

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

---

**INDEX - VOLUME C**

---

ITEM NO.	DESCRIPTION OF ITEM	PAGES
13.	Annexure - FA11 - Durban Labour Court Judgement dated 18 September 2014	214 - 248
14.	Annexure FA12 - letter by A Brink dated 17 November 2014	249 - 257
15.	Annexure FA13 - letter by A Brink dated 25 November 2014	258 - 279
16.	Annexure FA14 - Durban Labour Court Judgement dated 27 November 2014 i.r.o. application for leave to appeal by A. Brink	280 - 282

17. Annexure FA15 - letter by P. Hundermark  
dated 3 February 2015 283 - 285
18. Annexure FA16 - letter by A Brink  
dated 19 March 2015 286 - 306
19. Annexure FA 17 – letter by T. Mtati  
dated 26 May 2015 307 - 321

BRAAMFONTEIN

PRIVATE BAG X76

BRAAMFONTEIN, 2017

TEL: 011 877 2000

FAX: 011 877 2222

**C/O: PIETERMARITZBURG JUSTICE CENTRE**

183 CHURCH STREET

PIETERMARITZBURG, 3201

TEL: 033 394 2190

**REF: T MTATI/S SEKGOTA**

TO: THE REGISTRAR OF THE HONOURABLE COURT  
PIETERMARITZBURG HIGH COURT

AND TO: **ANTHONY ROBIN BRINK**  
RESPONDENT  
23 BAKER ROAD  
PRESTBURY  
PIETERMARITZBURG  
CEL: 083 676 0884



FA  
214

REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Reportable

Case no: D529/11

In the matter between

**ANTHONY ROBIN BRINK**

**Applicant**

and

**LEGAL AID SOUTH AFRICA**

**Respondent**

Heard: 28 May 2014

Delivered: 18 September 2014

Summary: Claim based on unfair discrimination under section 6 (1) of the Employment Equity Act ('EEA') the applicant sought an order that failure to appoint him to the post of Senior Litigator was unfair discrimination on prohibited grounds namely his conscience, belief or political opinion - applicant said he was an acutely unpopular and widely reviled leading dissident activist in the most politically inflamed AIDS treatment controversy – circumstantial evidence – principles of equality- in discrimination cases creating an inference that the employer lied can give rise to the extremely important inference that lying was for a particular reason such as to cover up a discriminatory purpose – act of discrimination not proved.

---

**JUDGMENT**

---

CELE J

N.N

Introduction

[1] This is a claim based on unfair discrimination brought under section 6 (1) of the Employment Equity Act<sup>1</sup> ('EEA'). The applicant sought an order declaring that in aborting his appointment to the post of Senior Litigator, Pietermaritzburg, following his recommendation by a duly constituted selection panel, the respondent unfairly discriminated against him on grounds prohibited by section 6 (1) of the EEA, namely on grounds of his conscience, belief or political opinion. Upon such a declaration he then sought an order in the following terms:

1. to direct the respondent to appoint him to the post, retrospective to 1 January 2010;
2. to pay him damages for lost income in a sum equivalent to the salary he would have earned had he been appointed to the post on that date;
3. to compensate him for *iniuria* in the sum of R 1 million;
4. to pay him *mora* interest at the prescribed rate on his damages for lost income, computed month to month from this commencement date to date of payment, and on his compensation award from date of judgment to date of payment;
5. to publish the order made in the case once in the *Sunday Times* newspaper and for a period of one year on the respondent's website in the 'About us' tab; and
6. to pay his costs on the scale as between attorney and client.

[2] The respondent denied having discriminated against the applicant. It pleaded in its amended response to the applicant's amended statement of claim that budgetary insufficiency caused it to simultaneously abort its recruitment of Senior Litigators for its Pietermaritzburg, Durban and Mthatha Justice Centres.

<sup>1</sup> Act Number 55 of 1998

N.N

Factual Background

- [3] While there are contradictory versions in the evidence led by the parties, there are many respects where their evidence was not in dispute. I shall accordingly allow myself to be guided by the parties' approach in briefly outlining the evidence of what turned out to be a lengthy trial. To them, I am indebted. The respondent created a number of posts which were then approved by the its Board of Directors on 24 November 2006 at the instance of the respondent's Management Executive Committee to remedy the respondent's lack of professional staff that were senior enough to take on cases of a highly complex nature. It was proposed that the respondent would build up such capacity at each province linked to a High Court unit. Such senior litigators would be able to undertake more complex work as well as support and mentor other High Court staff. In KwaZulu Natal, the respondent issued an advertisement for two of such posts for Durban and Pietermaritzburg. After the simultaneous advertisement of the nine new Senior Litigator posts in October 2007, six were filled. A Kimberley post was re-advertised in May 2009 while the Pietermaritzburg and Durban Senior Litigator posts were re-advertised in June and again in August 2009. The applicant, an advocate, was one the applicants. He was successful in securing an interview in the recruitment for the Pietermaritzburg post.
- [4] On 12 November 2009, the applicant was interviewed with other shortlisted candidates for the respondent's Senior Litigator post at Pietermaritzburg. Duly constituted under the respondent's Policies and Procedures on Recruitment, Induction, Probation and Relocation ('Recruitment code'), the selection panel comprised the respondent's senior lawyers in the region. In November 2009, the selection panel unanimously recorded its recommendations of the applicant and Durban High Court Unit Manager Mr Bongani Mngadi. The recommendation report does not specify who was recommended for which post, but the respondent admits that the applicant was selected for Pietermaritzburg and by implication Mr Mngadi for Durban. The selection was cast as a 'Recommendation for Next Round Interviews'. Provision was made at the foot of the recommendation for the National Operations Executive (the

N. N

NOE) Mr Nair to approve or reject the selections, by signing in either the 'Recommendation accepted' or 'Recommendation not accepted' box.

[5] On the same day that the panel signed the recommendation, KwaZulu-Natal Regional Human Resources Manager (the HRM) Mr Baboo Brijlal emailed it as a scanned attachment to the KwaZulu-Natal Regional Operations Executive (the ROE) Mr Vela Mdaka for transmission to Mr Nair and to the National Human Resources Executive (the HRE) Ms Clark, along with the CVs attached of all interviewed shortlisted candidates, including the CVs of the two persons who were not recommended in that selection process for the second round of interviews. The reason why Mr Brijlal also sent Mr Mdaka for transmission to Mr Nair the CVs of the candidates not recommended was because he had received telephone instructions to do so.

[6] On 26 November 2009, Mr Mdaka forwarded the recommendation and CVs to Mr Nair, but not to Ms Clark. On receiving the recommendation Mr Nair neither recorded his approval nor his disapproval of the applicant and Mr Mngadi by signing the recommendation either way. His reason for not doing so forms the central issue of the case. On 3 December 2009, the applicant telephoned Mr Brijlal to ask for the interview results. Having chaired the interview, taken the minutes, and co-signed the recommendation of the applicant, Mr Brijlal knew the results but his response was that he was not free to disclose them and instructed the applicant to wait.

[7] On 14 April 2010, now five silent months since his interview, the applicant telephoned Ms Clark for information about the state of affairs. She responded that she had not heard of him before and knew nothing of the pending recruitment process but undertook to enquire further, and within a couple of hours of the applicant's call, reverted by email:

'I have looked into this matter and can confirm it is still in progress and has not been concluded. I will endeavour to expedite the process in which I am not directly involved at this stage. ... Thanks for your keen interest. We hope to conclude the matter soon.'

N.N



[8] Ms Clark invited the applicant to contact Mr Brijlal for updates. Mr Brijlal was the probable source of her information, because Mr Nair and the Chief Executive Officer (the CEO) Ms Vidhu Vedalankar were out of the Braamfontein National office, having just briefed the Parliamentary Portfolio Committee in Cape Town on the respondent's Strategic Plan 2009–2012. On about 19 April 2010 the applicant telephoned Mr Brijlal for updates, but he had none to give. Over the next few days thereafter and following Mr Nair's and Ms Vedalankar's return to office, the applicant repeatedly tried reaching Ms Clark by telephone again, but was unable to get through, and despite his messages left requesting that she return his calls she did not do so.

[9] On 22 April 2010, the applicant emailed Ms Clark, stating his pressing practical reason for needing to know the upshot of the recruitment process one way or the other. Ms Clark's response on 30 April 2010 was, inter alia, that:

'The process is where it is. It is your decision as to whether you wish to wait to allow us to complete the process or whether you wish to withdraw. Applying for a job is done at the applicant's own risk. Being called to an interview is not a guarantee of being appointed to the position. I think you should allow us to complete the process at the pace we have decided. At this stage it is not even clear which applicants will be considered in the second round or indeed we will proceed with a second round. If we require further information or follow up from yourself, our organisation will contact you.'

[10] On 12 July 2010, which was eight months since his interview, the applicant wrote to Ms Vedalankar enquiring when his appointment might be finalised, mentioning his conclusion from Ms Clark's invitation that he 'withdraws' from 'the process' that he had indeed been selected and recommended by the selection panel, and not eliminated. On or about 27 July 2010, Ms Vedalankar read the applicant's letter and emailed Mr Nair about it on 29 July 2010 saying:

'I am not sure what is happening with these senior litigator appointment [sic] but we need to finalise the process and advise the persons interviewed of the

N.N

outcome. Please will you look into this and discuss with Mandi [Clark] and then discuss with me.'

