation as an impeccably well managed public body (Deputy Minister Andries Nel remarked in *Business*

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Day on 12 January: 'The world would be a better place if it were run by Legal Aid.').

51. If I haven't heard from you by the end of this week, I'll take it that your position against me remains unchanged, and I'll petition the Minister, the Deputy Minister, and all members of the Portfolio Committee as the next levels of authority and accountability – all four of my successive appeals to the Management Executive Committee and the Board of Directors having been spurned.
52. Please appreciate that whatever Vedalankar decides concerning my second records request, and even if she reverses her decision to refuse the first one, I will still be petitioning the Minister, the Deputy Minister, and the Portfolio Committee to intervene and remedy my main illegal discrimination complaint, unless the Board moves to resolve it immediately. I've been waiting over fourteen months now.
53. And if I get no joy from Parliament, I'll claim my constitutional rights in court, with its patient and efficient machinery for separating truth from lies.
54. This case is shaping up to be a historical, landmark development in South African constitutional jurisprudence. It's just dismal to think that LASA is set to be forever memorialized in the law reports for its shameful contempt of the basic civil liberties enshrined in our democratic Constitution.

Yours sincerely



ANTHONY BRINK

Advocate of the High Court of South Africa

033 344 2420

083 779 4174



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Cc:

To: Board Directors du Rand, Gandhi, Jarana, Konar, Kruger, Maree, Memka, Mgadza, Mhlungu, Monaledi, Mosidi, Naidoo, and Vawda;

And to: Board Secretary Schoeman;

And to: Attorneys Kisoon and Bokaba:

PAIA Unit, South African Human Rights Commission

Record of Meeting

Ela Gandhi and Christopher Rawlins

20 January 2011

2 P.M.

Ms Gandhi's home

During my meeting with Ela Gandhi on Thursday she received a telephone call from fellow board director, Prof. Yusuf Vawda, immediately informing him that she was busy discussing your letter with me. After the call, I explained that I had telephoned Prof. Vawda the previous Friday 14th January when he told me that he knew nothing at all about your letter and expressed no interest in learning of its contents. I reminded Ela Gandhi that she too would have known nothing about your letter had I not taken the trouble to print, bind and hand deliver it and now follow up with a meeting to update her on the correspondence since your letter to the board of 30 November 2010.

I outlined the way in which I believed you had been illegally discriminated against by the CEO and board Chair who held very opposed views to yours on the AIDS issue. Ela Gandhi said she firmly believed in the beneficial qualities of the drugs known as ARVs although she had never read any of your books or studies of AZT and nevirapine.

When I referred to the fact that KZN had been deprived of senior litigators in contrast to all other high court areas, Ela Gandhi assured me that KZN did in fact have senior litigators in post. She knew this from her attendance at the last meeting in Oct/Nov 2010 of the Legal Services Committee at which the good performance of the senior litigators had been commented on, in particular the one at Durban. I responded that you had been informed in the CEO's letter of 18 October that the KZN posts had been frozen because of lack of funding.

Ela Gandhi said there was no proof that you had been a victim of unlawful discrimination. She said many people are out of work and make unsuccessful job applications. She likened your application to that of Ashok Kaloo who had previously been rejected for the Pietermaritzburg senior litigator post after failing the second confirmatory interview in Johannesburg. I responded that the crucial distinction was that you had never been given the second confirmatory interview nor were you ever rejected on the basis of your skills, experience and personal qualities. You were informed after 9 months of waiting that the post had been frozen due to lack of sufficient funding.

I detailed the persistent steps you had taken to resolve the problem by written appeals to ever higher levels of authority within LASA, culminating in an appeal to the board Chair and the board in which you said that you would very much like to deflate the rapidly ballooning problem by way of a conciliatory meeting. Ela Gandhi said that this attempt to solve the problem by a conciliatory meeting amounted to attempted blackmail because you had made serious allegations of financial mismanagement in your letter of 30 November. Her belief was that you would offer to refrain from any

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further exposure of the contraventions of various Acts as outlined in the heading page of your letter, in return for confirmation of your appointment which you claimed to have been unlawfully blocked. I responded that you had not offered nor would you ever contemplate such an agreement. The purpose of a conciliatory meeting would be to obtain justice as defined in our constitution without the necessity of the dispute becoming public through protracted legal action in the full glare of the media. The onus was on the board to meet to discuss how to respond to the contraventions of Acts and failure of corporate governance which had accompanied the cover up of your unlawful discrimination. Exercising its oversight function, the board is responsible and accountable to parliament and the public of South Africa and clearly would be neglecting its role if it did not address and rectify the breakdown in internal control and executive management that had allowed the problem to develop to such a serious stage. This would be necessary regardless of whether the dispute was resolved by a face to face meeting or by correspondence.

Ela Gandhi also said that the contraventions of Acts specified in your letter of 30 November were grounds for LASA to sue you for defamation. I responded that the truth of the statements made in your letter could be confirmed by reference to the records you had requested, but LASA had failed to comply with its legal obligations under PAIA. Referring specifically to the false totals contained in the table of executive management remuneration in the 2009/10 annual report, I left Ela Gandhi a copy of the annual report table, which she had not seen before although the false totals were detailed in your letter. She explained that the annual financial statements were thoroughly audited and examined by the specialist board members and asked me why you had not reported the false totals to the external auditors. I explained yet again the persistent efforts you had made to get your letter distributed to all board members but the board secretary had failed to even acknowledge your two letters requesting her to notify all board directors and canvass them on their support for a special meeting. The external auditors attend all meetings of the audit and risk committee together with the Chief Financial Officer and the internal audit executive and have unrestricted access to the Chair of the Committee and the Chair of the board. The external auditors would automatically be informed of any financial irregularities if the board secretary and board Chair had performed their job responsibilities as defined in the annual report.

Christopher Rawlins



Anthony Brink

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From: Mlambo Dunstan [DMLambo@justice.gov.za]
Sent: 24 January 2011 11:12 PM
To: arbrink@iafrica.com
Cc: vidhuv@legal-aid.co.za; BeeMariS@legal-aid.co.za
Subject: Legal Aid SA

Mr Brink

I refer to your previous email communication to me and to the numerous emails you have sent to the Executive Management of Legal Aid SA. I further refer to the email you sent to me and to some Members of the Board of Directors of Legal Aid SA as well as some whose tenure as Members of the Board has come to an end. It has been brought to my attention that a friend of yours had, in the past week, also called some Board Members and then paid a visit to one of them during which your matter was brought up.

Your conduct is unbecoming to say the least and borders on harassment. I have on a previous occasion informed you that I could find nothing untoward in how you have been treated by Legal Aid SA. I reiterate this view. I further take this opportunity to advise you that the Board of Directors of Legal Aid SA is not the appropriate forum to raise your matter. Your approach to the Board is therefore misdirected. Your matter was handled at Executive Management level, being the level at which such matters are handled, and should you have any issues in that regard you are free to institute whatever legal action you may deem appropriate to obtain whatever redress you fathom is due to you. For this reason I call on you to desist from communicating with Board Members in this regard. I have, in turn, requested Board Members to ignore all communications from you and/or on your behalf.

I trust that you find this in order.

*D Mlambo
Chairperson- Legal Aid SA and
Judge President
Labour Courts
dmlambo@justice.gov.za
Tel +27113595735/6
Fax 0866447932*

25 Baker Road
Prestbury
Pietermaritzburg
25 February 2011

"FAA"
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Dear Board Directors

LASA BOARD MEETING, SATURDAY 26 FEBRUARY 2011

Your meeting on Saturday presents an opportunity to address, resolve, and defuse what threatens to be the most damaging crisis in LASA's history. And so easily.

In November last year, I addressed a 59-page petition to Judge Mlambo and the Board of Directors, appealing for the Board's intervention in CEO Vidhu Vedalankar's illegal abortion of my recruitment as Senior Litigator, Pietermaritzburg, for political reasons, following my selection and recommendation for appointment by a professional selection panel in November 2009.

My petition began by detailing Vedalankar's unlawful refusal as information officer to comply with the Promotion of Access to Information Act ('PAIA'), thus exposing LASA to the shame of being listed as a non-compliant PAIA delinquent in the South African Human Rights Commission's next annual report to Parliament.

I also raised LASA's contravention of the Public Finance Management Act – (a) in incurring fruitless and wasteful expenditure in Vedalankar's illegal abortion of my appointment and the wasted cost of readvertising the post, despite having already found a suitable candidate; and (b) in publishing false financial information in LASA's current annual report (Management Executive Committee members' personal incomes are massively understated in total).

My requests to Board Secretary Schoeman to forward my letter to all Board members and to put it on the agenda of the next Board meeting was not carried out; and indeed

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appear to have been countermanded, thus concealing from the Auditor General, represented at all Board Audit Sub-Committee meetings, these serious financial irregularities threatening to blot the unqualified audits that LASA has enjoyed for many years.

In her letter to me of 28 January 2011, in which Vedalankar implicitly abandoned her earlier wholly spurious reasons for not complying with PAIA and affording me access to the records I requested, replacing her clueless reasons with other equally fatuous ones, Vedalankar repeated her allegation that for financial reasons she'd 'frozen' the post for which I was selected and recommended; and she put up some records claimed to support this.

In truth, as all (besides recent) Board members are well aware, the single cost-cutting measure agreed by the Management Executive Committee on 16 July 2010 in its Report to the Board, and approved by the Board on the 31st, was the reduction of some junior criminal defence practitioner posts serving the district and regional courts.

The couple of remaining vacant critical Senior Litigator posts were never identified, never proposed, never agreed, and never approved for abolition as a cost-saving measure. On the contrary, the Report to the Board specifically distinguished vacant critical posts from the rest and prioritized them for recruitment.

This is incontrovertibly shown by (a) the Board meeting minutes; (b) the Management Executive Committee's Report to the Board; (c) NOE Nair's recommendations for cost-saving; and (d) Vedalankar's letter to the Director General on 16 April contemplating the abolition of some junior criminal defence practitioner posts, which was ultimately proposed, agreed and approved. All on the record, obviously.

Vedalankar's claims to me to have 'frozen' my post in July, and to have 'frozen' it for budgetary reasons, are lies. And being lies, they are naturally not supported by any records. Contrariwise, her lies are directly contradicted by the very records that she provided me for her own purposes (and not to comply with my PAIA requests) last month in January.

In my petition to the Board in November, I reported how in covering up her gravely illegal abortion of my appointment in late 2009/early 2010 and in contriving a bogus financial justification for it, Vedalankar also unlawfully aborted the appointments of two African lawyers duly selected and recommended for appointment to the Durban and Mthatha Senior Litigator posts, in April/May and July respectively – contemptuous of their rights, their legitimate expectations of being appointed, as well.

And all this in a grossly unlawful, furtive abuse of power; all completely off the record; with no regard for the peremptory requirements of the Approval Framework governing such operational decisions; contravening the Board's strategic policy to equip all seats of the High Court with Senior Litigators; disrespecting the express wishes of Parliament expressed in May 2007 in this regard; disrespecting the Minister's express wishes communicated to Judge Mlambo sometime in the first half of 2010; without informing the Board in the 16 July Report; and without informing the Portfolio Committee on 12 October.

The rapidly developing crisis LASA currently faces on account of Vedalankar's grossly illegal conduct, and the blind eye Judge Mlambo has turned to it in his brief, dismissive responses to my detailed petitions, is as follows:

Unless the extraordinary serious matters raised in my correspondence to the Board in November and again in January are addressed and resolved at Saturday's meeting of the Board, LASA's public reputation for exemplary probity in corporate governance and



financial management stands to be wrecked in a gargantuan public scandal when my complaints reach open court.

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Here I refer to my preliminary application to the South Gauteng High Court (Johannesburg) for which I've drawn draft papers for an order compelling Vedalankar to comply with PAIA by producing the records I've lawfully requested, or where they don't exist by confirming this on oath. Moreover I refer to my claim for appointment to the post for which I was selected and recommended, but which Vedalankar illegally aborted for political reasons, behind the scenes and completely off the record, and which she later tried covering up with a patently untruthful budgetary justification, contradicted by the very records she produced in January. Callously sacrificing two African lawyers on the way.