[11] On 3 August 2010, having been asked by Ms Vedalankar to provide a response to the applicant's letter to her, Mr Nair wrote to the applicant saying that the recruitment process to finalize the appointments for all vacant Senior Litigator posts was put on hold due to various reasons. He said that he could then confirm that they would not be proceeding with the filling of any of those posts. He was to request the HR department to send out regret letters to all persons who were interviewed during the first round of interviews. Indeed, on 16 August 2010, Mr Nair instructed Mr Mdaka to inform his HR section to regret all persons who attended senior litigator interviews for both Pietermaritzburg and Durban. On 23 August 2010, Mdaka sent such letters in identical terms to the applicant and to Mr Mngadi, and to one of the unsuccessful applicants, Mr van Wijk, but not to the other, Mr Ngcamu. There was an apology for the delay in informing candidates of the outcome of the interview process.

[12] On 30 August 2010, the applicant delivered a request to Ms Vedalankar qua the respondent's information officer under section 11 (1) of the Promotion of Access to Information Act 2 of 2000 ('PAIA') for 51 specified records concerning the Pietermaritzburg Senior Litigator recruitment and its cancellation, or sworn certification under section 23 (1). By the end of September 2010, Vedalankar had not responded within the 30-calendar-day timeframe prescribed by section 25, read with section 4 of the Interpretation Act 33 of 1957, which the applicant took to be amounting to a deemed refusal under section 27. At the applicant's request the PAIA Unit of the South African Human Rights Commission ('SAHRC') came in and elicited an undertaking to do so.

[13] On 18 October 2010, Ms Vedalankar expressly refused the applicant's entire request for records pertaining to the abortion of his recruitment, alleging a budgetary justification for freezing the appointment by averring, inter alia, that:

'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

N. N

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. Therefore the three vacant Senior Litigator positions for Durban, Pietermaritzburg and Mthatha have been frozen.'

[14] On 11 October 2010, Ms Vedalankar had informed the Justice Portfolio Committee that the respondent's budgetary uncertainty had already been resolved in principle saying that:

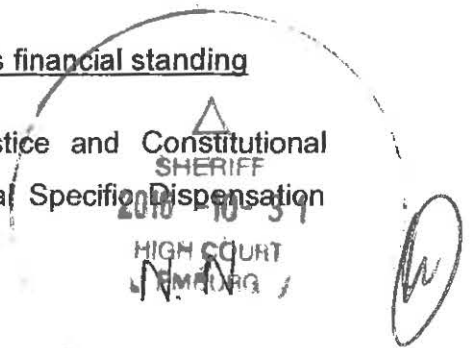
'the Minister did get involved and he had assisted. [the OSD money] was in the mid-term adjustment, we are on track on all components of our Business Plan and we are confident that we will deliver this Business Plan in this financial year also. So we don't have any problem areas that we would like to report on. We do have challenges in terms of some of the funding issues like OSD but at the moment we are in the process of fixing it. In fact the Minister has been involved in that which relates to OSD Phase 1 and Phase 2 funding.'

[15] In her second letter to the applicant of 28 January 2011, refusing his first PAIA request again, as well as his second in December 2010 for further records to test the veracity of her budgetary justification for cancelling his appointment, even refusing and returning his compulsory request fee prescribed by section 22 - Ms Vedalankar reiterated her budgetary explanation for aborting the applicant's appointment saying that:

'the explanation furnished by me to you on 18 October remains valid and will be clarified and added to where possible. I, and the Legal Aid SA under my watch, have never sought to make any decisions regarding the Senior Litigator posts on any ground other than the budget constraints which you have rejected.'

Occupational Specific dispensation (OSD) and Respondent's financial standing

[16] Effective from July 2007, the Department of Justice and Constitutional Development (DoJ&CD) introduced the Occupational Specific Dispensation



(OSD), a salary incentive scheme aiming to assist, recruit and retain specialists in the legal profession who had gained at least 10 years active legal court experience and who were still actively involved in litigation or court work. The OSD was subsequently extended to the respondent. In November 2009, the respondent had already commenced implementing OSD phase 1, and it received funding for this during the 2009/10 financial year as per its annual report for 2009/10 which recorded that the OSD phase 1 shortfall of R23million in the 2009/10 financial year was received from the DoJ&CD. The 'shortfall' had arisen because funding for the implementation of OSD phase 1 in 2009/10 had not been included in the respondent's baseline budget for 2009/10 as expected, having regard to a written assurance by the Director General of the DoJ&CD given on 5 February 2009 in which he had committed himself to adjust the baseline of the respondent in the Adjustment Budget with R69, 6million, inter alia, to cover the implementation of the OSD. As the annual report recorded, funding for OSD phase 1 for 2009/10 was paid by the Department later in the year.

- [17] On 25 February 2010, the respondent's Legal Services Technical Committee (LSTC), chaired by Mr Nair, resolved to invite motivations from interested regions for the reallocation of the redundant Senior Litigator budget for Kimberley to another Justice Centre. The Legal Aid Guide ratified by both houses of Parliament explains the LSTC's function within the respondent:

'The Board delegates authority to the CEO, the Management Exco, LSTC, other committees and officials through its Approval Framework. The LSTC's collective responsibility is managing the legal services delivery programme, the execution of all Board strategy, policies, programmes and plans relating to the legal services delivery programme of the Legal Aid South Africa'.

- [18] According to the respondent's Annual Report 2009/10, the budget for 2010/11 was approved by the Board on 27 February 2010. It included provision for salaries for nine Senior Litigator posts. On 15 March 2010, responding to the LSTC's invitation, the Eastern Cape management region applied for the creation of a new Senior Litigator post at Mthatha. On 24 March 2010, two weeks after a realization by of the budgetary issues that

suddenly confronted the Respondent on 10 March 2010, the LSTC resolved to abolish the Kimberley Senior Litigator post, to create a new Senior Litigator post at Mthatha, to transfer the budget, and to immediately commence recruitment for it. The LSTC took this decision on the strength of the Eastern Cape ROE Mr Thembile Mtati's pressing motivation for the transfer of the post to Mthatha, where he urged it was sorely needed, for the reason inter alia that they were then having one Senior Litigator who was stationed at Port Elizabeth. He said that it was a huge challenge for one person to provide support to the whole Region. Two weeks earlier on 10 March 2010, on learning that its OSD funding allocation had not been included in its baseline budget, the priority for transferring the budget and recruiting for a Senior Litigator at Mthatha was designated 'Immediate'. The same consideration was not accorded to the finalisation of the Pietermaritzburg and Durban Senior Litigator appointments. The budget for the new post was transferred from the vacant, 'redundant', equivalent post at Kimberley; and, as mandated by the LSTC, the new Mthatha Senior Litigator post was immediately advertised in April.

[19] On 13 April 2010, in a follow-up query to the Director General, Vedalankar now raised the prospect that unless the respondent received its outstanding OSD phase 1 allocation, staff cuts would be unavoidable, saying that:

we will be forced to effect the necessary adjustments to our 2010/11 Budget so as to accommodate the R23 million budget shortfall of OSD phase 1. The primary impact of that will unfortunately have to be on service delivery at courts including increased delays and backlogs as a result of us reducing the number of practitioners that we can make available at courts'.

[20] Quite irrespective of the 'budgetary issues that suddenly confronted the Respondent' on 10 March 2010, the respondent's First Quarter Report for April to June 2010, presented to the Portfolio Committee on 11 October 2010, shows that it created 82 new budgeted posts during this period. To fill these and previously established posts, 82 more staff were employed, including 17 principal attorneys and professional assistants, 11 supervisory staff/managers, and 49 candidate attorneys. On 13 October 2010, the day after the

N.N 

respondent's presentation of its First Quarter Report, the Government Communication and Information System news agency Bua News quoted Board Chairperson Mlambo JP stating:

'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.'

[21] In the first quarter April to June 2010, the respondent appeared to have increased its total number of budgeted establishment posts by 3.3% (2513 to 2595) – almost as many as the 3.9% increase (2419 to 2513) for the whole of 2009/10. Following a nil net increase (more resignations than recruitments) in the third quarter September to December 2009 (1136 to 1129) and a 1.6% increase in the fourth quarter January to March 2010 (1129 to 1147), legal staff recruitment appeared to have spiked in the first quarter April to June 2010, increasing by 2.3% (1147 to 1173). In the first quarter April to June 2010, total staff recruitment appeared to have increased by 3.5% (2352 to 2434) – greater than the increase of 3.1% (2281 to 2352) for the whole of 2009/10.

[22] On or about 24 May 2010, Mahikeng Senior Litigator Mr Nzame Skibi was selected and recommended for lateral transfer. However, according to the respondent Mr Skibi was shortlisted for a second round of interviews in Johannesburg. There was no mention of any second round interview for him in the recommendation, nor was any such shortlist drawn.

[23] A report to Board on 16 July 2010 recorded that

'On the 14 July 2010 Legal Aid COO [Makokoane] met with both DoJ DDG [Deputy Director General of the Department of Justice and Constitutional Development], Mr Vuso Shabalala, as well as Adv Pieter du Rand, Legal Aid SA board member in order to clarify the position of DoJ regarding the outstanding OSD funding of R53.8 million for the 2010/11 budget period, as well as the MTEF baseline. DoJ has indicated that they do not have funds to cover for the R53.8 million OSD shortfall. The Executive Authority [i.e. the

N. N

Minister] has however in a meeting with the Legal Aid SA Board Chairperson expressed his wish to have Legal Aid SA service delivery maintained and that DoJ should make funds available to cover the OSD shortfall through the mid-year budget adjustments in September/October 2010.'