In his email to me on 24 January, Judge Mlambo told me he'd requested all Board members 'to ignore all communications from' me, notwithstanding the Board's statutory responsibilities to oversee and ensure the proper management of LASA by the Management Executive Committee and its compliance with the laws of the country that I'd highlighted.

Having regard to the extraordinarily serious nature of the matters I've raised – *so easily fixed* – I would suggest that you rather 'ignore' judge Mlambo's grossly improper request to 'ignore' my petitions pointing up the breakdown of proper corporate governance and Vedalankar's evident contempt for the Constitution and the law of our country and the fundamental constitutional rights of its people.

In the situation, I respectfully call on you as a Director to exercise your responsibility to LASA, to Parliament, and to the people of South Africa, and to move for the discussion by the Board of the grave matters I've brought to your attention so that they can be openly ventilated, debated, and resolved. Before this shambles spills into the open to the

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considerable embarrassment of the Minister and Deputy Minister of Justice and Constitutional Development.

All relevant documents in this matter are accessible online at a private secure archive: www.tig.org.za/LASA; username: lasa; password: LASA2010.

Thank you for your attention.

Yours sincerely



ADV ANTHONY BRINK

CC:

The Minister of Justice and Constitutional Development, the Honourable Mr Jeffrey Radebe MP

The Deputy Minister of Justice and Constitutional Development, the Honourable Mr Andries Nel MP

Special Advisor to the Minister of Justice and Constitutional Development, Dr Jabulani Mzaliya

The Chairperson, Parliamentary Portfolio Committee on Justice and Constitutional Development, the Honourable Mr Lewellyn Landers MP



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MEMORANDUM

**TO: ATTORNEYS CHANTAL KISOON AND MOIPONE
BOKABA, PAIA UNIT, THE SOUTH AFRICAN HUMAN
RIGHTS COMMISSION**

**IN RE: ADV ANTHONY BRINK AND LEGAL AID SOUTH
AFRICA**

**A CRITICAL ANALYSIS DEMONSTRATING THE LEGAL
IRRELEVANCE OR INSUFFICIENCY OF THE VARIOUS
CHANGING REASONS GIVEN BY LEGAL AID SOUTH
AFRICA INFORMATION OFFICER AND CEO VIDHU
VEDALANKAR FOR TWICE REFUSING ACCESS TO 69
SPECIFIED RECORDS DULY REQUESTED UNDER
SECTION 11 OF THE PROMOTION OF ACCESS TO
INFORMATION ACT 2 OF 2000**

On 30 August 2010 a request for access to 51 specified records was submitted to Legal Aid South Africa's information officer, CEO Vidhu Vedalankar, by the records requester Adv Anthony Brink under the Promotion of Access to Information Act 2 of 2000 ('PAIA' or 'the Act').

LASA is a 'public body' in terms of the 'Definitions' in section 1 of the Act, in that it's an 'institution ... performing a public function in terms of any legislation', namely the Legal Aid Act 22 of 1969, and its CEO Vedalankar is its information officer ex officio in terms of the 'Definitions': "information officer" ... means the chief executive officer ... in the case of any other public body' such as LASA.



Section 11(1) of the Act stipulates that ‘A requester must be given access to a record of a public body if – (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.’

The request conformed to the procedural requirements of PAIA, in that it comprised a Form A application with an annexure listing the records sought. LASA had not at that stage published a mandatory PAIA manual under section 14 of the Act indicating its request fee and access charges, so the records requester asked what they were in his covering letter and tendered to pay them (no response received).

The information officer responded by ignoring the records request. Only with the intervention of the PAIA Unit of the South African Human Rights Commission (‘SAHRC’) did LASA undertake to deal with the request, as the Act required.

On 18 October 2010 the information officer refused the records request in its entirety.

Numbered paragraph 1 of her letter commenced by alleging the law applicable to the decision of such requests:

The test to be applied to a request for information in terms of the PAIA, as laid down by the court in the case of *National Teachers Union v Superintendent General: Department of Education & Culture, KwaZulu-Natal and Another (D38/08) [2008] ZALC 18*, is as follows:

- a) *In dealing with a request in terms of the Act, the question is not whether the requester is entitled to information but about whether the information is relevant for the purpose of enabling the requester to exercise a right that maybe breached, rendered unenforceable or weakened by the non disclosure.*

(There is no paragraph ‘b’) and the phrase ‘is as follows’ is italicized in the original.)

The use of indented block paragraphs is a universal writing convention to distinguish quoted text from the writer's own prose. One understands, therefore, that the indented block quote is an excerpt from the judgment. This impression is further emphasized by the use of distinguishing italics in the indented paragraph. Indeed, the indented, italicized block paragraph is preceded by the explicit claim that the 'test to be applied ... as laid down by the court ... is as follows:'.

In truth, no such 'test to be applied' was 'laid down by the court' in the National Teachers Union case, and the information officer's statement in this regard was both false and deceptive. To the contrary, Pillay J pertinently noted in paragraph 32 of his judgment: 'Unlike access to information from another person, access to information from the state is manifestly not constrained by the requirement that information should be for the exercise or protection of any rights.' (The judgment is online at <http://j.mp/dxh3sZ>. All shortened internet URLs in this memorandum will henceforth be given simply as 'j.mp [.....]'.)

The information officer thereupon proceeded to apply this false test to the records request. Paragraph 2 commenced: 'In considering your request for information we were guided by this principle, together with Section 32 of the Constitution and the relevant provisions of the PAIA.'

Citing 'Section 32 of the Constitution' and what she considered to be 'the relevant provisions of the PAIA', the information officer then concluded by refusing the records request on wholly unrelated grounds, namely '(i) your request for information [sic: for records] goes beyond your individual circumstances and extends to information on third parties, (ii) the information on third parties does not fall within the section 46 category above'.

Of course, this reason given had nothing to do with her bogus 'test' or 'principle' that the records requester would only be entitled to the records requested if 'the information is relevant for the purpose of enabling the requester to exercise a right that maybe breached, rendered unenforceable or weakened by the non disclosure'.

And nowhere in PAIA does one find entitlement to records of a public body excluded by reason of being 'beyond [the requestor's] personal circumstances'.

The so-called 'principle' by which 'we were guided' bobs up at the very end of the letter refusing the records request, after a lengthy and irrelevant argumentative excursus into the underlying dispute. Final paragraph 8 notes that the request for records is 'declined' for the further reason given that 'it is not relevant to you exercising any right you may have in law' – only it's a 'test', a 'principle' that has no bearing on a request for records from a public body, as PAIA makes clear, and the court in the National Teachers Union case plainly stated.

And as the Supreme Court of Appeal underscored in *Mittalsteel SA Ltd v Hlatshwayo* [2006] SCA 94 (RSA) (j.mp/bKUmCW):

The issue before us is ... whether the appellant at the relevant time and in creating the requested documents was a "public body" as that term is to be understood in PAIA. If it was then the respondent is entitled to the documents requested by it in terms of s 11 of PAIA. The section is headed "Right of access to records of public bodies". Subsection 11(1) provides that a "requester *must* be given access to a record of a public body if" (emphasis added [in the judgment]) (a) the requester complies with all the procedural requirements of the Act and (b) access to the record is not refused in terms of any ground set out in the provisions of PAIA dealing with the records of public bodies. None of these provisions is applicable to the respondent's request, and compliance with procedural requirements is not in issue.

As to the first reason stated for not complying with the Act – '(i) your request for information [sic: for records] goes beyond your individual circumstances and extends to information on third parties, (ii) the information on third parties does not fall within the section 46 category above' – a glance at the list of records sought shows that the records requester wasn't seeking 'information on third parties'. A relatively small part of the request identified records of communications with certain third parties or sworn confirmation, as section 23 of PAIA requires, that



such records don't exist, showing that contrary to what had been alleged or suggested, in truth such communications never took place.

To protect their privacy – if privacy really was a genuine consideration – records of communications to and from third parties have only to 'be edited by blanking out the name of any third party whose privacy would otherwise be infringed by disclosure', as Brand JA put it in *Unitas Hospital v Van Wyk* [2006] SCA 32 (RSA). (j.mp/cHDY5D)

However, the fact that privacy issues were not a genuine concern, but rather a false covering pretext for not complying with the Act, is revealed by the fact that the information officer provided the records requester with all the names of the third parties concerned in a record she later put up for her own purposes in January 2011.

Since the information officer's provision of the records requested could not conceivably 'involve the unreasonable disclosure of personal information about a third party', as Section 34 (1) of PAIA puts it, the provisos in Section 46 cited and discussed in paragraph 3 of her letter are perfectly irrelevant.

But even if it were relevant, Section 46 would anyway require access to the records for the reasons that '(a) the disclosure of the record would reveal evidence of ... a substantial contravention, or failure to comply with, the law ... and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question'.

Though in terms of section 11(3) of the Act, the intention or premise animating a request for the records of a public body is strictly immaterial to the decision of the request, the then available and now conclusive new evidence to hand supports the case that the disclosure of the records would indeed reveal further documentary 'evidence of ... a substantial contravention of, or failure to comply with, the law' – namely the Constitution and the Acts enforcing it, prohibiting discrimination on unlawful grounds in the democratic era, including by reason of 'conscience and belief' and because, motivated by these, the records requester has 'campaign[ed] for ... a cause' and participated in the public policy debates of the day, as expressly 'encouraged' by Section 195(1)(e)



in Chapter 10 of the Constitution. And by reason of race, unless justified by the provisions of the Employment Equity Act 55 of 1998 and the reported cases elucidating its practical application. Also the Acts and regulations governing the operation and financial management of public bodies.

As for 'the public interest' – proviso (b) of Section 46 – the public have a clear interest in the disclosure of the records in the case, because they have a fundamental interest in having the certain assurance that they will not be subject to illegal discrimination of any form when applying for employment with a public entity responsible through Parliament to the people of South Africa. It's clearly in the public interest that any breach of constitutional rights by publicly accountable institutions, especially those within the sphere of justice and constitutional development, be exposed. The hard won political gains of justice and human rights for all citizens of our country, including liberty of opinion and expression, are jeopardized if a major public entity whose very purpose is to secure justice for those citizens can subvert and undermine those principles of justice and human rights without being held accountable.

In sum, the information officer's reasons for refusing the request are idle in law. Having duly complied 'with all the procedural requirements of the Act' (as the Mittalsteel judgment put it), the records requester was and remains accordingly entitled to the records requested.

On 15 December 2010 the records requester filed a second records request with LASA, and prompted by another letter from the SAHRC the information officer responded, with allowance for Christmas break, on 28 January 2011.

Although the first paragraph of her letter referred to 'your letter of 15 December 2010 in which you request access to information in Legal Aid South Africa's possession in terms of the Promotion of Access to Information Act', the information officer entirely failed to deal with this second records request. Instead she revisited the records requester's first records request in August which she'd already refused in October.

Her reason for neglecting to deal specifically with the second records request in December appears from paragraph 10 of her January letter, in

which she claims that the December records request 'repeated' the August 2010 one. This is incorrect, as a cursory comparison of the two Form A annexures in the August and December requests for records reveals.

There is some partial overlap between the two requests in August and December to the extent that NOE Nair's allegations in his 3 August 2010 letter and the information officer's allegations in her 18 October 2010 letter qua CEO have a similar thrust – except that where Nair was vague the information officer qua CEO is specific; and the records request in December was plainly directed at testing the veracity of her specific allegations.

Together with her January letter, the information officer put up twelve records, four of which the records requester already had: a third copy of a letter sent him in August, a copy of which the information officer had already sent him in October; part of the Approval Framework she had also already sent him in October; an email exchange with the records requester and the Human Resources Executive in April; and two documents the records requester had himself generated and sent to the information officer: a scanned copy of the newspaper advertisement for the Pietermaritzburg Senior Litigator post and a transcription of an oral presentation the information officer made to the Portfolio Committee on Justice and Constitutional Development in October 2010.

The information officer's purpose in providing these records was not to comply with the records requests; it was to support her defensive allegations concerning the core dispute made in her October letter and repeated in her January letter. Concerning each of the twelve records the information officer noted in her 'Aim of the Document' column: 'To demonstrate ...' her contentions.

Nonetheless, four of the records provided by the information officer happened more or less to meet some of the requests for records in the August and December lists. Apart from these few records requests coincidentally met to the records requester's satisfaction in this manner, the rest of the unanswered December request is deemed refused by section 27 of the Act.

The net result of the information officer's second go at the August request was the same. Again she refused it, this time on a variety of different grounds – tacitly abandoning her first set of spurious reasons for refusing it. And as just mentioned, she failed to specifically deal with the December records request.

This memorandum will demonstrate that like her October reasons, the information officer's new reasons given in January are equally vacant and indefensible under PAIA, and that the records that she has unlawfully refused are compellable by way of a High Court mandamus.

In the light of the information officer's allegations qua CEO in her October and January letters, and the evidence of the hard documentary information annexed to her January letter contradicting these allegations, the facts concerning the underlying cause of action in this matter have at last become clear, to the extent that it is now plain on the evidence of the available records that the records requester's appointment was unlawfully aborted off the record and behind the scenes and that a false justification was advanced to cover the true reason for it. In the interests of expedition, therefore, a number of records refused by the information officer, though clearly compellable under PAIA, will not be pursued.

In his letter covering his August request the records requester pointed up the information officer's obligations under section 23 of the Act to notify the records requester on affidavit where specified records requested do not exist. Notwithstanding this advice on the operation of the Act, the information officer failed to comply. A draft affidavit concerning non-existent records is accordingly annexed hereto for the information officer to sign under oath or affirmation, as section 23 requires.

In terms of section 74(2)(b) of the Act, no internal appeal lies against the refusal of a request for access to the records of a public body such as LASA. Under section 83(3)(c) of the Act, however, 'The Human Rights Commission may ... if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act'.

The records requester seeks the assistance of the SAHRC's PAIA Unit in (a) impressing on the information officer the extraordinary

seriousness of her violation of the records requester's constitutionally guaranteed right to public documentary information, and (b) urging the information officer's compliance with the Act, to avert (i) mandatory interdict proceedings in the South Gauteng High Court (Johannesburg) for an order compelling the information officer's compliance with the Act (draft papers are ready) and (b) being reported under section 84 of the Act as a PAIA delinquent in the SAHRC's next annual report to Parliament. Both events set to bring LASA into grave disrepute.

The judgment in *The President of RSA v M & G Media* (570/10) [2010] ZASCA 177 delivered recently by the Supreme Court of Appeal points up the enormous gravity and implications of the information officer's apparent contempt for what are rightly described as the 'founding values ... of accountability, responsiveness and openness' in our new constitutional democracy (j.mp/fgVErS):

[1] Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the state',¹ of which Ngcobo J said the following in *Brümmer v Minister for Social Development*:² "The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.'"

Paragraphs 9–11 of the judgment emphasize this:

[9] The Constitution – and consequently the legislation that it has spawned – signals a decided rejection of past odious laws, policies and practices. In *Shabalala v Attorney-General of Transvaal*⁷ Mahomed DP expressed that trenchantly in relation to the Interim Constitution (it applies as much to the present Constitution) when he called it a 'radical and decisive break from that part of the past which is unacceptable'. He went on to say: "There is a stark and

SHERIFF
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HIGH COURT
PRETORIA 323

dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is “justifiable in an open and democratic society based on freedom and equality”. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment’.

[10] Etienne Mureinik⁸ captured the essence of the Bill of Rights⁹ when he described it as a ‘bridge from a culture of authority ... to a culture of justification’ – what he called ‘a culture in which every exercise of power is expected to be justified.’ The Bill of Rights, he continued¹⁰ ‘is a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises’.

[11] The ‘culture of justification’ referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it unless he or she can justify withholding it. And if he or she refuses a request then ‘adequate reasons for the refusal’ must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request).¹¹ And in court proceedings under s 78(2) proof that a record has been requested and declined is enough to oblige the public body to justify its refusal.¹²

Footnotes:

1. Section 32(1)(a): ‘Everyone has the right of access to any information that is held by the state...’.

Section 31(1)(b) confers a right of access to information held by other persons in certain circumstances but that is not relevant for present purposes.



- 2. 2009 (6) SA 323 (CC) para 62.
- 7. 1996 (1) SA 725 (CC) para 26.
- 8. Erienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 (10) SALJ 31.
- 9. Once more with reference to the Interim Constitution.
- 10. Page 32.
- 11. Section 25(3)(a).
- 12. Section 81(3)(a): 'The burden of establishing that...the refusal of a request for access ... complies with the provisions of this Act rests on the party claiming that it so applies'.

A critical analysis and refutation of the information officer's new reasons given in January for refusing the August records request follows below, with an identification of the unanswered December requests for records still required. The analysis is divided into twenty parts.

FIRST RECORDS REQUEST, AUGUST 2010

PART 1

Record:

A: Relevant excerpts from the minutes of meetings of the Management Board [Executive Committee] of Legal Aid South Africa, and its resolutions, concerning:

- 2. – the procedural mechanism adopted for the recruitment of suitably qualified and experienced Senior Litigators, and specifically the selection, confirmation, and appointment process.

Response:

- 11. As to your requests 1 and 2: I wish to refer you to the Legal Aid SA's Policy Document read with the Approval Framework.

Critical analysis and comment:

Paragraph 11 is no adequate response to request A2. Neither the 'Approval Framework' nor the 'Recruitment' ('Policy Document') protocol (the part of it provided) say anything about any confirmation process following the regional professional selection board's selection

and recommendation of a candidate for appointment. The part (it seems) of the 'Recruitment' protocol supplied makes no provision for any second interview. If the information officer can't produce any resolution supporting her allegations qua CEO in paragraphs 6.2-4 of her October letter, section 23 of the Act requires her to confirm on affidavit that no such record exists.

PART 2

Records:

A: Relevant excerpts from the minutes of meetings of the Management Board [Executive Committee] of Legal Aid South Africa, and its resolutions, concerning:

9. – the two issues: 'At this stage it is not even clear which applicants will be considered in the second round or if indeed we will proceed with a second round' (– per Clark in her email to Brink on 30 April 2010, quoted in paragraph 28 of Brink's letter to Vedalankar).

Response:

16. As to requests 8 and 9: I refuse to grant you access to this information on the basis of section 44(1) and (2) as the information sought herein relate to the deliberative process of the Legal Aid SA with third parties. Such information was required by it before; during and/or after engaging, in interviews and candidates reference check. (Refer in this regard to the Legal Aid SA's Policy on Recruitment Checks.)

Critical analysis and comment:

Paragraph 16 is no proper answer to request A9. It appears from the information officer's response here that enquiries were made and information was gathered purportedly in terms of the 'Recruitment Checks' provisions of the 'RECRUITMENT' protocol (V2).

In her letter of 18 October 2010, the information officer qua CEO alleged that the Pietermaritzburg Senior Litigator post and two others had been frozen for budgetary reasons, and stated, 'Should we decide to unfreeze these positions in the future, the positions will be duly



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advertised and you will be at liberty to submit your application for any of the positions.’ Which means – in her opinion – the records requester’s successful application for the post is now dead and buried, and not merely hibernating until better days.

This absolutely excludes the possibility envisaged by section 44(1)(b) of the Act that the ‘the disclosure of the record could possibly be expected to frustrate the deliberative process’ – namely the records ‘containing personal information about’ the records requester to which he’s entitled to access in terms of the express provisions of section 11(2) of the Act: ‘A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.’

In short, the records requester is entitled to copies of all and any records containing personal information and opinions about him that LASA has gathered.

If no minutes exist of any discussion of what applicants would be interviewed for a second time, and whether or not such second interviews would be held, the information officer is required by section 23 of the Act to state on affidavit that there is no record of any discussion ever having taken place of these two issues that Clark alleged to have arisen.

PART 3

Record:

A: Relevant excerpts from the minutes of meetings of the Management Board [Executive Committee] of Legal Aid South Africa, and its resolutions, concerning:

- 10 – the particular ‘pace we have decided ... to complete our process’ to recruit and appoint a Senior Litigator for Pietermaritzburg – which remaining ‘process’ entailed arranging an interview of the selected candidate by Judge Mlambo (– per Clark in her email to Brink on 30 April 2010, nearly six months after the professional selection board had interviewed the shortlisted candidates and made its selection, quoted in paragraph 33 of Brink’s letter to Vedalankar; and per KwaZulu-Natal Regional HR Officer Baboo Brijlal’s (‘Brijlal’)

telephonic advice to Brink, quoted in paragraph 21 of Brink's letter to Vedalankar).

Response:

17. As to request 10: No time limit was set to finalise the recruitment process.

Critical analysis and comment:

Paragraph 17: Ad request A10: If contrary to what Clark claimed to the records requester – six months after his successful interview and no feedback from LASA whatsoever – no decision on the record was taken as to the 'pace we have decided ... to complete our process' to appoint him Senior Litigator at Pietermaritzburg, after his selection and recommendation, section 23 of the Act requires the information officer to confirm this on affidavit.

PART 4

Records:

A: Relevant excerpts from the minutes of meetings of the Management Board [Executive Committee] of Legal Aid South Africa, and its resolutions, concerning:

- 11. – the decision to 'put on hold ... the recruitment process to finalize the appointments for all vacant Senior Litigator posts' (– per Nair in his letter to Brink).
- 12. – the decision by the Management Board thereafter that 'we will not be proceeding with the filling of any of these posts due to various reasons' – and the excerpt of the minutes relating to this resolution will enumerate and detail all of these 'various reasons' for aborting the recruitment process in respect of the Pietermaritzburg Senior Litigator position, and of the other Senior Litigator posts referred to, after the Pietermaritzburg Senior Litigator post had promptly been nationally re-advertised following Judge Mlambo's disapproval of the first applicant selected; after shortlisted candidates had been interviewed; and after the professional selection board had assessed, selected and recommended a suitably qualified and experienced

senior legal professional for the Pietermaritzburg Senior litigator post (– per Nair in his letter to Brink).

Response:

19. For your requests 11; 12: 13 (PART A); 13 (PART B); 14 (PART A); 14 (PART B); 15 (PART B): please refer to the correspondence on costs cutting measures, read with the Legal Aid SA’s Approval Framework.

Critical analysis and comment:

It is no sufficient answer to requests A11 and A12 to ‘refer to the correspondence on costs-cutting measures, read with the Legal Aid SA’s Approval Framework’. These records do not reflect either of the alleged two decisions specified in requests A11 and A12. The records to which the information officer refers don’t even mention Senior Litigators, let alone any decision-making to first ‘put on hold’ their recruitment and then ‘freeze’ the vacant posts for which they were selected and recommended. If no records of these two alleged decisions exist, section 23 of the Act requires the information officer to confirm this on affidavit.

PART 5

Record:

A: Relevant excerpts from the minutes of meetings of the Management Board [Executive Committee] of Legal Aid South Africa, and its resolutions, concerning:

16 – any other matters discussed by the Management Board concerning Brink and/or the Pietermaritzburg Senior Litigator post, after the re-advertisement of the post in August 2009.

Response

21. As for your request 16: I am not aware of any of the Executives discussing you and/or your candidacy for the above-mentioned post save the edited and blacked out recommendation for the next

round of interviews. This is attached hereto as part of the bundle in the table above.

22. As to the regional panel members' individual assessment notes; scores; deliberations; submissions and assessment reports on you, I, having considered your request, refuse to grant you access thereto as these documents and information relating thereto were compiled from the Legal Aid SA's panel's deliberative process of decision-making in the assessment and interview of candidates, including you, for vacant posts in the Legal Aid SA. I am entitled to refuse to grant you this information in terms of section 44(1) and (2) of PAIA.

Critical analysis and comment:

Ad paragraph 21: If no records exist of any discussion of the records requester or of the Pietermaritzburg Senior Litigator post by members of the management executive after August 2009, section 23 of the Act requires the information officer to confirm this on affidavit.

Ad paragraph 22: Not having been asked for access to 'the regional panel members' individual assessment notes; scores; deliberations; submissions; and assessment reports', the information officer's announcement of her decision to retain these records is irrelevant. (Had they been sought, the information officer would have been required to produce them under section 11(3) of the Act.)

PART 6

B: Other records

Records:

1. The minutes of the KwaZulu-Natal regional professional selection board's interview with ... Brink on 12 November 2009.