[24] On 14 or 15 July 2010, Mr Makokoane asked Mr Nair to identify some vacant posts that might be frozen to save on salary costs with a view to mitigating the budgetary deficit that the respondent anticipated as a result. It had budgeted in the expectation of receiving its OSD phase 1 allocation and was paying OSD phase 1 salary increases to its staff, so the Department's failure to transfer this allocation threatened a budgetary deficit. Then on 15 July 2010 and under the subject heading 'Budget cuts – Reduction in Criminal Court Coverage – July 2010.xlsx', Mr Nair emailed Mr Makokoane a spreadsheet, copied to Ms Vedalankar, Ms Clark and Chief Financial Officer Ms Rebecca Hlabatau, in which he identified and motivated thus:

' my first cut of 56 practitioner posts at 56 Justice Centres]. I have not looked for paralegal and admin positions at JCs yet. This amounts to a potential savings of R10m which is much lower than what is required. In terms of this cut, I have ensured that DC will not be lower than 80% coverage whilst RCs will not be lower than 90% coverage. If we need to find more savings from practitioner positions, then we will need to agree lower coverage levels for District and Regional courts.'

[25] On 16 July 2010, Makokoane submitted a 'Report to Board' in which he recommended Nair's proposal to freeze recruitment to 56 vacant practitioner posts serving the lower criminal courts, but not more of them, nor of any lighter 'paralegal and admin positions' which Nair had mooted if needs be. Specifically, 'To provide for the anticipated OSD shortfall funding of R23.8 million', Makokoane recommended in his Report to Board that:

- I. Savings from the 2010/11 financial year be used to fund the OSD shortfall;
- II. District Court coverage be approximately no lower than 80% coverage, while Regional Court coverage is reduced to no lower than 90%

N.N

coverage, for the remaining part of the 2010/11 budget period. This will derive a saving of about R16 million to cover the shortfall.

[26] Among the measures to mitigate the probable deficit proposed in his 'Report to Board', Mr Makokoane advised that the recruitment process would be reviewed, centralizing the decision of the filling of posts at Executive level, with due regard to the need to prioritise critical positions. Mentioned generically in the 'Report to Board', the Pietermaritzburg Senior Litigator post was 'a critical position'. Since the temporary freeze on recruitment to some public defender posts amounted to a potential savings of R10m which was much lower than what was required i.e. R23.8 million, Mr Makokoane proposed making up the difference with unspent budget savings. On 31 July 2010, the Board agreed with the executives and resolved to approve the mitigating measures in response to the OSD shortfall as proposed in paragraph 4 of the 'Report to Board' namely to temporarily hold recruitment to 56 vacant practitioner posts serving the lower criminal courts, but only until the end of the financial year, and to use savings from the 2010/11 financial year to fund the OSD shortfall. The reason the Management Executive Committee sought the Board's approval was that its proposal to temporarily freeze recruitment to a limited number of public defender posts was a deviation from its Business Plan, also referred to as the 'Annual Performance Plan', based on the Board's Strategic Plan, and section 1.2 of the Approval Framework required that the Board must be consulted before any such change.

[27] Besides the temporary freezing of a number of practitioner posts serving the lower criminal courts, legal staff recruitment otherwise continued in the following quarter July to September 2010, and increased by 1.7% that is 1173 to 1199. For instance, the respondent advertised in August 2010 to recruit a 'Supervisory Professional Assistant' for its Pinetown Justice Centre, and a 'High Court Unit Professional Assistant' for its King William's Town Justice Centre. On 9 July 2011 Ms Vedalankar informed the Access to Justice Conference in her presentation that the respondent had recruited 2489 staff including 1932 lawyers, whereas the First Quarter Report, that is 1 April–30 June 2010, showed 2434 staff including 1855 lawyers, which is a difference of

N.N

77 more. The same figures appear in the respondent's Annual Report for 2010/11. That is, in the nine months following its decision in July 2010 to temporarily freeze recruitment to some practitioner posts serving the lower criminal courts the respondent recruited 77 more lawyers.

- [28] Being mindful of the respondent's version that Mr Nair decided on 16 August 2010 to communicate the respondent's decision that the recruitment process to finalize the appointments for all vacant Senior Litigator posts was put on hold due to various reasons, the events of the respondent relating to the recruitment process followed in the subsequent months will not be outlined any further. The only exception is to point out that the financial assistance that had been promised by the Minister of the DoJ&CD in October 2010 was finally paid over to the respondent on 15 December 2010, some months after the applicant was appraised of the outcome of the recruitment process.

#### The Applicant's version

- [29] The applicant was the only witness for his case. While he initially indicated that there were employees of the respondent whom he wanted to call as his witnesses, he changed track and dispense with them.
- [30] The applicant testified that when applying for the post he was mindful of two handicaps, one quite legal, and the other gravely illegal. As a white male he faced the constitutional imperatives of employment equity and affirmative action, but in the result the selection panel duly certified upon a proper demographic analysis of the Pietermaritzburg and Durban Justice Centres that his and Mr Mngadi's appointments to the respective posts would conform to the respondent's employment equity targets. Although he had not been able to eliminate race prejudice as a possible reason for the abortion of his appointment by the respondent's national office, he said that it looked unlikely to him in light of its confirmation of the appointment of a White male as High Court Unit Manager at the Cape Town Justice Centre in the face of protests by other staff of colour that this went against the respondent's employment equity policies, and in light further of the fact that that White male was subsequently promoted to Senior Litigator there. That suggested to the applicant that there

N. N



was not any culture of racism in the respondent's national office; and picking up on this, the respondent's counsel, Mr du Toit made the point in cross-examination that race prejudice as a possibility had been eliminated from the case. That then stood as a common cause ground.

[31] Concerning his second handicap, the applicant testified that he was an acutely unpopular and widely reviled leading dissident activist in the most politically inflamed and morally polarised domestic policy dispute in the democratic era, the AIDS treatment controversy. He testified that he had ignited this with the draft of a book he had written, *Debating AZT*, later published under the subtitle *Mbeki and the AIDS drug controversy* (Exhibit 2A), which he had sent up to government in manuscript in 1999, and which, former President Thabo Mbeki confirmed directly to the authors of two books exhibited by the applicant,<sup>2</sup> had 'sparked' (Mbeki's word) his enquiry into the safety of the drug, announced in the National Council of Provinces on 28 October 1999, and his wider enquiry into the integrity of the American HIV-AIDS paradigm generally.

[32] The applicant quoted some of what he called the many effusively positive commendations of his critique of the drug by high-ranking scientists, most significantly by Professor Richard Beltz PhD, Emeritus Professor of Biochemistry, Loma Linda University School of Medicine, California, US, who first synthesized it in 1961 (and not, the applicant said, Horvitz in 1964, as generally credited), saying:

'You are justified in sounding a warning against the long-term therapeutic use of AZT, or its use in pregnant women, because of its demonstrated toxicity and side effects. Unfortunately, the devastating effects of AZT emerged only after the final level of experiments was well underway. Your effort is a worthy one. I hope you succeed in convincing your government not to make AZT available.'

<sup>2</sup> Allister Sparks, *Beyond the Miracle: Inside the New South Africa*, Cape Town: Jonathan Ball, 2003, page 286; and Mark Gevisser, *Thabo Mbeki: The Dream Deferred*, Cape Town: Jonathan Ball, 2007, page 729.

LABOUR COURT

SHERIFF  
2015 -10- 31  
HIGH COURT  
PMBURG

- [33] In court the applicant exhibited a bottle containing a minute quantity of AZT supplied for research use and read from its label: 'TOXIC Toxic by inhalation, in contact with skin and if swallowed. Target organs: Blood Bone marrow. In case of accident or if you feel unwell seek medical advice immediately (show the label where possible). Wear suitable protective clothing.' He also exhibited a bottle of AZT capsules marketed by the pharmaceutical corporation GlaxoSmithKline for deliberate human ingestion, bearing no such warning. The deadly toxic hazard label and Beltz's support for the applicant in his campaign against the drug are quoted on the cover of the applicant's book, *Poisoning our Children: AZT in Pregnancy* (Exhibit 20).
- [34] On the other hand, the applicant cited a collection of vituperative attacks on him in the media and elsewhere over the years, with the *Sunday Times*, for instance, having referred to 'such loathed personalities as Anthony Brink' for 'supporting [Mbeki] at the outset of the AIDS-denial debate'. The London *Guardian* damned 'Anthony Brink the man who is credited with introducing Mbeki to HIV denialism, who has helped cost the lives of tens of thousands of people needlessly deprived of effective treatments.' He cited an article in *Time* magazine repeating the conventional western wisdom that for 'denying citizens life-saving anti-HIV drugs' he 'may have cost 365,000 South African lives, according to a study by Harvard researchers.' Aggressively intolerant general opinion and sentiment against critics and opponents of these drugs was epitomised, the applicant suggested, by a reference in the context of the controversy by a judge of the High Court (before her appointment) to then Health Minister Dr Manto Tshabalala-Msimang as a 'criminal'. Illustrating the intense antagonism against him for opposing AZT, the applicant quoted from a 'Public Health Warning' issued by the Democratic Alliance in October 2005, naming him, he said, like someone named in the Government Gazette as a Communist by the apartheid Minister of Justice, as the 'No.1. Ranking' AIDS dissident in the country, 'so dangerous' that such 'Aids denialists' with their 'false and dangerous views' and natural criminal propensity should be both politically and professionally neutralised:

'The DA calls on the media, the public, and professional organisations to, for example, wherever possible exclude these individuals from positions of

N. N



authority; deny their dissident views publicity; and take vigorous steps to pursue official action in respect of any infringements of the law.'