28. The instruction issued to Mdaka to send Brink a 'regret letter'.

32. The Management Board's, alternatively Nair's, alternatively, Mdaka's, alternatively any other officer's notifications of the Principals of the Pietermaritzburg and Durban Justice Centres (and of any other Justice

Centres affected) that the Management Board, alternatively Nair, would 'not be proceeding with the filling any of these posts' for Senior Litigators which had been nationally advertised for a second time, and for which suitably qualified and experienced senior legal professionals had been shortlisted, interviewed, assessed and selected by the KwaZulu-Natal (and any other) regional professional selection board(s) (-per Nair's letter to Brink).

Response:

23. I have decided, notwithstanding the above position, and after I have exercised my discretion, to grant you access to an edited/blacked out version of the final recommendation of the panel to show you what its decision was.

24. As for your requests 1; 2; 28; 29; 30; 31; and 32: Except for annexures "V7" and "V9" (attached), I have exercised my discretion against granting you access thereto. I refuse to grant you access thereto in terms of section 44(1) and (2) of PAIA. My reason therefore is that this information was generated and compiled as a result of the Legal Aid SA's panel's deliberative process of decision-making in the assessment and interview of candidates, including you, for the vacant posts in the Legal Aid SA.

Critical analysis and comment:

Ad paragraph 23: The 'final recommendation of the panel' (V7) in its edited form sufficiently meets requests B1 and B2 for the records requester's purposes. (Having supplied the record, the question becomes academic, but the Act affords the information officer no 'discretion' to withhold such personal information about the records requester following the conclusion of the selection process.)

Ad paragraph 24: Request B28 for "The instruction issued to Mdaka to send Brink a "regret letter"" is not satisfied by providing the records requester with a third copy of the letter itself (V9).

The request for a copy of the simple instruction is manifestly not hit by 'section 44(1) and (2) of PAIA', having nothing to do with 'Legal Aid SA's panel's deliberative process of decision-making in the assessment



and interview of candidates, including you, for the vacant posts in the Legal Aid SA' as the information officer wrongly alleges.

For the same reason, request B32 for copies of the written 'notifications of the Principals of the Pietermaritzburg and Durban Justice Centres (and of any other Justice Centres affected) that the Management Board, alternatively Nair, would "not be proceeding with the filling any of these posts" for Senior Litigators' is plainly not hit by 'section 44(1) and (2) of PAIA' either.

PART 7

Records:

- 3. All written communications, including email, between Brijlal and Nair, and/or other members of the Management Board, concerning the Durban and Pietermaritzburg Senior Litigator posts, subsequent to the re-advertisement of these posts in August 2009.
- 4. All written communications, including email, between members of the KwaZulu-Natal regional professional selection board and Nair, and/or other members of the Management Board, concerning the Durban and Pietermaritzburg Senior Litigator posts, subsequent to the re-advertisement of the posts in August 2009.

Responses:

18. As to requests 3 and 4 (both in Part A and B of the request document): there are no such communications that I am aware of. I am willing to provide you with an email from Ms Clark dated 30 April 2010 which you already have in your possession and which you have referred to in your letter to Mlambo JP on or about 30 November 2010. This was blind copied to the ROE of KZN Mr Mdaka and Brijal.

25. As to requests 3: and 4: Please refer to above. [paragraph 24 quoted in Part 6 above]

Critical analysis and comment:

In her paragraph 18, the information officer incorrectly suggests that requests A3 and A4 are the same as B3 and B4. In fact they are quite different – the former are clearly not for records of ‘communications’. If, other than Clark’s email to the records requester blind-copied to Mdaka and Brijlal, no records exist of ‘written communications’ between the parties described over the period defined in these requests, the information officer is required to confirm this on affidavit under section 23 of the Act.

PART 8

Record:

- 13. All records, including but not limited to email, reports and notes, pertaining to the decision to ‘put on hold ... the recruitment process to finalize the appointments for all vacant Senior Litigator posts’ (– per Nair’s letter to Brink).
- 14. All records, including but not limited to email, reports and notes, pertaining to the decision to finally abort the ‘recruitment process’ and ‘not be proceeding with the filling of any of these posts’ (– per Nair’s letter to Brink).
- 15. All records, including but not limited to email, reports and notes, canvassing the ‘various reasons’ that the alleged decision to abort the ‘recruitment process’ was allegedly ‘due to’ (– per Nair’s letter to Brink).

Response:

19. For your requests 11; 12; 13 (PART A); 13 (PART B); 14 (PART A); 14 (PART B); 15 (PART B): please refer to the correspondence on costs cutting measures, read with the Legal Aid SA’s Approval Framework.

29. As to requests 13, 14 and 15: The decision to create or abolish a post is derived from the Approval Framework which is annexed herewith. All communication relating thereto is also attached. If for any reason, the e-mail or any form of communication is not

proceeding with the filling of any of these posts', i.e. 'all vacant Senior Litigator posts' (– per Nair's letter to Brink).

Response:

30. As to your requests 16; 19; 20; 21; 22; 23; 24; 26; and 27: I have exercised my discretion against granting you access to this information in terms of sections 43(1) as it relates to confidential correspondence with third parties.

31. I further refuse to grant you access on the same information and documents on the basis of section 44(1) and (2) as the information sought herein relate to the deliberative process of the Legal Aid SA with third parties. Such information was required by it before; during and/or after engaging, in interviews and candidates reference check. (Refer in this regard to the Legal Aid SA's Policy on Recruitment Checks). I also refuse to provide access to this record as it relates to research or information gathering by third parties on behalf of Legal Aid SA as contemplated in section 43(1) and (2). It seems apparent to me that you already have document(s) that you seek in this regard.

Critical analysis and comment:

Section 43(1) of the Act doesn't provide that 'confidential correspondence with third parties' (the information officer's homebrewed faux legal phrase) is excluded from access by a records requester. The section provides (in the heading) for the 'Mandatory protection of research information of third party and protection of research information of public body'.

The information officer hasn't made a case that any 'research information' is contained in the correspondence records identified in request B16 – nor, even if it did contain 'research information', that 'serious disadvantage' would ensue from disclosing it.

Section 43(1) obviously has no application to request B16, and the information officer is not justified in denying the records requester access to the records of LASA's 'correspondence with third parties' about him and the post he was duly selected and recommended for.

Section 11(2) of the Act explicitly entitles the records requester to access records of ‘correspondence with third parties concerning Brink and/or his selection by the KwaZulu-Natal regional professional selection board for appointment to the Pietermaritzburg Senior Litigator post’.

Request B26 manifestly has nothing whatsoever to do with ‘research information of third party [or] public body’ nor with ‘Operations of public bodies’. It is a request for copies of the ‘regret letters’ allegedly ‘sent to all of the other shortlisted candidates interviewed by the KwaZulu-Natal regional professional selection board on 12 November 2009’. Copies of these letters are required, and any confidential information (addresses, telephone numbers) may be blacked out. If no such letters were sent, and no copies of them exist in LASA’s records accordingly, the information officer is required by section 23 of the Act to confirm this on affidavit.

Section 43(1) and (2) of the Act (‘Mandatory protection of research information of third party, and protection of research information of public body’) and/or section 44(1) and (2) (‘Operations of public bodies’) do not preclude access to these records.

In stating her impression in her paragraph 31 that the records requester ‘already ha[s]’ the records mentioned in her paragraph 30, the information officer is mistaken.

PART 10

Record:

17. Vedalankar’s ‘referr[al]’ to Nair of Brink’s letter to her, ‘to provide a response’ to it on her behalf (– per Nair’s letter to Brink).
18. Any further correspondence between Vedalankar and Nair by email or otherwise concerning Brink, and/or his letter to Vedalankar.

Response:

32. As for your requests 17 and 18: There is no such discussion other than the documents provided to you.

Critical analysis and comment:

None of the 'documents provided' by the information officer correspond with these requests. Section 23 of the Act requires the information officer to confirm on affidavit that the records identified in requests B17 and B18 don't exist.

Part 11

Record:

25. Nair's 'request' issued to the 'HR department' in accordance with his stated intention to 'request our HR department to send out regret letters to all persons who were interviewed during the first round of interviews' on 12 November 2009 (– per Nair's letter to Brink).

Response:

33. As for your request 25: As this information would relate to the internal deliberations; opinions and views intended for Legal Aid SA to take certain decisions as contemplated in section 44(1) and (2), I have exercised my discretion against granting you access thereto. I therefore refuse to grant you access to this information or document.

Critical analysis and comment:

A simple instruction of the sort identified in request B25 is manifestly not hit by section 44(1) and (2), because it does not reflect 'deliberations; opinions and views intended for Legal Aid SA to take certain decisions'. The information officer has no 'discretion' under the Act to refuse this record and the records requester is entitled to it. If this record doesn't exist, section 23 of the Act requires the information officer to confirm this on affidavit.

PART 12

Record:

33. All and any records, including internal email, founding Nair's statement: 'I can now confirm that we will not be proceeding with the

filling of any of these posts', i.e. 'all vacant Senior Litigator posts' (- per Nair's letter to Brink).

Response:

As for your requests 33; and 34: Your attention is referred to the costs-cutting measures correspondence in which Nair was instrumental in identifying posts that should be cut; frozen etc. This was part of the Executive's mandate around that time. See especially the email and memo from COO to all Executives: ROES; JCEs and 'All Staff' herein above wherein Cabinet also propagated the same mechanisms as Legal Aid SA.

Critical analysis and comment:

None of the 'costs-cutting measures correspondence in which Nair was instrumental in identifying posts that should be cut; frozen etc' makes any mention of any decision to 'not be proceeding with the filling of any of these posts', i.e. 'all vacant Senior Litigator posts'. The 'correspondence ... referred to' is accordingly irrelevant. If no records exist concerning the alleged decision not to 'be proceeding with the filling of any of these posts', i.e. 'all vacant Senior Litigator posts', section 23 of the Act requires the information officer to confirm it on affidavit.

PART 13

Record:

35. All and any other electronic records, including internal email, in which the word 'Brink' features, where it clearly or possibly refers to the records requester Adv Anthony Brink (- conduct a search on the word 'Brink' of the computer server at LASA's national office on which all computer files, documents, and email are archived).

Response:

35. As for request 35: To the best of knowledge there are no other electronic records relating to you.



Critical analysis and comment:

Section 23 of the Act requires the information officer to confirm her allegation on affidavit, noting the steps she's taken to enquire and make sure.

SECOND PAIA RECORDS REQUEST, 15 DECEMBER 2010:

Note: All text quoted below originates from paragraphs 6.6 and 6.7 of the CEO and information officer's letter to the records requester on 18 October 2010.

PART 14

Records:

1. Records/relevant excerpt(s) from records reflecting the quantum of LASA's 'anticipated funding for the 2010/11 financial year'.
2. Records/relevant excerpt(s) from records reflecting the quantum of the lower 'funding' that 'materialise[d]'.
3. Records/relevant excerpt(s) from records reflecting the quantum of the 'funding ... shortfall ... cutting our baseline funding by a significant amount'.

Response:

None.

Comment:

Even if unintentionally, the records V3 and V4 provided by the information officer satisfactorily meet requests 2.1-3.

PART 15

Record:

4. Minutes reflecting NOE Nair's 'motivat[ion of] a change in the organizational structure', namely 'a reduction to our staff



establishment in the 2010/11 financial year in order to meet this shortfall', alternatively the mere 'freezing of positions' without an actual 'reduction to our staff establishment to meet this shortfall'.

Response:

None.

Comment:

It's plain from paragraph 29 of the information officer's letter that no record exists to support her clear implication qua CEO in her October letter that Nair 'motivate[d] a change in the organizational structure' apropos of Senior Litigator posts, namely 'a reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall' by abolishing vacant Senior Litigator posts, alternatively by the 'freezing of positions'.

The only record that exists of a 'change in the organizational structure' that Nair 'motivate[d]' in 2010 was his proposal on 15 July that 56 vacant junior criminal defence practitioner posts be abolished, with more if necessary, and possibly some paralegal and administrative posts too, in 'reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall'.

The information officer's statements quoted in record request 2.4 were made in the context of her allegations that Senior Litigator posts had been frozen to meet LASA's budgetary 'shortfall' (paragraphs 6.6-7 of her October letter).

Section 23 requires the information officer to confirm on affidavit that no record exists of Nair having 'motivate[d]' for 'a reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall' by abolishing vacant Senior Litigator posts, alternatively by the 'freezing of [such] positions'.