- [35] He said that the public enemies list, headed by him, was reproduced on the Nelson Mandela Centre for Memory website, host of the 'Heart of Hope' archive. The applicant testified that his main political opponents, the Treatment Action Campaign ('TAC'), a political action group promoting ARV drugs, had got him banned by the Advertising Standards Authority from publishing his case against AZT in the print media, and that under the ban no printing-works may reproduce it either.
- [36] The applicant pointed out that the extraordinarily heated tenor of the controversy was a fact notorious to the judiciary, and he cited several references to this in judgments of the High and Constitutional Courts: 'In our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention.' There is 'deep anxiety and considerable hysteria' about it. There has been much 'discord' in the 'boisterous and, at times, unseemly debate with regard to the efficacy or otherwise of antiretroviral treatment'. To sum it up, as the applicant put it, 'Politically, I stink.'
- [37] The applicant referred to an interview with the respondent's Ms Vedalankar on 10 November 2009, two days before his own, in which she held up as the respondent's 'most significant accomplishment' the fact that the respondent had founded the constitutional litigation on behalf of the Treatment Action Campaign to get the government to roll out anti-retrovirals to pregnant mothers who were HIV positive to prevent the transmission of the virus from mother-to-child in all state hospitals. This case is arguably one of the most significant impact cases as it has resulted in preventing loss of life of a large number of babies who would otherwise have contracted HIV AIDS.'
- [38] The applicant said that in her introduction to the respondent's 'Impact Litigation' booklet in March 2011, Ms Vedalankar again singled out for special mention the respondent's financial support for the TAC in the case, and frankly

underscored its propaganda value to put down the dissenters in the epistemological and political contest between the believers and the recusants:

'Not many people are aware that the Impact Litigation Unit funded, amongst others, the challenge brought by the Treatment Action Campaign in the Constitutional Court to make treatment available to those suffering from HIV/AIDS at a time when many were still questioning the link between HIV and AIDS.'

[39] The applicant testified that he had opposed the TAC in the case by way of an urgent amicus curiae application to the Constitutional Court which he drew for the late Professor Sam Mhlongo, bringing to the court's attention the fact that the single clinical study on which the TAC's entire case was based had just been rejected as a worthless sham by the US Food and Drug Administration; but that, although described by the then Chief Justice Chaskalson in the debate as a 'compelling argument', his application had been dismissed as out of time. The applicant argued that the Constitutional Court's judgment had been a disaster'. He produced a copy of his book about the case, *The trouble with nevirapine*, and quoted commendations on its back cover (Exhibit 2B) by Dr Jonathan Fishbein MD, formerly Director of the Office for Policy in Clinical Research Operations, Division of AIDS, National Institute of Allergy and Infectious Diseases, US National Institutes of Health: 'an expertly written piece about this very dangerous drug'; and by Professor Andrew Hensler MB, FRCP, Emeritus Fellow of the UK Cochrane Centre, Oxford, tutor in clinical pharmacology and therapeutics at Charing Cross and Westminster Medical School, London University (ret.); advisor to the WHO; founder of *Drug Therapeutics Bulletin*; co-founder of the International Society of Drug Bulletins; and co-founder of DIPEX.org saying:

'...an amazing job ... brilliantly dissects an avoidable tragedy: how misconceptions and misunderstandings about a new medicine caused a pointless, costly and toxic mess that still needs clearing up. An important story with lessons for all of us'.

[40] The applicant pointed out that the respondent spent R200 000 a year, and previously twice and thrice as much, on its 'HIV/AIDS Strategy and Roll Out

N. N

Plan' which it prioritised as a 'KEY' operating policy, and that accordingly, it was institutionally aligned with and invested in the conventional HIV-ARV-AIDS paradigm to which he was opposed and which he worked for many years to debunk as a 'profoundly harmful, fundamentally racist error in our time'. He referred to a mailing list he had discovered of some of the world's leading ARV-promoting activists, of which Ms Vedalankar and Mr Nair were members.

- [41] The applicant testified that, he was certain that his deeply unpopular minority political engagement in the controversy would be found out with a simple Google search on his name, he disclosed it in his CV submitted in support of his application for the post, and in a Personal and Political History handed in at the interview; and the selection panel's recommendation of the applicant referenced it: 'Candidate demonstrated his capability to undertake high level research. Candidate is a prolific writer/author with many commendations cited on his CV.'

Concern on the justification for aborting the applicant's appointment

- [42] In relation to the respondent's budgetary justification for aborting the applicant's appointment, the applicant gave evidence with reference to the respondent's records about some transient budgetary uncertainty for a few months in 2010, seeking to demonstrate that this never had any bearing on Senior Litigator recruitment and the abortion of his recruitment. Most of the evidence, which was statistical in nature, forms part of the factual background as it came across as common cause.
- [43] When the applicant was interviewed and recommended for the Pietermaritzburg Senior Litigator post in November 2009, the respondent had already commenced implementing OSD phase 1, and it received funding for this during the 2009/10 financial year. As regards the respondent's settled expectation of receiving the OSD funding which the DoJ&CD had committed to pay, the applicant said that Ms Vedalankar later confirmed to him on 28 January 2011 that in conducting those recruitment processes parallel with the fundraising drive, the respondent acted under the impression that the

DoJ&CD would honour its promise to extend OSD funding to it which it did in December 2010. He said that on 10 March 2010, however, the respondent learned from a copy of the OSD letter of DoJ&CD to National Treasury received on that day that contrary to confirmed reports by the DoJ&CD, the Department did not recommend a budget baseline adjustment for MTEF 2010/13 for the respondent. That situation was to result in a budget deficit for the respondent in its 2010/11 MTEF cycle, as Ms Vedalankar put it in her query to the Director General a week later on 18 March 2010. That was because the respondent had already budgeted for 2010/13 on the basis of the DG's commitment<sup>3</sup>. He said that the respondent later put it in the pleadings that it was on 10 March 2010 that budgetary issues suddenly confronted it.

[44] He testified that in April or May 2010, and to his exclusion, Mr Mngadi was informally told verbally that the Senior Litigator recruitment was off. He said that on or about 24 May 2010 and following the advertisement and interviews of the shortlisted candidates of the Mthatha Senior Litigator post in April, Mahikeng Senior Litigator Mr Nzame Skibi was selected and recommended for a lateral transfer and he was appointed to it. He said that contrary to the respondent's false denial in the pleadings that the Mthatha candidate was recommended for appointment, the selection panel indeed recorded that he was recommended for that position on the basis that he came across as the strongest candidate, with substantiating reasons duly noted. He again said that contrary to the respondent's false allegation, confirmed by Mr Nair on affidavit, that Mr Skibi was shortlisted for a second round of interviews in Johannesburg, he was not, and there was no mention of any second round interview for him in the recommendation, nor was any such shortlist drawn.

[45] In relation to the 'Budget cuts – Reduction in Criminal Court Coverage – July 2010' he averred that by 'cut' Mr Nair meant freezing recruitment to the vacant lower criminal court posts in question, not abolishing the posts, and that indeed no posts were cut. Contrary to the respondent's allegation in its original response that 'Nair's email to the COO had not been specific about other posts or measures to be recommended for the cost cutting process', the

<sup>3</sup> as Vedalankar recorded in her follow-up letter to the DG on 13 April 2010

N. N

applicant contended that the record both of the contents of Mr Nair's email and its heading 'Reduction of Criminal Court Coverage' showed that Mr Nair had indeed been specific. According to him, Mr Nair did not propose to Mr Makokoane and other management executives that cancelling the Senior Litigator recruitments and freezing the three remaining vacant Senior Litigator posts could achieve further cost savings and that the recruitment process to finalize the appointments for all vacant Senior Litigator posts' had already been put on hold due to various reasons, as Mr Nair alleged to the applicant a couple of weeks later.

[46] The applicant contradicted the version of the respondent that budgetary constraints constituted the reason for aborting the recruitment process. In essence his reasons were, inter alia, that:

- Mr Nair had in November 2009 decided to reject his application after he had read applicant's CV in which the applicant had disclosed his work and literary contributions on the debate around the alleged effect of AZT and or Nevirapine (anti-retrovirals) on HIV positive pregnant women, which he said was his life's work;
- Mr Nair did not agree with applicant's medical opinion on anti-retrovirals and that Mr Nair's name and that of the CEO appeared on an email list of people who promoted Western medicines to treat AIDS in South Africa;
- In any event, the budgetary constraints were resolved in October 2010 by a ministerial promise. In December 2010, the respondent received the additional funds that had been withheld. The freezing of the Durban and Mthatha Senior Litigator posts was a camouflage in order to justify terminating the Pietermaritzburg process and that such budget constraints were an afterthought;
- There had been a marked increase in recruitment of staff by the respondent in 2010 and the respondent's December 2010 recruitment/vacancy/budget statistics reflected that the Pietermaritzburg and Durban Senior Litigator posts remain budgeted

N. N

vacant posts, and not frozen, as Ms Vedalankar falsely alleged to the applicant on 18 October 2010;

- The “next round” of interviews for Senior Litigator was unlawfully instituted in 2008 because Mr Nair had no power to do this.
- Ms Vedalankar’s and Mr Nair’s claims to have aborted the Senior Litigator recruitments and to have frozen the posts were *ultra vires* and legally incompetent even on their own version. The engagement of Senior Litigators was an integral part of the respondent’s Board’s Strategic Plan to develop and increase the respondent’s capacity to deliver expert litigation services to indigent litigants by creating a pool of specialist professionals to attend to complex matters in specialist and High Courts, including the Supreme Court of Appeal and Constitutional Court. The Strategic Plan was key to respondent’s operations and it complied with the National Treasury Regulations.
- The respondent’s Annual Business Plan for implementation by the LSTC was based on the Strategic Plan; and section 1.2 of the Approval Framework permitted the Business Plan to be changed by the LSTC, provided that (a) the Board was consulted before any such change, and (b) the full Management Executive Committee gave its final approval. The LSTC Terms of Reference prescribed likewise saying that any decision taken by LSTC that was of a policy nature which impacted on the Business Plan was to be referred to management or to the executive body for approval;
- A decision to ‘terminate’ three substantially completed Senior Litigator recruitments and to indefinitely freeze recruitment to one third (3/9) of the respondent’s critical, top-echelon specialist legal professional Senior Litigator posts was a decision to change the Business Plan.
- Where Board approval was required to temporarily hold recruitment to some lower court practitioner posts, as indeed it was, Board approval was all the more required to abort the substantially complete

recruitments of three Senior Litigators and to indefinitely freeze recruitment to the three critical posts;

- No record existed to show that the Board was consulted before such alleged decision was taken, as it had to be. To the contrary, Mr Nair confirmed on affidavit on 8 April 2011 that the Board was not informed of the decision. No record existed to show that the full Management Executive Committee gave its final approval of any such decision to abort the recruitments and to freeze the posts.
- No record existed to show that Mr Nair duly originated the freezing of recruitment to one third of the respondent's top echelon of critical vacant professional staff posts. No record existed to show that Ms Vedalankar agreed to that, as she had to. No record existed to show that all Committees were informed hereafter as had to be done.
- No record existed to show that Mr Nair ever motivated to Ms Vedalankar a change in the organizational structure by dint of the freezing of Senior Litigator positions, for discussion and finalisation with her, as Ms Vedalankar alleged to the applicant in her October 2010 letter.
- In short, notwithstanding her delegation by the Board for all the responsibilities of the Accounting Officer as provided for in the Public Finance Management Act and her unrestricted authority in managing the respondent, Ms Vedalankar did not have the power under the Approval Framework to deviate from the Board's Strategic Plan. She had no power to change the Management Executive Committee's Business Plan based on it to recruit Senior Litigators, and to decide with Mr Nair off the record without:
  - First consulting the Board;
  - A supporting resolution of the LSTC;
  - obtaining the full Management Executive Committee's agreement; and

N. N



- thereafter informing all committees to abort three substantially completed Senior Litigator recruitments and to indefinitely, and practically permanently, freeze recruitment to one third of the respondent's vacant budgeted critical Senior Litigator establishment.

## 2 Respondent's version

[47] The Respondent called Mr Nair to testify on its behalf. He testified that applicant's claim of discrimination on the basis alleged whether it be political opinion or race was totally untrue. He confirmed that on or about 23 November 2009, he received an email from Mr Mdaka, together with attachments which contained the recommendation of the regional select committee on the recruitment of two Senior Litigator posts for Durban and Pietermaritzburg. Because it was close to the end of the year for the respondent, he knew immediately that the earliest period at which the second round of interviews could be held was in mid-February of 2010. He read Mr Mdaka's covering email on 26 November 2009 but did not open and read the attached recommendation and CVs because this would have been premature. He merely placed the bundle of documents he had received in his drawer without reading and scrutinising the recommendation. It was in July 2010 that he received an email query from the CEO regarding the recruitment process of Senior Litigator posts by the Applicant. It was thereafter that he first opened and read the recommendation with its attachments to find out who the applicant was. By then it was the end of the following year, 2010, or early in 2011. At the time he received the recommendation from Mr Mdaka, the respondent had no budgetary issues preventing the applicant's appointment. The reason the applicant's and Mr Mngadi's recruitment was not proceeded with was because he knew about the two-and-a-half month delay.

[48] He testified that on receiving the recommendation and CVs he did not do anything. There was nothing for him to sign, because he had to pass all the CVs of all the candidates interviewed by the selection panel to the second round interview panel. The regional office mistakenly included provision in the recommendation report for him to sign his approval or disapproval of the selection panel's recommendation. He testified as to the origin, the

N.N



composition and the importance of the next round of interviews. He stated that the second panel, the National panel, was not a rubber-stamp of the first panel in that it also had to satisfy itself from all the applicants who were interviewed, that is, including those who may have not been recommended for further interviews, who it wanted to interview.

- [49] He intended setting up the second round interviews the following year. These could not be held before mid-February 2010, because Mlambo JP was on recess and January was the executives' busiest period at the beginning of the last quarter of the financial year when they took stock of coverage under the Business Plan, held their Management Executive Committee meeting at the end of the month, and prepared for the Board meeting in February.
- [50] He first heard the applicant's name when his complaint was received in July 2010, but did not know his political views. He had no views of his own on ARVs besides what he read in the media, which was that the roll-out seems to have contained the pandemic facing the country. The applicant's political views played no part in the matter. Neither he nor Ms Vedalankar were aware of these because he did not open the email attachments. The reason the posts were frozen had nothing to do with the applicant's position on ARVs and he was not discriminated against on this basis. He did not immediately abort the applicant's recruitment on receiving the CVs and recommendation.
- [51] At the end of 2009 when the Treasury released its budget allocation letter, the respondent learned that expected funding for OSD phase 1 was not included in its budget, despite promises. At its meeting with the respondent in January 2010 the Department confirmed it would provide this funding. Ms Vedalankar's letters to the Department in March and April 2010 showed that at about that time the executives began to deliberate intensively on the possibility that the Department would not fulfil its financial commitments. They immediately realised that the over R23 million shortfall could not be accommodated with minor cuts and that it would impact on staffing and limit coverage at courts, as Ms Vedalankar's April letter mentioned.

- [52] To his mind recruitment of Senior Litigators was not an urgent consideration. There was a real possibility that the respondent would not get the money. He did not think filling the posts appropriate so he decided to delay this until clarity around the funding issues was obtained. There was no need for him to inform anyone. The reason he did not inform the Justice Centre Executives that Senior Litigator posts might be cut was that he did not want to create panic. He had an informal discussion with Mr Mdaka in March or April 2010 and told him of the delay, saying they needed to wait to see how the financials turn out. Mr Mdaka did not tell him then that two candidates had been recommended.
- [53] On 29 July 2010, Ms Vedalankar enquired about the applicant's letter to her. He informed her and Ms Clark that he had delayed the recruitment in view of the financial uncertainty, because he did not think it prudent to fill the post while the respondent faced a funding shortfall. Ms Vedalankar then advised that they rather take the decision to freeze the posts so that the recruitment process did not hang in the air. She felt it appropriate to freeze the posts. He concurred. Ms Clark agreed. He then informed the applicant and instructed Mr Mdaka to send regret letters to all applicants. Since Senior Litigator posts are at grade LP10, section 8.2.2 (b) of the Approval Framework empowers him and Ms Vedalankar to abolish such posts between them. He must agree and she has final approval. Mr Mngadi was definitely not told in April or May 2010 that the Senior Litigator recruitment had been cancelled, because the posts were not frozen until July. If such a statement was made to Mr Mngadi, it did not come from him.
- [54] Nothing in the Recruitment code prevents the holding of second round interviews. All CVs had to be sent to the second round panel. It would look at all four CVs and consider whether anyone besides a recommended candidate would be interviewed again. It was free to interview whoever it wanted. Previously the second round interview panel did not support a recommendation. It often came to a contrary recommendation. All Senior Litigators had been interviewed twice. The second panel had sat three times. It had interviewed all candidates interviewed by the selection panels again.

After the second round interview panel makes its recommendation, the ROE decides on the appointment with the NOE and CEO.

[55] He said that he wrote the 'Report to Board' of November 2011. The reason he told the Board that recruitment challenges prevented the filling of the Senior Litigator posts, and not budgetary constraints as alleged to the applicant and to court, was because when he wrote this he was aware that three posts had been vacant for a long period since end of 2007 until frozen in July 2010. They had failed to attract suitable candidates. There was no guarantee that the second panel would have accepted the applicant. Had the second panel sat, he would have had serious problems with the recommendation of the applicant for four reasons. He did not meet the minimum requirements; he had not actively represented clients in the High Court in the previous three to four years; he didn't see any mention in his CV that his Supreme Court of Appeal and Constitutional Court cases had been reported, so assumed he had not practised in those courts; and the weight of his experience was civil whereas the major part of the respondent's services were criminal defences and it wanted Senior Litigators to handle criminal appeals. He could only speculate why the applicant had been shortlisted in the first place.