PART 16

Record:

- 5. Minutes reflecting NOE Nair's consultation with HRE Clark and noting her views, in terms of section 8.1.2 (b) of the Approval Framework, concerning his intended 'decision that all vacant senior litigator posts that were vacant would be immediately frozen'.

Response:

None.

Comment:

It further appears from paragraph 29 of the information officer's January letter that no record as identified in request 2.5 exists, and if this is correct section 23 requires her to confirm this on affidavit.

PART 17

Records:

- 6. Minutes of 'management' meetings held 'Since early this year' recording its discussion that 'a reduction to our staff establishment' was 'required ... in order to meet this shortfall' in 'funding' that was lower than 'anticipated' by a 'significant' amount.
- 7. Minutes of 'management' meetings held 'Since early this year' recording the work 'management ... had' to perform 'to identify positions which could be frozen ... in order to meet this shortfall' in 'funding' that was lower than 'anticipated' by a 'significant' amount.
- 8. Minutes and/or notes kept/made 'Since early this year' in which the 'positions which could be frozen' were 'identif[ied]' by 'management'.

Response:

None.

Comment:

193. Though not exactly so, requests 2.6-8 are substantially met by records V4 and V5, and these records suffice.

PART 18

Record:

- 9. The resolution passed by 'management' in terms of section 8.1.2 (b) of the Approval Framework, following consultation with HRE Clark and with COO Makokoane's agreement, in relation to the claim: 'In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would immediately be frozen.'

Response:

None.

Comment:

It also appears from paragraph 29 that no record exists of the decision mentioned in request 2.10, and if so section 23 of the Act requires the information officer to confirm this on affidavit – namely that no record whatsoever exists of any decision by member of the management executive taken 'In July 2010 ... that all senior litigator posts that were vacant would be immediately frozen.'

PART 19

Record:

- 10. Written notification of the Board Executive Committee of the 'decision ... the NOE and CEO took ... In July 2010 ... that all senior litigator posts that were vacant would immediately be frozen'.

Response:

None.

Comment:

It appears from paragraph 34 of the information officer's letter that no record exists of any notification of the Board of Directors of the alleged decision that 'the NOE and CEO took' as alleged by the information officer in her October letter 'that all senior litigator posts that were

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vacant would be immediately frozen'; and if so, section 23 of the Act requires the information officer to confirm this on affidavit.

PART 20

Record:

11. Email to Durban Justice Centre attorney Bongani Mngadi (he says 'in April/May') notifying him that the Durban Senior Litigator post for which he'd applied wasn't going to be filled.

Response:

None.

Comment:

According to Mngadi's information to the records requester on 12 November 2010, this record must exist and the records requester requires it.




ADV ANTHONY BRINK

3 March 2011

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REPORT TO THE HONOURABLE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Re: Adv Anthony Brink

1. Background

On 12 July 2010 Advocate Anthony Brink wrote to the CEO expressing his concern with regards the delays in the finalisation of the recruitment process for the senior litigator position at our Pietermaritzburg Justice Centre. Adv Brink was an applicant for this position and he was interviewed by our regional selection panel. He was recommended by the regional selection panel to the second stage of the interview process, before a nationally constituted interview panel.

This nationally constituted panel did not however sit to consider applicants recommended for the second stage of interviews. Whilst the initial reason for this panel not sitting was caused by delays in coordinating a meeting time suitable for all members of the panel of which the Chairperson of the Board of Directors is one, other pressing financial constraints facing Legal Aid SA resulted in a decision being made not to proceed with the filling of vacant senior litigator posts. Adv Brink was subsequently informed of this decision.

This resulted in him generating numerous requests for information in terms of PAIA, arising from his discontent with not being appointed to this post. He also wrote several lengthy letters to various individuals and organisations, including to the Chairperson and other Directors of the Board of Legal Aid SA. In his letter to the Board, Adv Brink also made allegations relating to multiple contraventions of the PFMA, including the presentation of false financial information in our 2009/10 Annual Report.

2. Adv Brink's discontent with non-appointment to Senior Litigator Position

From the many letters received from Adv Brink, it is clear that he believes that he was not appointed because of a racial and political bias against him resulting in a conspiracy to exclude him from Legal Aid SA. The conspiracy he alleges relates to his political views against the use of anti-retro viral drugs for HIV AIDS and also discrimination against him as a white male. He incorrectly believes that the second round of interviews was simply a confirmation process where he appears before the Chairperson of our Board who must ratify his appointment. This however is incorrect. All executives involved in this matter have confirmed that this individual was not known to them, nor his political views or publications, and that the first time they came across his name was when his letter of complaint about his non-appointment was received.

The reason for freezing of senior litigator posts was that Legal Aid SA was going through a very uncertain period with regards the provision of funding by the DoJ to finance our OSD phase 1 implementation, which was resulting in an unbalanced budget for 2010/11. As a result various options to make up for the shortfall in our funding, including the freezing of posts, were considered. Various documents which clearly demonstrate the financial uncertainty that we were experiencing at the time, as well as contingency measures that we were contemplating to cater for this, including

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the freezing of many positions, were shared with Adv Brink in response to his request for information in terms of PAIA.

Adv Brink however remains unconvinced that our reasons for freezing this post is honest, as he remains convinced that there is a conspiracy against him. Legal Aid SA, has under the current leadership, never refused legal aid nor refused appointment of any individual/s because of their race or political views. He is currently pursuing his requests for further information with the Human Rights Commission and has threatened litigation. We are satisfied that we have been open and transparent with Adv Brink in terms of the provision of information as it relates to his core complaint. We are in the process of ensuring that any outstanding requests for information are attended to in terms of PAIA, notwithstanding the fact that many of his requests do not relate to his complaint regarding non appointment. Whilst Adv Brink has threatened legal action in his correspondence to us, we remain confident that we have acted properly in this matter and that we have complied with the provisions of PAIA. We have responded to all Adv Brink's requests for information in terms of PAIA within the timeframe stipulated in the Act. We copied these responses to the SA Human Rights Commission to confirm our compliance with PAIA.

Adv A Brink subsequently referred a dispute against Legal Aid SA in the CCMA on 20 April 2011. He alleged unfair discrimination on the basis of political conscience, belief and activism on the issue of HIV Aids and to a lesser extent race. He further contended that he held the belief that this alleged unfair discrimination resulted in him not being appointed to the position of Senior Litigator at Legal Aid SA – a position for which he applied and was interviewed. The relief he sought was monetary in the amount of R55 000 per month from January 2011 (he avers to have become aware of the alleged discrimination at this point) to the date of the conciliation which totalled R220 000. The dispute could not be resolved as Legal Aid SA submitted that it believed that it had not directly or indirectly discriminated unfairly against Mr Brink on the basis averred by him or on any other basis. A certificate of non-resolution was thus issued by the CCMA on 20 April 2011 which paved the way for Mr Brink to refer the dispute for adjudication to the Labour Court, a route he has to date not pursued.

3. Allegations of multiple contraventions of the PFMA

In Adv Brink's November correspondence to the Board Chairperson and members of the Board, he draws attention to the fact that Table 3 in Section 4.1 at page 106 of Legal Aid SA's Annual Report for 2009/10, relating to executives remuneration, contains incorrect column totals for basic salaries, bonuses, incentives, expenses/allowances and other unspecified payments.

An examination of this table has revealed that these four column totals are indeed incorrect, although the last column relating to total expenditure is correct. It must also be noted that the row totals which show individual executives remuneration is correct. We have since been able to determine that the source of this problem was caused by human error at the time when the annual report was being prepared for printing.

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The executives' remuneration is also referred to in Note 18.2 of the AFS (page 145 of the Annual Report) in which the total per executive as well as the overall total is indicated. The total per

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Confidential

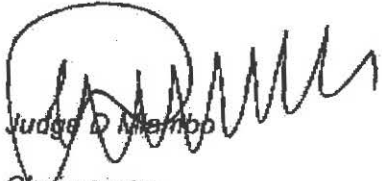
executive as well as the overall total in Note 18.2 of the AFS is the same as the row totals and overall total in Table 3. This confirms that the material amount included in the AFS was not incorrect and therefore our AFS 2009/10 remain correct.

Given that the AFS remain correct and that the error in Table 3 is not material to the AFS, the allegations by Brink of 'false and misleading figures' being a serious criminal offence and that our Annual Financial Statements in our Annual Report are not a 'true and fair representation' are unfounded.

4. Conclusion

Notwithstanding the insulting and malicious tone of most of Adv Brink correspondence with us on this matter, we have tried to convince him, by the provision of relevant documentary evidence, that the basis of his conspiracy theory is unfounded. It is however clear that Adv Brink believes otherwise. Therefore, whilst we would not prefer litigation in the normal course of dispute resolution, it seems in this matter that Adv Brink would be well advised to approach the courts to ventilate his issues. We are however comfortable that we would be able to show to a court of law that the decisions we took on this matter made good business sense and were in the best interests of our organisation at the time. As a result of Mr Brink's invasive conduct, the Chairperson of the Board wrote to him specifically requesting him to cease contacting Board members as the attached email attests. Despite the Board Chairperson's request Mr Brink has continued with his tirade.

This report is sent to the Ministry to provide the necessary background to this matter as well as to contextualise and clarify the allegations by Mr Brink re contravention of the PFMA and provides the necessary reassurance that no contravention occurred in this regard.



Judge D Mlambo

Chairperson

Legal Aid SA

9 March 2011

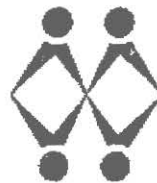
Updated with sections in blue font

22 June 2011

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22 June 2011

Mr L Landers MP
Chairperson Justice Portfolio Committee
National Assembly
P O Box 15
Cape Town
8000

Dear Mr Landers

Adv A Brink

Your letter dated 23 March 2011 on the above matter refers. Please accept my sincere apology for the delay in responding to your letter. Attached please find a report on this matter which was submitted to the Minister of Justice and Constitutional Development in March 2011 and which has since been updated. In summary I wish to reiterate what I said to Mr Brink when he wrote and complained to me :

"Your conduct is unbecoming to say the least and borders on harassment. I have on a previous occasion informed you that I could find nothing untoward in how you have been treated by Legal Aid SA. I reiterate this view. I further take this opportunity to advise you that the Board of Directors of Legal SA is not the appropriate forum to raise your matter. Your approach to the Board is therefore misdirected. Your matter was handled at Executive Management level, being the level at which such matters are handled, and should you have any issues in that regard you are free to institute whatever legal action you may deem appropriate to obtain whatever redress you fathom is due to you. For this reason I call on you to desist from communicating with Board Members in this regard. I have, in turn, requested Board Members to ignore all communications from you and/or on your behalf."

I trust that the attached report and this letter clarify the matter concerning Mr Brink.

Yours faithfully



Judge Dunstan Mhambiro
Chairperson

Legal Aid South Africa

Your voice. For justice.

N.N 504





REPORT TO THE HONOURABLE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Re: Adv Anthony Brink

1. Background

On 12 July 2010 Advocate Anthony Brink wrote to the CEO expressing his concern with regards the delays in the finalisation of the recruitment process for the senior litigator position at our Pietermaritzburg Justice Centre. Adv Brink was an applicant for this position and he was interviewed by our regional selection panel. He was recommended by the regional selection panel to the second stage of the interview process, before a nationally constituted interview panel.

This nationally constituted panel did not however sit to consider applicants recommended for the second stage of interviews. Whilst the initial reason for this panel not sitting was caused by delays in coordinating a meeting time suitable for all members of the panel of which the Chairperson of the Board of Directors is one, other pressing financial constraints facing Legal Aid SA resulted in a decision being made not to proceed with the filling of vacant senior litigator posts. Adv Brink was subsequently informed of this decision.

This resulted in him generating numerous requests for information in terms of PAIA, arising from his discontent with not being appointed to this post. He also wrote several lengthy letters to various individuals and organisations, including to the Chairperson and other Directors of the Board of Legal Aid SA. In his letter to the Board, Adv Brink also made allegations relating to multiple contraventions of the PFMA, including the presentation of false financial information in our 2009/10 Annual Report.