[56] There had been no demand for a Senior Litigator in the Northern Cape, so they had invited other regions to motivate why they needed such a post. The LSTC approved the transfer of the Kimberley post to Mthatha. He was aware that in giving the Eastern Cape permission to proceed with the recruitment, they were still under financial constraints. He knew that while the Eastern Cape could continue, it would still have to come to his desk, and if funding was not resolved he would delay the process until certainty was obtained. He saw the recruitment as facilitative, so that once the funding issue was resolved they would not have to start again. After the LSTC resolved to recommend transferring the Kimberley post to Mthatha, Ms Vedalankar's approval was needed. They met and she said she would think about it. He supported it, but she did not. They discussed it again. He was unable to persuade her. She finally decided she was not happy. She did not agree. So the transfer was aborted in early July 2010. He knew of no record of Ms

Vedalankar's rejection of its decision to transfer the Kimberley Senior Litigator budget to Mthatha. The decision to cancel the Mthatha Senior Litigator recruitment had nothing to do with budget considerations. He verbally instructed the Eastern Cape ROE that the Mthatha Senior Litigator recruitment process had to stop. The Eastern Cape selection panel never signed the recommendation and that is why it was never received by the national office.

[57] His email to COO Mr Makokoane on 15 July 2010 was never supposed to be an exhaustive list of posts to be frozen. The cuts he proposed did not result in the respondent acquiring the budget needed to cater for the shortfall. All he did was slow down the recruitment process. His intention was to convey to the Board and stakeholders that the impact of cutting lower court posts would be very significant, because these practitioners take the majority of cases, so the cuts would seriously affect delivery. The lower criminal court practitioner posts are critical posts. No posts are more important than they are. The reason these lower court positions, not High Court positions, are critical posts, is that they are at the coalface, and High Court is a minor part of the workload. Senior Litigator posts are more to assist other practitioners. They are nice to have but can be done without in tough times. Regarding Parliament's concern that all critical posts be filled, this did not apply to the respondent, but only to the Department of Justice and Constitutional Development.

[58] He said that when the government launched the South African National AIDS Council, Ms Vedalankar had been appointed to it. She then delegated the position to him. They later discontinued with it. That is how he thinks his name had got onto the email group. The test for legal aid funding was not based on ideologies but whether a substantial injustice would result. The respondent's funding of the Boeremag defence was evidence of this. The respondent could not be expected to employ the applicant in view of his charges that its officers had lied about the circumstances in which his recruitment had been aborted.

Evaluation

[59] The applicant has brought his claim under section 6 (1) of the EEA. It provides:

SHERIFF  
2016 -10- 31  
HIGH COURT  
N. N.



'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth'.

[60] Section 6 (1) of the EEA has a resemblance to section 9 (3) of the Constitution Act which proves that:

'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

[61] When paraphrased, the applicant's complaint is that he was not accorded equal treatment which he would ordinarily be entitled to<sup>4</sup> in the processing of his application for a Senior Litigator's post. He said that he was unfairly discriminated against by the respondent. Discrimination or differentiation, to employ a neutral descriptive term, lies at the very heart of equality jurisprudence in general and of the section 9<sup>5</sup> right or rights in particular<sup>6</sup>. In the case of *South African Police Service v Solidarity obo Barnard*<sup>7</sup> Court sketched out the applicable legal framework within which the principles of equality apply in South Africa and had the following, inter alia, to say:

'[28] Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.

[29] At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. Beyond these

<sup>4</sup> In terms of section 9 (1) of the Constitution of the Republic of South Africa Act, 1996, (the Constitution Act).

<sup>5</sup> Of the Constitution Act.

<sup>6</sup> See paragraph 23 in the case of *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 at 1024.

<sup>7</sup> [2014] ZACC 23 handed down on 2 September 2014.

plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists<sup>8</sup>. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.

[30] Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory<sup>9</sup>. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.

[31] We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged. The scope of this “visionary and inclusive constitutional structure”<sup>10</sup> was stated in *Fourie*:

‘The founders committed themselves to a conception of our nationhood that was both very wide and very inclusive. It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they determined that henceforth the role of the law would be different for all South Africans. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans’.<sup>11</sup>

<sup>8</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 76.

<sup>9</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 43.

<sup>10</sup> *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) at para 25.


<sup>11</sup> *Id* at para 9.

- [62] Commenting on the steps taken to promote substantive equality, the Court proceeded to say that remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, such measures must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society. It pointed out that restitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other. Our state must direct reasonable public resources to achieve substantive equality for full and equal enjoyment of all rights and freedoms.<sup>12</sup>
- [63] In respect of the Employment Equity Act which the applicant relies on, the Court said that the mission of the Act is diverse. For now, its important objects are to give effect to the constitutional guarantee of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people. The Act expressly prohibits unfair discrimination.
- [64] As a point of departure the present case is not one where there was evidence of remedial measures that had to be implemented so as to promote substantive equality to advance the position of people who suffered past discrimination. Therefore, the concessions which were made at the Constitutional Court on behalf of Ms Barnard<sup>13</sup> which then shaped the nature of the enquiry do not, in my view, find application in the present matter. If my understanding of the Barnard decision of the Concourt is correct, then the determination of the issue at hand as well as the controlling law should still be the one outlined in *Harksen v Lane and Others*<sup>14</sup> which the Supreme Court of Appeal in the Barnard decision paraphrased in the following terms:

<sup>12</sup> See paras 32 and 33.

<sup>13</sup> See para 52 of the judgment.

<sup>14</sup> 1997 (11) BCLR 1489 (CC)

N. N. 

'The starting point for enquiries of the kind under consideration is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair.'

[65] The applicant accordingly carried the burden to prove the existence of the discrimination he complained of<sup>15</sup>. Should he be successful, the discrimination is then presumed to be unfair and the respondent has then to rebut the presumption. For purposes of this matter, conscience, belief and political opinion are the grounds on which the case of the applicant can possibly be premised. The applicant testified that he was an acutely unpopular and widely reviled leading dissident activist in the most politically inflamed and morally polarised domestic policy dispute in the democratic era, the AIDS treatment controversy. He said that he had ignited this with the draft of a book he had written, *Debating AZT*, later published under the subtitle *Mbeki and the AIDS drug controversy*. The applicant testified that he was certain that his deeply unpopular minority political engagement in the controversy would be found out with a simple Google search on his name, he disclosed it in his CV submitted in support of his application for the post, and in a Personal and Political History handed in at the interview.

[66] It must now be ascertained whether a failure by the respondent to appoint the applicant to a Senior Litigator position was due to him being an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. The respondent's denials of the alleged discriminatory practice were described by the applicant as nothing short of a pretext for prohibited discrimination. In some employment discrimination cases in which an issue of pretext arises the respondent often provides all sorts of seemingly legitimate reasons to justify its behaviour. The applicant may fight to discredit these justifications and may prove that the employer acted based on discriminatory and impermissible motive. However, the applicant will rarely, if ever, ferret out any sort of 'smoking gun' or affirmative evidence demonstrating discrimination

<sup>15</sup> See *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) para 34 and *Germishuys v Upington Municipality* [2001] 3 BLLR 345 (LC) at para 77.

by the employer.<sup>16</sup> The question facing triers of facts in discrimination cases is often both sensitive and difficult to discern. Thus, creating an inference that the employer lied can give rise to the extremely important inference that the employer lied for a particular reason such as to cover up a discriminatory purpose.<sup>17</sup> Such are the contentions that have been made by the applicant in this matter.

[67] In this matter the applicant had to surmount an arduous task of discharging the onus resting on him through circumstantial evidence. Circumstantial evidence, it must however, be noted, does not always carry less evidential weight than direct evidence.<sup>18</sup> The applicant could not produce any direct evidence that Mr Nair knew that he was an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. Relying on circumstantial evidence the applicant submitted that the Court should find that Mr Nair read not only the email accompanying the recommendation but also his CV as forming part of the bundle of documents submitted to him by Mr Mdaka. The applicant pointed out a number of facts and circumstances in the case of the respondent to suggest that Mr Nair was not generous with the truth and therefore that the respondent's version was a pretext which was given by an employer who acted based on discriminatory and impermissible motive.

[68] In his pleaded case and in his initial approach at trial in court, the applicant attributed discriminatory acts against him, on the part of Mr Nair, Ms Clark, Ms Vedatankar and Mlambo JP, the Chairman of the Board. He later exonerated all but Mr Nair, blaming the respondent for not supplying him timeously with the information he had sought from it.

[69] On 14 April 2010, the applicant telephoned Ms Clark for information about the state of affairs of his application. He would have introduced himself to her during that telephone call. He accepted her response that she had not heard of him before and knew nothing of the pending recruitment process as she

<sup>16</sup> See *Reeves v Sanderson Plumbing Products Inc*, 530 US 133, 140 (2000) which relied on *U. S. Postal Serv. Bd of Governors v Aikens*, 460 U. S. 711, 716 (1983).

<sup>17</sup> *Reeves supra*.

<sup>18</sup> See in this regard *Cloete v Birch* 1993 (2) PH F17 (E).

undertook to enquire further. On 12 July 2010, the applicant wrote to Ms Vedalankar enquiring when his appointment might be finalised and on or about 29 July 2010 Ms Vedalankar emailed Mr Nair about it saying that she was not sure what was happening with the senior litigator appointments but that they needed to finalise the process and advise the persons interviewed of the outcome. From those discussions and correspondence it could be concluded as a probability that neither Ms Clark nor Ms Vedalankar knew of the applicant, at that stage, his belief that he was an acutely unpopular and widely reviled leading dissident activist notwithstanding. Other than from reading his CV, the applicant has also not suggested that Mr Nair knew of him. I conclude therefore, based on Mr Nair's evidence that, with the exception of possibly having read the CV of the applicant, Mr Nair did not know of the applicant.

- [70] Mr Nair denied having read the CVs which came with the e mail from Mr Mdaka. While this evidence was challenged by cross examination, it was left intact as Mr Nair was not shaken but remained adamant on it.
- [71] He said that because it was close to the end of the year, he knew immediately that the earliest period at which the second round of interviews could be held was in mid-February of 2010. Reading the attached recommendation and CVs would be premature. He merely placed the bundle of documents he had received in his drawer without reading and scrutinising the recommendation. Mr Nair's version must be seen against the nature of the work done by him. He was based at the National office. He would receive recruitment documents from all nine provinces in South Africa for processing and further transmission. He did not just deal with recruitment documents only. He received and worked with various reports and he generated some reports. Essentially and because of his position, he dealt with numerous documents at different times. He received the email from Mr Mdaka as part of the routine correspondence that would come to his office. There is no suggestion at all that there was something unusual or out of the ordinary which would attract his curiosity to the bundle with the email, such that I should find that he probably read the applicant's CV. Upon receipt of these documents he knew what was to be

done with them at a particular period. From February to July 2010 Mr Nair was then pre-occupied with a deficient budget of the respondent until he received an email of 29 July 2010 from Ms Vedalankar enquiring about the applicant. I hold therefore that the applicant has not succeeded in showing that Mr Nair probably read his CV at around the time of its receipt.

[72] Without reading the CV of the applicant and without having prior knowledge of him, Mr Nair could not possibly have aborted the recruitment of the applicant by discriminating him on the basis of the applicant being an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. It must follow that the applicant has not shown that he was meted with any different treatment than was given to the recommended candidates for Durban and Mthatha. In my view, the defence raised by the respondent is not a pretext for a discriminatory and impermissible motive. Accordingly the presumption of unfair discrimination does not arise. On this basis alone the claim of the applicant must fail.

[73] There was also the issue of Mr Nair having to sign in support of or at variance with the recommendation. The applicant made a big issue of this matter. I see no reason why. Mr Nair was still to sit as a panellist in the second level interview. It made no sense of the process if he had to prejudge the issues by confirming or disagreeing with the recommendation. If he signed, he would have to recuse himself from the next step. The provision for signing made sense where there was to be no further interviews and was probably designed for the single interview processes.

[74] While the applicant attacked the second stage interview, he did not suggest that it was a violation of Section 6 (1) of the EEA. The applicant also attacked the various acts of Mr Nair, Ms Clark and Ms Vedalankar in failing to have him appointed. The basis of that attack was never laid as it was never suggested that it also fell within the purview of section 6 (1) of the EEA. It was the choice of the applicant not to seek to review the decision of the respondent in not appointing him. The applicant contended that the senior litigator position was a critical position. How critical these posts were must have depended on different circumstances in various regions of the respondent. In Kimberly for

N.N



instance the post was made redundant. There would have to be evidence to demonstrate in a particular area the extent of a high need for a senior litigator and no such evidence was adduced in this case.

[75] In the circumstances, and having reflected on the law and justice of this matter on the issue of costs, the following order will issue:

1. The application is dismissed.
2. The applicant is to pay the costs thereof.

LABOUR COURT

\_\_\_\_\_  
Cele J

Judge of the Labour Court of South Africa.

APPEARANCES

1. For the applicant: In person
2. For the respondent: Adv.P.Mokoena SC and Adv. T.Machaba

N.N

FA12

249

1 Boast Road

Eshowe 3815

17 November 2014

Patrick Hundermark  
Deputy Information Officer,  
Legal Aid South Africa  
29 De Beer Street  
Braamfontein  
Per email: patrickh@legal-aid.co.za

Dear Mr Hundermark

#### FURTHER PAIA REQUEST

Further to my PAIA request a week ago concerning your Durban Justice Centre's Children's Court Practitioner, which you kindly acknowledged immediately, there's another matter I'm investigating – this time one in which National Operations Executive Brian Nair claims you're directly involved, making you best placed to respond to my further brief PAIA request about it.

Nair's allegations about you, made under oath during my cross-examination of him at the trial of my labour claim, are recited in the annexure to my request. I expect they'll be news to you, and that you'll accordingly be able to promptly dispose of my request under section 23, by certifying that none of the records I've specified exist – which is to say Nair falsely implicated you in his elaborate, corrupt scheming, as he was inventing and developing new stories to replace the budgetary pretext given me for not finalising my appointment to the Pietermaritzburg Senior Litigator post, which I'd refuted and exposed as a lie in my first petition to the Board in November 2010.

Since I pressingly need your response for the purposes of my appeal (and, in time, for referral to the Public Service Commission and the Director of Public Prosecutions), I'd appreciate it if you'd let me have your response 'as soon as reasonably possible' in

N.N

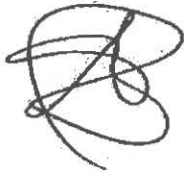


250

compliance with section 25(1), and not wait out the full maximum thirty calendar days allowed you.

If you email me LASA's bank account details I'll deposit the PAIA request fee.

Thanks again.



ANTHONY BRINK

arbrink@iafrica.com

Cc:

Nokwanda Molefe, PAIA Unit, South African Human Rights Commission

Sinthia Reddy, Public Protector investigator (ref: 7/2-040815/12)

Lesleigh Timothy, LASA Board Secretary



**FORM A**

**REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY**

(Section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000))

**[Regulation 2]**

<p><b>FOR DEPARTMENTAL USE</b></p> <p style="text-align: right;">Reference number:</p> <p>Request received by (state rank, name and surname of information officer/deputy information officer) on (date) at (place).</p> <p>Request fee (if any): R .....</p> <p>Deposit (if any): R .....</p> <p>Access fee: R .....</p> <p>SIGNATURE OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER</p>
--

**A. Particulars of public body**

**Legal Aid SA**

**Patrick Hundermark**  
**Deputy Information Officer,**  
**National Office**  
**29 De Beer Street**  
**Braamfontein**

**B. Particulars of person requesting access to the record**

<p><i>(a) The particulars of the person who requests access to the record must be recorded below.</i></p> <p><i>(b) Furnish an address and/or fax number in the Republic to which information must be sent.</i></p> <p><i>(c) Proof of the capacity in which the request is made, if applicable, must be attached.</i></p>
--

N.N

Full names and surname : **Anthony Robin Brink**  
 Identity number : **590225 5116 081**  
 Postal address : **1 Boast Street, Eshowe 3815, KwaZulu-Natal**  
 Fax number : **086 672 0776**  
 Telephone number : **035 474 0145**  
 E-mail address : **arbrink@iafrica.com**

Capacity in which request is made, when made on behalf of another person:

N/A

**C. Particulars of person on whose behalf request is made**

*This section must be completed only if a request for information is made on behalf of another person.*

Full names and surname : N/A  
 Identity number : N/A

**D. Particulars of record**

*(a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.*

*(b) If the provided space is inadequate please continue on a separate folio and attach it to this form. The requester must sign all the additional folios.*

1. Description of record or relevant part of the record:
2. Reference number, if available:
3. Any further particulars of record:

See annexure

N.N

**E. Fees**

- (a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a request fee has been paid.
- (b) You will be notified of the amount required to be paid as the request fee.
- (c) The fee payable for access to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.
- (d) If you qualify for exemption of the payment of any fee, please state the reason therefor.

Reason for exemption from payment of fees:

N/A

**F. Form of access to record**

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 hereunder, state your disability and indicate in which form the record is required.

Disability: N/A	Form in which record is required:		
<p>Mark the appropriate box with an "X".</p> <p><b>NOTES:</b></p> <p>(a) Your indication as to the required form of access depends on the form in which the record is available.</p> <p>(b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.</p> <p>(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.</p>			
<b>1. If the record is in written or printed form -</b>			
<input checked="" type="checkbox"/>	copy of record*	<input type="checkbox"/>	inspection of record

△  
 SHERIFF  
 2016-10-31  
 HIGH COURT  
 PMB/HR

**2. If record consists of visual images -**  
 (this includes photographs, slides, video recordings, computer-generated images, sketches, etc.)

<input type="checkbox"/>	view the images	<input checked="" type="checkbox"/>	copy of the images*	<input type="checkbox"/>	transcription of the images*
--------------------------	-----------------	-------------------------------------	---------------------	--------------------------	------------------------------

**3. If record consists of recorded words or information which can be reproduced in sound -**

<input type="checkbox"/>	listen to the soundtrack (audio cassette)	<input checked="" type="checkbox"/>	transcription of soundtrack* (written or printed document)
--------------------------	---	-------------------------------------	---

**4. If record is held on computer or in an electronic or machine-readable form -**

<input type="checkbox"/>	printed copy of record*	<input type="checkbox"/>	printed copy of information derived from the record*	<input checked="" type="checkbox"/>	copy in computer readable form* (on compact disc)
--------------------------	-------------------------	--------------------------	--	-------------------------------------	--

\*If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you? **YES**

**A postal fee is payable.**

*Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.*

In which language would you prefer the record? **English**

N.N 


255

**G. Notice of decision regarding request for access**

*You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.*

How would you prefer to be informed of the decision regarding your request for access to the record? **By email**

Signed at Eshowe on 17 November 2014



SIGNATURE OF REQUESTER

N.N





FORM A ANNEXURE

1. Apropos of National Operations Executive Brian Nair's allegation in his 'Report to Board' on Senior Litigators in November 2011, concerning which he volunteered at the trial of case LC D529/11, 'I was the author of this',<sup>1</sup> 'It is felt that the current system of evaluating their performance by the High Court Unit Managers and thereafter by our Legal Quality Assurance Unit may not be appropriate',<sup>2</sup> the minute of the meeting at which this alleged view was expressed, and/or the record of the communication of this view to Nair or other executive.
2. The record of Nair's instruction to 'the Chief Legal Executive, then the Legal Development Executive' Patrick Hundermark to draft the 'terms of reference'<sup>3</sup> of a 'review panel'<sup>4</sup> to conduct 'performance reviews or quality reviews' for 'senior litigators',<sup>5</sup> being the 'person' to whom Nair claimed at the trial to have 'allocated the responsibility'<sup>6</sup> for doing this.
3. The minutes of the 'number of meetings' that Nair claimed Hundermark has 'hosted' in the allegedly 'on-going ... process ... still being attended to' by him, in the two years since Nair claimed to have 'allocated the responsibility' to him 'to properly develop terms of reference, to identify possible people to contribute to the panel, and to consult'<sup>7</sup> with a view to conducting 'performance reviews or quality reviews' for 'senior litigators'.<sup>8</sup>
4. All and any records vouching that Hundermark has acted to (i) 'develop [the] terms of reference' set out in Nair's said Report to Board, (ii) 'to identify possible people to contribute to the panel', and (iii) 'to consult' anyone about it.