2. Adv Brink's discontent with non-appointment to Senior Litigator Position

From the many letters received from Adv Brink, it is clear that he believes that he was not appointed because of a racial and political bias against him resulting in a conspiracy to exclude him from Legal Aid SA. The conspiracy he alleges relates to his political views against the use of anti-retro viral drugs for HIV AIDS and also discrimination against him as a white male. He incorrectly believes that the second round of interviews was simply a confirmation process where he appears before the Chairperson of our Board who must ratify his appointment. This however is incorrect. All executives involved in this matter have confirmed that this individual was not known to them, nor his political views or publications, and that the first time they came across his name was when his letter of complaint about his non-appointment was received.

The reason for freezing of senior litigator posts was that Legal Aid SA was going through a very uncertain period with regards the provision of funding by the DoJ to finance our OSD phase 1 implementation, which was resulting in an unbalanced budget for 2010/11. As a result various options to make up for the shortfall in our funding, including the freezing of posts, were considered. Various documents which clearly demonstrate the financial uncertainty that we were experiencing at the time, as well as contingency measures that we were contemplating to cater for this, including

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the freezing of many positions, were shared with Adv Brink in response to his request for information in terms of PAIA.

Adv Brink however remains unconvinced that our reasons for freezing this post is honest, as he remains convinced that there is a conspiracy against him. Legal Aid SA, has under the current leadership, never refused legal aid nor refused appointment of any individual/s because of their race or political views. He is currently pursuing his requests for further information with the Human Rights Commission and has threatened litigation. We are satisfied that we have been open and transparent with Adv Brink in terms of the provision of information as it relates to his core complaint. We are in the process of ensuring that any outstanding requests for information are attended to in terms of PAIA, notwithstanding the fact that many of his requests do not relate to his complaint regarding non appointment. Whilst Adv Brink has threatened legal action in his correspondence to us, we remain confident that we have acted properly in this matter and that we have complied with the provisions of PAIA. We have responded to all Adv Brink's requests for information in terms of PAIA within the timeframe stipulated in the Act. We copied these responses to the SA Human Rights Commission to confirm our compliance with PAIA.

Adv A Brink subsequently referred a dispute against Legal Aid SA in the CCMA on 20 April 2011. He alleged unfair discrimination on the basis of political conscience, belief and activism on the issue of HIV Aids and to a lesser extent race. He further contended that he held the belief that this alleged unfair discrimination resulted in him not being appointed to the position of Senior Litigator at Legal Aid SA – a position for which he applied and was interviewed. The relief he sought was monetary in the amount of R55 000 per month from January 2011 (he avers to have become aware of the alleged discrimination at this point) to the date of the conciliation which totalled R220 000. The dispute could not be resolved as Legal Aid SA submitted that it believed that it had not directly or indirectly discriminated unfairly against Mr Brink on the basis averred by him or on any other basis. A certificate of non-resolution was thus issued by the CCMA on 20 April 2011 which paved the way for Mr Brink to refer the dispute for adjudication to the Labour Court, a route he has to date not pursued.

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LWELLYN LANDERS MP
National Assembly

e-mail:
llanders@parliament.gov.za
29 June 2011

Ref.: Brink (29-06-11)

Adv. Anthony Brink
25 Baker Road
Prestbury
PIETERMARITZBURG

Dear Advocate Brink

Your e-mail dated Tuesday, 28 June 2011 refers.

On receipt of your original letter I submitted a letter to the Chairperson: Legal Aid South Africa (LASA), Judge D. Mlambo dated 23 March 2011 (please see Annexure **A**).

On 22 June 2011 I received a written response from Judge Mlambo, Chairperson: LASA, a copy of which I have attached (please see Annexure **B**) which serves as a formal response to your complaint.

It is important to note that whilst I have sought to comply with your request for intervention in this matter, normally neither I nor the Justice Portfolio Committee becomes involved in the day-to-day operational matters of LASA, or any other entity of the Justice family.

If I have been tardy in not responding to you sooner, do forgive me. In light of the facts set out in Justice Mlambo's response, I now regard this matter as closed. Thank you.

Yours faithfully

LWELLYN LANDERS MP

Chairperson: Justice & Constitutional Development
Portfolio Committee

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SAHRC COMPLAINT: GP/2011/0166

ADDENDUM TO COMPLAINT FORM

AMENDED AND FURTHER COMPLAINT

My complaint against Legal Aid South Africa information officer Vidhu Vedalankar on Monday 11 April 2011 for 'violating my fundamental right to documentary information held by the state, as guaranteed by section 32 of the Bill of Rights and given effect by PAIA' was filed after the expiry of the 30-day period prescribed by section 25 of PAIA for compliance with my third records request and I'd received no response.

It transpires, however, that my third request was indeed dealt with – by deputy information officer Brian Nair, newly appointed by Vedalankar for the job. On 19 April I learned from LASA that its email to me with attachments on 8 April had been trapped as 'oversize' by LASA's 'MailMarshal' email software, and so had not been transmitted to me; and that in view of this, hardcopy originals of the documents were mailed to me by registered post. I collected these on the same day.

Nair also dealt with my First Memorandum to the SAHRC's PAIA Unit detailing the outstanding records specified in my first and second requests in August and December 2010 that I still required, or confirmation on oath that they didn't exist.

I accept that LASA's response out of time to my third request was the result of unanticipated technical difficulties, and I accordingly waive the point.

Nair has finally provided me with the long-outstanding section 23 affidavit I require concerning my first and second requests in August and December 2010, as redacted in my First Memorandum. He has also put up a section 23 affidavit concerning my third records request.

Nair's two section 23 affidavits comply with PAIA for my purposes.

It is to be regretted, however, that like Vedalankar has twice done in this matter, Nair has also conflated my PAIA requests with the core dispute between us about his and Vedalankar's unlawful abortion of my appointment to the senior professional post for

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which I was selected and recommended by a professional selection panel, an issue wholly irrelevant to my PAIA requests; and he has likewise abused the occasion to contend aspects of Vedalankar's and his demonstrably false version of the facts ahead of the impending trial of my claim to appointment and compensation/damages in the Labour Court (my Statement of Claim is substantially complete and the case will be launched soon). Misconceiving the purpose of a section 23 affidavit, Nair even puts up superfluous confirming affidavits, which are not contemplated by PAIA and are therefore irrelevant.

At all events, now that I have section 23 affidavits in respect of both my first and second records requests as redacted in my First Memorandum and my third records request, I withdraw my complaint to the SAHRC that the information officer has not provided me with a section 23 affidavit as required by PAIA.

My residual complaint for adjudication in this regard is that in contempt of her obligations under section 23 of PAIA, Vedalankar has kept me waiting unnecessarily for more than six months for an affidavit in respect of my first and most extensive records request delivered on 30 August 2010. And it wasn't just legal ignorance, because I highlighted this requirement and quoted the Act in my covering letter of 26 August.

I further persist with my complaint that in violation of my constitutional right to access LASA's records, deputy information officer Nair is still unlawfully withholding several critically important records from me, required for the preparation of my case in the Labour Court; and he is doing so on grounds that are manifestly factually and legally spurious. Nair's given reasons for refusing my requests are analysed and debunked in my Second Memorandum annexed hereto.

I have included provision in my Second Memorandum for the SAHRC's PAIA Unit to record its concurrence or disagreement with my factual and legal analysis. The PAIA Unit's shared opinion that the reasons given by Nair are legally irrelevant, conveyed to him for discussion with legally qualified personnel in LASA (neither he nor Vedalankar are legally qualified), ought to suffice to exact the outstanding records that he is unlawfully withholding.



But if it doesn't, and Nair continues concealing the evidence of the records I need for my case, I persist with my appeal at the conclusion of my complaint to the SAHRC earlier this month that the SAHRC convene 'a public hearing, urgently ... in terms of Article 6.5 of the Complaints Handling Procedures, for Vedalankar's [and Nair's] interrogation by the SAHRC concerning [their] contemptuous refusal to comply with [their] constitutional and legal obligations'.

And, 'If, despite this, Vedalankar [and Nair] persist.. in unlawfully withholding the records I need ... I request that the SAHRC applies in its own name in terms of Article 7.2 to the South Gauteng High Court, Johannesburg, for an order compelling Vedalankar [and Nair] to comply with my records requests, on pain of the usual sanction for contempt of court.'

The difference between civil wrongs and crimes is that the public have an interest in the proper prosecution of the latter. Vedalankar's and Nair's contempt for the constitutional rights circumscribed by section 32 of the Constitution and made practically enforceable by PAIA is obviously a matter of public interest and importance, exceeding my personal interest, particularly having regard to the special aggravating circumstances in the matter.

It is plain that the real reason that Vedalankar and Nair have persistently concealed records from me, and from the Labour Court – asserting the most transparently vacuous pretexts for doing so – has been to delay and pervert the true and just determination of my claim.

The Preamble to PAIA 'Recogniz[es]' that 'the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations'.

It was precisely to put an end to these abuses that PAIA was enacted.

Not only have Vedalankar and Nair abused their power as CEO and NOE of a public body to secretly violate my human right to equality and not to be discriminated against on prohibited unconstitutional grounds and then attempted to cover this up

with lies, they have also abused their power as information officer and deputy information officer to conceal the documentary evidence revealing this.

To this end, Vedalankar as information officer has even lied to me to cover her tracks as CEO.

Item 35 of my first records request in August 2010 sought 'All and any other electronic records, including internal email, in which the word 'Brink' features, where it clearly or possibly refers to the records requester Adv Anthony Brink (– conduct a search on the word 'Brink' of the computer server at LASA's national office on which all computer files, documents, and email are archived).'

Vedalankar falsely replied on 28 January 2011: 'As for request 35: To the best of knowledge [sic], there are no other electronic records referring to you.'

In truth and in fact, there were 'such other electronic records referring to you' – on her own computer.

In my August letter to Vedalankar covering my first request, I drew her attention to Section 90(1)(b) of PAIA, and quoted it: 'A person who with intent to deny a right of access in terms of this Act ... conceals a record ... commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.'

I considered it necessary to mention this in view of the many lies I'd already been told by two other executive managers.

Despite being warned of this criminal sanction for concealing records, Vedalankar deliberately suppressed 'other electronic records referring to' me.

On 30 November 2010 I petitioned LASA Chairman Judge Mlambo and the Board of Directors about Vedalankar's refusal to comply with PAIA and her unlawful discrimination against me.

I emailed my letter as a PDF attachment individually to Judge Mlambo and to those members of the Board listed in LASA's annual report whose email addresses I'd found by internet searching. I did not copy Vedalankar in.

On 6 December Board Secretary Bee-Mari Schoeman (I hadn't copied her in either) emailed on Judge Mlambo's behalf to acknowledge his receipt of my letter and to tell me he was 'presently out of the country' and would respond when he could. I thereafter ascertained from his secretary at the Labour Court that he was returning on the 22nd.

Judge Mlambo emailed me his reply on 30 December 2010.

The PDF properties folder of his letter, however, tell that it was authored on Vedalankar's computer two weeks earlier on the 15th, while Judge Mlambo was still in the USA.*

This shows that there was email correspondence between Vedalankar and Judge Mlambo within the ambit of my request item 35.

Please advise me whether I should report Vedalankar's criminal contravention of section 90(1)(c) of PAIA to the police.

Please advise me further what steps will be taken to force Vedalankar to disgorge these records that she's hiding and lying about. (When I called for them specifically in my third records request, deputy information officer cluelessly refused them as 'not relevant'.)

As my recent email with the PAIA Unit of the SAHRC shows (copied to the Complaints Registrar on 11 April together with my complaint), I have repeatedly asked whether LASA has been registered as a PAIA delinquent in the SAHRC's next report to Parliament, and what the reporting period is. And whether a particular Commissioner has been appointed to oversee the implementation of PAIA, as Parliament has urged. I have not been favoured with a reply.

It is unprofessional – even in the public service – for attorneys not to respond to correspondence, and I would ask that my simple questions in this regard be answered at last. The matter is extraordinarily important.

Even if the remaining critically important records that Nair is unlawfully withholding are finally surrendered to me – thereby averting the need for an application to the

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High Court to compel – please advise me what action will the SAHRC take concerning Vedalankar’s and Nair’s shocking display of contempt for section 32 of the Constitution, and their abuse of their offices as information officer and deputy information officer in not complying with their obligations under PAIA in order to conceal the evidence of their violation, as CEO and NOE, of my constitutional right to equality and not to be discriminated against on prohibited grounds in the democratic constitutional era.

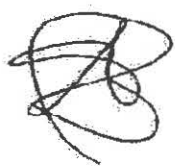
A year ago, on 14 April, at a meeting between SAHRC representatives and the Parliamentary Portfolio Committee on Justice and Constitutional Development, John Jeffrey MP emphasized ‘the importance of people getting access to information’, and urged the appointment of a dedicated Commissioner to oversee this, even offering more money for the project.

Dene Smuts MP remarked: ‘We do not have access to information in South Africa. The whole thing is characterized by mute refusal.’ Even with ‘limited resources, there’s never any excuse to do nothing. ... We would appreciate it if the Commission would just get cracking’ notwithstanding staff turnover problems etc. And ‘It would be great if you would just try to cut through all the difficulties and get going.’

I would be grateful, and I look forward to the SAHRC’s response and advices.


This complaint almost certainly concerns the most serious case of deliberate contempt for PAIA by information officers of a public body yet reported to the SAHRC.

Dated at Pietermaritzburg this 28th day of April 2011.



ADV ANTHONY BRINK

*All material documents in this matter are archived online at:
www.tig.org.za/LASA
username: lasa
password: LASA2010

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SECTION 1

First Memorandum

PART 9

26. Excluding the 'regret letter' to Brink from KwaZulu-Natal Regional Operations Executive Vela Mdaka ('Mdaka') on 23 August 2010 and emailed to Brink by Brijlal by way of an email attachment on the same day, the 'regret letters' sent to all of the other shortlisted candidates interviewed by the KwaZulu-Natal regional professional selection board on 12 November 2009 – following the decision made not to 'be proceeding with the filling of any of these posts', i.e. 'all vacant Senior Litigator posts' (– per Nair's letter to Brink).

Information officer's response on 28 January 2011:

30. As to your request.. ... 26 ...: I have exercised my discretion against granting you access to this information in terms of sections 43(1) as it relates to confidential correspondence with third parties.

Requester's critical analysis and comment in First Memorandum on 3 March 2011:

Section 43(1) of the Act doesn't provide that 'confidential correspondence with third parties' (the information officer's homebrewed faux legal phrase) is excluded from access by a records requester. The section provides (in the heading) for the 'Mandatory protection of research information of third party and protection of research information of public body'. ...

Request B26 manifestly has nothing whatsoever to do with 'research information of third party [or] public body' nor with 'Operations of public bodies'. It is a request for copies of the 'regret letters' allegedly 'sent to all of the other shortlisted candidates interviewed by the KwaZulu-Natal regional professional selection board on 12 November 2009'. Copies of these letters are required, and any confidential information (addresses, telephone numbers) may be blacked out. ...

Deputy information officer's response on 8 April 2011:

I confirm that regret letters were sent to two other applicants for the senior litigator positions. However such information cannot be disclosed to third parties without their consent.

Requester's further comment:

The term 'personal information' defined in section 1 of PAIA 'means information about an identifiable individual, including, but not limited to ... (f) correspondence sent by the individual that is implicitly or explicitly of private or confidential nature or further correspondence that would reveal the contents of the original correspondence'.

Section 34(1) of PAIA provides that 'the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party'.

Section 34(2) provides: 'A record may not be refused in terms of subsection (1) insofar as it consists of information – (a) about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned'.

I am not seeking any 'personal information about a third party' or 'about an individual' or 'correspondence sent by' him.

I am seeking copies of formal 'regret letters' sent to the other shortlisted applicants interviewed for the vacant Pietermaritzburg and Durban Senior Litigator posts. Four were interviewed, including me. Our names are no secret and appear on KZN Regional Operations Executive Vela Mdaka's Motivation form, signed off by the selection panel in November 2009.

This Motivation form, supplied to me by the information officer on 28 January 2011, well over a year after my successful interview, shows that indeed I was selected and recommended for appointment to the Pietermaritzburg Senior Litigator post for which I had applied (as Bongani Mngadi was chosen for Durban).

Mngadi's information to me on the telephone on 12 November 2010 was that he'd already been notified 'in April/May' 2010 that the Durban

post wasn't going to be filled. (In contradistinction, despite my persistent appeals for information, I was deliberately kept waiting in the dark.)

Mngadi told me he never got any 'regret letter' in August 2010, like I did.

The deputy information officer appears to confirm this in his reasons for refusing me copies of the other 'regret letters': 'I confirm that regret letters were sent to two other applicants' – not three.

As mentioned, I have the other candidates' names. Their addresses are 'publicly available', as section 34(2)(c) puts it, kept on register by the Law Society. The names and addresses on the 'regret letters' are accordingly not 'personal information about a third party' or 'about an individual'.

Bald 'regret letters' from LASA, such as the one I received, giving no reasons and containing no 'personal information about a third party' or 'about an individual', are manifestly not hit by section 34 of PAIA and are therefore compellable and must be disclosed.

No consent by the addressees is required under section 34(2) of PAIA, and the deputy information officer ignorantly misstates the law in alleging it is.

The deputy information officer's refusal to disclose these records is incompetent and unlawful.

The record is compellable and it must be disclosed.

SAHRC PAIA Unit's comment:

We agree/We disagree because

SECTION 2

Third records request on 9 March 2011

Record 3.2

LASA's complete Recruitment protocol if it extends beyond nine pages. (Record V2 annexed to Vedalankar's letter ends abruptly on page 9 and appears to be incomplete. (Bundle, pages 228-34))

Deputy information officer's response on 8 April 2011:

The policy deals with Recruitment, Induction, Probation and Relocation. You have been provided with the entire extract of the policy as far as it relates to the recruitment aspect. The remaining part of the policy does not deal with recruitment issues and is therefore irrelevant.

Requester's comment:

It makes no intelligent sense for the information officer to claim that only part of a document entitled 'Recruitment' deals with recruitment, and that the section dealing with e.g. 'Induction' is not a recruitment matter.

In terms of section 11(3) of PAIA, an information officer's opinion as to what he thinks the requester's purpose is in requesting a record is irrelevant.

PAIA does not require that a record of a public body be relevant to anything for it to be compellable.

'Relevance' is not a criterion for the discoverability of a public record.

No discretionary or mandatory grounds exist for refusing me the complete 'Recruitment' protocol, only some of which has been provided.

I have requested the complete record and PAIA entitles me to access and read it.

See further the dicta of the Supreme Court of Appeal judgment in the Mittalsteel case quoted in the introduction to my First Memorandum.

The deputy information officer's refusal to grant me access to the complete Recruitment protocol is unlawful.

He is required by PAIA to disclose the complete record.

PAIA Unit comment:

We agree that PAIA entitles the records requester to access the complete record. / In our opinion the records requester is not entitled to access the complete record because

Records 3.6-9

- 6. The minutes of the Board meeting held on 29 May 2010.
- 7. The minutes of the Board meeting held on 30 October 2010.
- 8. The agenda of the Board meeting held on 26 February 2011.
- 9. The minutes of the Board meeting held on 26 February 2011.

The deputy information officer's response on 8 April 2011:

I can confirm that no item relating to you was either on the agenda or tabled at any of the Board meetings. ... Your request for information is refused in terms of section 44(1)(a) of the Promotion of Access to Information Act 2 of 2000 as amended.


Requester's comment:

The deputy information officer's response reveals his entire lack of understanding of how section 44(1)(a) applies to records requests of this nature.

He appears to think that section 44(1)(a) veils all agendas and minutes of public body Board meetings from access by the public. Certainly he thinks that all he has to do is invoke the sub-section against my request and that is the end of it; he doesn't even need to apply his mind to each record and exercise a discretion whether or not to refuse access to them, much less does he need to provide a full statement of his reasons, sufficient for a court to interrogate their reasonableness and their validity.

The Supreme Court of Appeal recently considered and rejected this approach in *The President of the Republic of South Africa and Others v*

SHERIFF
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 HIGH COURT
 (PMBURG)



M & G Media Ltd (570/2010) [2010] ZASCA 177; 2011 (2) SA 1 (SCA) (14 December 2010), likening it to that of apartheid officials.

The court noted in paragraph 19 of the judgment that ‘The affidavits that have been filed by the appellants are reminiscent of affidavits that were customarily filed in cases of that kind [tried under apartheid legislation, discussed]. In the main they assert conclusions that have been reached by the deponents, with no evidential basis to support them, in the apparent expectation that their conclusions put an end to the matter. That is not how things work under the Act. The Act requires a court to be satisfied that secrecy is justified and that calls for a proper evidential basis to justify the secrecy.’

As the court put it in the following paragraph: ‘What the appellants’ case amounts to is little more than rote recitation of the relevant sections and bald assertions that the report falls within their terms. That is not the “stark and dramatic contrast” with the past that was referred to by Mahomed DP. Nor does it reflect the “culture of justification” that was referred to by Mureinik and which is imbedded in the Act.’

The apartheid ‘past’ to which the court referred was (per paragraph 18) ‘another time [when] courts were regularly confronted with laws that precluded them from going behind conclusions and opinions formed by public officials’. (In the instant case, the deputy information officer hasn’t even got as far as expressing an opinion and conclusion.)

The court noted in paragraph 22: ‘Some provisions of the Act make secrecy mandatory and others make it discretionary. The sections with which we are concerned are both discretionary. ... Section 44 allows access to a record to be refused “if the record contains an opinion, advice, report or recommendation obtained or prepared ... or an account of a consultation, discussion or deliberation that has occurred ... for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.”’ (ellipsis in the judgment)

The deputy information officer doesn’t even think about whether I’m seeking a record of that nature: he just sees the words ‘including, but not limited to, minutes of a meeting’ and reckons that permits him, without



more, to bar me from accessing and reading the agendas and minutes of LASA Board's meetings.

It's notable that information officer Vedalankar takes a different view of the matter. On 28 January 2011 she gave me the minutes of the Board meeting of 31 July 2010 as well as the 'Report to Board' on 16 July from herself and her fellow executive managers – concerning a policy proposal and resolution. Unlike the deputy information officer, Vedalankar appreciates that such records are not ipso facto secret, to be concealed from the public under section 44(1)(a).

In *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA), the Supreme Court of Appeal held: 'It is clear that s 44(1)(a) limits the right of access to information and s 36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable. Section 39(2) obliges every court to promote "the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. It must also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution.'

These values are not exhibited by the deputy information officer in concealing the evidence of the records I require for trial.

And in *CCII Systems (Proprietary) Ltd v Fakie NO and Others* 2002 JDR 0897 (T) the Hartzenburg J held obiter in paragraph 18 of the judgment: 'The applicant argues that if he was de-selected as supplier due to political pressure or some impropriety a comparison between draft reports and the final one may indicate that that is what happened. Conversely if there was no impropriety the very same comparison will prove that. That raises the question what the object of section 44 is. It was submitted that it is not to hamper a public body in its administration and formulation of policy and to guard against the supply of confidential information prematurely. Senior and junior officials must be able to talk freely about the development of policy matters and their interaction at a stage before finalisation should not at that stage be accessible. Opportunistic entrepreneurs should not be allowed to obtain information along this route which give them an unfair advantage over



their rivals. In my view it does not deal with historic situations. The joint report has been finalized and accepted by Parliament. At this stage the draft reports are only of historic importance and cannot obstruct the joint commission in its work. In my view they are no longer protected by the provisions of section 44.'

This is to say, on Hartzenburg J's construction of section 44, the minutes of LASA board meetings held in the past in regard to settled policy matters 'are no longer protected by the provisions of section 44', even if such minutes were hit by section 44 in the first place.

Nair's statement that 'no item relating to you was either on the agenda or tabled at any of the Board meetings' does not count as a legitimate reason for refusal. He did not know my purpose in seeking the records, and his opinion as to what it might be is irrelevant under section 11(3) and is no valid basis to refuse my requests.

Although it's irrelevant to the decision of my request, I record that my purpose in seeking these records is to determine whether at any of the Board meetings whose agenda and minutes I requested, the Board (a) resolved to abolish or freeze posts to resolve funding problems, and (b) even discussed the abolition or freezing of posts to this end.

In other words, besides the Board's resolution to abolish 56 junior practitioner posts, and none other, taken at its meeting on 31 July 2010 on Vedalankar's, Nair's and other executive managers' recommendation, the Board has never discussed, much less resolved to abolish or freeze any other posts, including critical Senior Litigator posts.

I also wish to establish whether the Board discussed funding issues at the meetings in question.

My main discrimination case is founded on Vedalankar's and Nair's gravely unlawful conduct: their violation of my constitutional rights to equality and not to be unfairly discriminated against on prohibited unconstitutional grounds and their breach of the provisions of the Employment Equity Act in this regard. This is to say, their 'substantial contravention of, or failure to comply with, the law' as contemplated by the overriding provisions of section 46 of PAIA under the heading 'Mandatory disclosure in the public interest'.

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PAIA entitles me to all these records and the deputy information officer is withholding them unlawfully.

PAIA Unit comment:

We agree that PAIA entitles the records requester to access these records, absent a statement of reasons supported by evidence that the refusal of access to these records is reasonably justified under section 44(1)(a). / In our opinion the records requester is not entitled to access these records because

Record 3.12

The 'regret letter' sent in 2010 to the candidate selected and recommended for appointment as Senior Litigator, Mthatha, conveying that LASA executive management had resolved not to fill the post; personal information may be blacked out. (Per Nair's letter to Brink on 3 August 2010 read with Vedalankar's letter to Brink on 18 October 2010. (Bundle, page 19; and page 104, paragraph 7.3))

Deputy information officer's response on 8 April 2011:


The communication that the position was not going to be filled was conveyed to the relevant candidate by the Regional Operations Executive of the Eastern Cape. The information requested is refused and cannot be provided as it relates to third parties as envisaged in terms of section 34(1) of the Promotion of Access to Information Act 2 of 2000 as amended.

Requester's comment:

Section 34(1) of PAIA does not bar the disclosure of a record by reason of the fact merely that it 'relates to third parties'; and the deputy information officer's stated reason for refusing this record is irrelevant and bad in law.

The point is addressed at length in Section 1 above.

I require the record and PAIA entitles me to it.

N.N 411 

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I mentioned in my request that 'personal information may be blacked out'. This excludes the successful Mthatha applicant's name and professional contact particulars, which I require.

Although section 11(3) of PAIA stipulates that my purpose in seeking any record of a public body is immaterial, I record here that I wish to consult the successful Mthatha applicant with a view to calling him as a possible witness to testify in my impending case in the Labour Court.

I also propose advising him of his rights that Vedalankar and Nair, as CEO and NOE, have violated, and to offer to assist him pro bono to vindicate them.

PAIA Unit comment:

We agree that PAIA entitles the records requester to access this record with the name and professional contact particulars visible and not blacked out. / In our opinion the records requester is not entitled to access this record/is not entitled to know the name and professional contact particulars of the successful Mthatha candidate because

Record 3.13

The instruction issued to Board Secretary Bee-Mari Schoeman not to circulate Brink's 30 November 2010 petition addressed to the Chairperson and the Board of Directors to all Board members and not to put it on the agenda of the next Board meeting for discussion, as Brink had requested, and furthermore not to respond to Brink's correspondence to her. (Bundle, page 198, paragraph 6; and page 207, first paragraph)

Record 3.14

All email communications between Judge Mlambo and Vedalankar concerning Brink's petition to Judge Mlambo and the Board of Directors on 30 November 2010.

Record 3.15

LASA Chairperson Judge Dunstan Mlambo's 'request..' to the Board of Directors 'to ignore all communications from' Brink. (Per Judge Mlambo's email to Brink on 24 January 2011. (Bundle, page 209))

Deputy information officer's response on 8 April 2011 regarding requests 3.13-15:

The information requested is refused as it is not relevant because it is after you were informed that we are not proceeding to fill the Senior Litigator position.

Requester's comment:

As mentioned above with reference to section 11(3) of PAIA, an information officer's opinion as to the relevance or otherwise to any fact or issue of a public body's record is itself legally irrelevant.

The deputy information officer's refusal to provide access to the records described in items 3.13-15 above, on the ground that in his opinion these records are 'not relevant', is unlawful.

The records are all discoverable and compellable under PAIA and must be provided.

For easy reference, I quote below from my letter to information officer Vedalankar on 9 March 2011 covering my third PAIA request and dealing with the principle applicable to requests 3.14 and 3.15:

Apropos of the status of the records identified in my new record requests 14 and 15, the Sarah Palin Yahoo email scandal in the US is instructive. In September 2008 the Governor of Alaska and Vice Presidential candidate was found to have been using a private email account to discuss government business. *The article in iTwire pointed up the issue involved: 'Personal emails are not part of the public record. That's the general state of play when it comes to politics in the good ol' USA. It is why there are official public email accounts which are designed for official business use and which become part of the official public record.'* (<http://bit.ly/hnyXO8>)

Your reciprocal communications with Judge Mlambo concerning my letter to him and the Board on 30 November 2010 while he was



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abroad in the US are public records, and I require them. Likewise the record of Judge Mlambo's request to the Board of Directors to ignore my correspondence to the Board concerning the breakdown of lawful governance at LASA; your and LASA's contraventions of the PFMA; and your failure, citing wholly bogus reasons, to comply with your constitutional obligations under PAIA ...

PAIA Unit comment:

We agree that PAIA entitles the records requester to access all these records. / In our opinion the records requester is not entitled to access these records because



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SECOND MEMORANDUM

TO: ATTORNEYS CHANTAL KISOON AND NOKWANDA MOLEFE, PAIA UNIT, THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

IN RE: ADV ANTHONY BRINK AND LEGAL AID SOUTH AFRICA

A CRITICAL ANALYSIS DEMONSTRATING THE FACTUAL AND LEGAL IRRELEVANCE OF THE REASONS ADVANCED BY BRIAN NAIR, DEPUTY INFORMATION OFFICER OF LEGAL AID SOUTH AFRICA, FOR REFUSING ACCESS TO CERTAIN SPECIFIED RECORDS DULY REQUESTED UNDER SECTION 11 OF THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000


This Second Memorandum comprises two sections.

Section 1 deals with newly appointed LASA deputy information officer Brian Nair's response to Parts 9 and 20 of my First Memorandum of 3 March 2011, in which I identified the records I still require but which LASA information officer Vedalankar has unlawfully withheld and which records Nair persists in unlawfully withholding.

Section 2 deals with Nair's unlawful refusal of records specified in my third records request of 9 March 2011.

For ease of reference, Parts 9 and 20 of my First Memorandum are recited in Section 1 below, detailing the records I need that Vedalankar and Nair have unlawfully withheld. Likewise, the records specified in my third records request that Nair has unlawfully refused are recited in Section 2.

In each case, I will analyse and demonstrate the obvious factual and legal vacancy of the reasons Nair advances for unlawfully refusing me access


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to the records I need, in violation of my constitutional right to information.

I have made provision for the SAHRC's PAIA Unit to record its opinion regarding Nair's reasons for concealing from me and from the Labour Court the evidence of the records I seek and which I now urgently require for the preparation of my case against LASA in that court.

I respectfully request this matter be given priority attention: the outcome of my referral of my unfair discrimination complaint to the CCMA was the issue of a non-resolution certificate, as expected, following a conciliation hearing on 20 April, and I am required to launch my case in the Labour Court within six weeks of that date.




ADV ANTHONY BRINK

28 April 2011

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N. N⁴⁰² 

FA

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Our Ref.: GP/2011/0166
Your Ref.:

(Please quote reference in all correspondence)

29 June 2011

MR ANTHONY BRINK

Per Email: arbrink@iafrica.com

Dear Sir

RE: YOUR COMPLAINT LODGED WITH THE GAUTENG PROVINCIAL OFFICE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (THE "COMMISSION")

We refer to the above matter and in particular to your email dated 28 April 2011, together with attachments, the contents of which have been noted.

The Commission has carefully perused all relevant documents that you have provided to it in relation to this matter and confirm as follows:

1. That you have waived your complaint in respect of your third request to Legal Aid South Africa ("LASA") for information, and that you have accordingly accepted LASA's explanation that its late response was attributed to unanticipated technical difficulties.
2. In light of having received the affidavit in terms of section 23 of the *Promotion of Access to Information Act 2 of 2000* ("PAIA") from LASA, you accordingly withdrew your complaint against the information officer of LASA.
3. That the basis of your amended complaint is premised on your dissatisfaction with the time taken by Ms Vedalankar, information officer and CEO of LASA, to provide the required affidavit in accordance with section 23 of PAIA and your belief that LASA continues to conceal further documents which you require for purposes of proceeding with your matter in the Labour Court (page 3 paragraph 4 re addendum to complaint form).

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Chief Executive Officer: K. Ahmed

N.N

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As your complaint specifically relates to the PAIA and in light of the fact that your initial complaint had been lodged with the PAIA unit of the Commission, which unit has been set up to advance the observance of the right to access information enshrined in section 32 of the Constitution, the writer confirms having engaged with the PAIA unit in various in depth consultations regarding the assistance which it provided to you and the role which it has played herein.

We accordingly hereby wish to respond as follows to your complaint:

1. We wish to state from the outset and confirm that the withholding of records or parts thereof, on the part of the information officers of LASA was engaged in extensively by the PAIA unit on your behalf. The PAIA unit has furthermore confirmed that LASA provided some of the records requested as well as an affidavit in terms of PAIA as a result of its facilitation. The affidavit provided by LASA furthermore related to the availability of records which LASA indicated could not be furnished to you.
2. A cogent opinion demonstrating the unlawfulness of the action of the deputy information officer of LASA is made in your memorandum.
3. It is important to note however that a close consideration of the facts and adherence to principles of due process, which would *inter alia* involve obtaining evidence from both parties in this matter, would be required and necessary for the Commission to be in a position to provide a decision herein which it considers fair, objective and justifiable.
4. We note from correspondence that you have provided and based on your engagement with the PAIA unit, that you intend using responses furnished by the Commission (PAIA unit) in respect of the 5 (five) questions posed to the PAIA unit, to further your matter which is currently before or is shortly to be adjudicated upon by the Labour Court.

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Chief Executive Officer: K. Ahmed

N. N 499

A handwritten signature in black ink, appearing to be "N. N".

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5. In this regard we wish to advise that if this is indeed correct, this proposed action would be prejudicial and not necessarily in the interest of justice, as our office has not had an opportunity to test your assertions by putting your allegations to LASA for a response. It is also to be emphasized, as you were previously advised by the PAIA unit, that due to a lack of resources, the PAIA unit is not able to conduct a full investigation into the matter in order to satisfy itself to the extent required to provide the opinions as requested. This will therefore undoubtedly unfairly impact on potential proceedings before any court of law or tribunal, which in the Commission's view, would be better placed to assess and test all evidence before pronouncing on the lawfulness of the conduct of the deputy information or information officers.

Therefore, given the impact of litigation herein, on both yourself and the information holder, the Commission does not deem it appropriate at this stage to enter proceedings which you intend instituting or have instituted by providing said opinions. The Commission may however, and reserves it right to do so at a later stage, enter proceedings as an amicus of the court, if it deems such action necessary and subject to it having adequate resources to do so.

We confirm that the Commission has on various occasions communicated to you that it is unwilling to initiate or participate in proceedings in this matter for want of resources. The PAIA legislation is cognizant of the need to permit the Commission the discretion to respond to specific matters to the extent that such action is "reasonably possible".

6. It is the Commission's view therefore that on the facts of the matter before it and in terms of the PAIA legislation, specific matters which include partial and complete refusal, dissatisfaction with the quality, type or extent of information provided are to be adjudicated before the courts.
7. It is accordingly the Commission's considered opinion that it has in terms of section 83(3)(c) of PAIA provided you with assistance through the PAIA unit to the full extent of its resource availability.
8. In light of the aforementioned and in terms of Article 4.2 of the Commission's Complaints Handling Procedures, it is our opinion that this matter will more effectively and expeditiously be dealt with through adjudication by a court of law.

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Chairperson: L. Mushwana; **Deputy Chairperson:** G. Govender; **Commissioners:** L. Mokate, B. Malatji, J. Love and T. Titus.

Chief Executive Officer: K. Ahmed

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N. N.

A handwritten signature in black ink, appearing to be "N. N." with a stylized flourish.