---

<sup>1</sup> Record, page 359, lines 10-15.  
<sup>2</sup> Bundle (trial documents), page 870, section 4.  
<sup>3</sup> Record, page 398, lines 1-3.  
<sup>4</sup> Record, page 397, line 21.  
<sup>5</sup> Record, page 397, line 15.  
<sup>6</sup> Record, page 398, lines 1-3 .  
<sup>7</sup> Record, page 398, lines 3-10.  
<sup>8</sup> Record, page 397, line 15.

N.N.  

PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

23 Records that cannot be found or do not exist

(1) If-

- (a) all reasonable steps have been taken to find a record requested; and
- (b) there are reasonable grounds for believing that the record-
  - (i) is in the public body's possession but cannot be found; or
  - (ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

25 Decision on request and notice thereof

(1) Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the information officer to whom the request is made or transferred, must, as soon as reasonably possible, but in any event within 30 days, after the request is received-

- (a) decide in accordance with this Act whether to grant the request; and
- (b) notify the requester of the decision and, if the requester stated, as contemplated in section 18 (2) (e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

90 Offences

(1) A person who with intent to deny a right of access in terms of this Act-

- (a) destroys, damages or alters a record;
- (b) conceals a record; or
- (c) falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

INTERPRETATION ACT 33 OF 1957

4 Reckoning of number of days

When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

N.N

"FA13"

25

1 Boast Road  
Eshowe 3815  
25 November 2014

Jerry Makokoane  
Deputy Information Officer,  
Legal Aid South Africa  
29 De Beer Street  
Braamfontein  
  
Per email: jerrym@legal-aid.co.za

Dear Mr Makokoane

#### PAIA REQUEST

According to LASA's PAIA manual, published for the true information of the public, you're one of several deputy information officers in LASA's national office – appointed, the Act explains in subsection 17(1) and again in subsection 17(4), 'to render the public body as accessible as reasonably possible for requesters of its records.'

Herewith then a request for records under PAIA for your response please.

In view of the number of records I'm seeking, I hereby consent under section 26(1)(e) to an extension of the ordinary 30 days allowed by section 25 for responding to a PAIA request, by a further 30 days, which will give you 60 calendar days in total, the maximum allowed by the Act.

What I said in my letter of the 10th instant to Chief Legal Executive Patrick Hundermark covering a different PAIA request applies equally to this one:

Please be advised that I'll sue immediately for whatever records you refuse,\* and likewise for any records you deny exist if I have reason to believe they do. In this latter regard, my founding affidavit in my PAIA application against Eastern Cape deputy information officer Bambiso records LASA's history of concealing records from me under cover of lies that they don't exist. (\*I was constrained to delay suing Bambiso, Vedalankar, and Msweli for the full six months allowed by the Act to apply to court to compel their compliance with my PAIA requests because I was seriously hands-full at the time with my labour case.)

N.N



If you have in mind to refuse any of the records I've duly requested, before you do please consider consulting the SAHRC's PAIA Unit for expert advice on whether the Act permits it – especially recalling the SAHRC's PAIA training workshop report in October 2012, which recorded LASA's 'challenges [in] complying with PAIA';<sup>1</sup> its 'lack of application based knowledge';<sup>2</sup> 'the fact that they had previously been misapplying the provisions of PAIA';<sup>3</sup> that this 'misinterpretation and misapplication was identified as high risk to LASA';<sup>4</sup> 'LASA compliance history was flagged with participants and most reacted to the reporting of LASA as non-compliant to Parliament with concern';<sup>5</sup> 'Most participants were a little overwhelmed by the requirements of the legislation';<sup>6</sup> 'personnel from the Legal Department were able to gain value from the training. They have as a result undertaken to review decisions which may not have had justification in terms of PAIA and to create guidelines within the organisation to ensure misapplication does not recur';<sup>7</sup> and 'LASA has identified the need to have a clear budget dedicated to PAIA compliance and implementation'.<sup>8</sup>

As you will see from my replying affidavits in my three pending PAIA applications,<sup>9</sup> LASA's very junior counsel used to date is clueless, so looking to and relying on him again will be disastrous.

Notwithstanding LASA's concessions and undertakings to the SAHRC minuted in its report following its PAIA training course for LASA, its information officers have continued illegally refusing me access to duly requested records, hence my pending applications.

I'm sure you don't want an embarrassing repeat of this, with your name on the front page of another set of court papers and then shamefully included in the SAHRC's next section 84 report to the National Assembly.

If, as I suspect, information officer Vedalankar hasn't yet designated you a deputy information officer in writing under section 17(6) of PAIA, please be sure

<sup>1</sup> Bundle addendum (trial documents in case LC D529/11), page 916.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Bundle addendum, page 919.

<sup>6</sup> Ibid.

<sup>7</sup> Bundle addendum, page 920.

<sup>8</sup> Ibid.

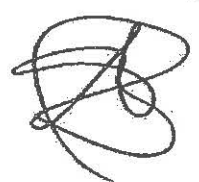
<sup>9</sup> Accessible at the case document archive online: [www.tig.org.za/LASA](http://www.tig.org.za/LASA) username: lasa password: LASA2010.



to fix this before commencing to deal with my request (like Nair did in March 2011<sup>10</sup> before dealing with my first three PAIA requests made in 2010/11), or you'll be acting ultra vires and unlawfully (like Mtati did in November 2013),<sup>11</sup> thus exposing you and LASA to more remedial litigation in the Eshowe Magistrate's Court. [...] merely being named a deputy information officer in LASA's revised PAIA manual, even if the Board approves it, isn't a valid designation under the section.

I paid the prescribed R35 request fee by EFT directly into LASA's bank account yesterday evening under reference code 'PAIA/JM'.

Yours sincerely




ANTHONY BRINK

Cc:

- Nokwanda Molefe, PAIA Unit, South African Human Rights Commission
- Sinthia Reddy, Public Protector investigator (ref: 7/2-040815/12)
- Lesleigh Timothy, LASA Board Secretary

<sup>10</sup> Bundle, page 387.

<sup>11</sup> Replying affidavit in application to compel Vedalankar; online, see footnote 9 above.

SHERIFF  
 2016 -5-  
 HIGH COURT  
 N. N. BULLE  


**FORM A**

**REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY**

(Section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000))

**[Regulation 2]**

<p><b>FOR DEPARTMENTAL USE</b></p> <p style="text-align: right;">Reference number:</p> <p>Request received by (state rank, name and surname of information officer/deputy information officer) on (date) at (place).</p> <p>Request fee (if any): R .....</p> <p>Deposit (if any): R .....</p> <p>Access fee: R .....</p> <p>SIGNATURE OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER</p>
--

**A. Particulars of public body**

**Legal Aid SA**

**Jerry Makokoane  
Deputy Information Officer,  
National Office  
29 De Beer Street  
Braamfontein**

**B. Particulars of person requesting access to the record**

<p><i>(a) The particulars of the person who requests access to the record must be recorded below.</i></p> <p><i>(b) Furnish an address and/or fax number in the Republic to which information must be sent.</i></p> <p><i>(c) Proof of the capacity in which the request is made, if applicable, must be attached.</i></p>
--

N.N

Full names and surname : **Anthony Robin Brink**  
 Identity number : **590225 5116 081**  
 Postal address : **1 Boast Street, Eshowe 3815, KwaZulu-Natal**  
 Fax number : **086 672 0776**  
 Telephone number : **035 474 0145**  
 E-mail address : **arbrink@iafrica.com**

Capacity in which request is made, when made on behalf of another person:

N/A

**C. Particulars of person on whose behalf request is made**

*This section must be completed only if a request for information is made on behalf of another person.*

Full names and surname : **N/A**  
 Identity number : **N/A**

**D. Particulars of record**

*(a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.*

*(b) If the provided space is inadequate please continue on a separate folio and attach it to this form. **The requester must sign all the additional folios.***

1. Description of record or relevant part of the record:
2. Reference number, if available:
3. Any further particulars of record:

**See annexure**

N. N



**E. Fees**

<p>(a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a <b>request fee</b> has been paid.</p> <p>(b) You will be notified of the amount required to be paid as the request fee.</p> <p>(c) The <b>fee payable for access</b> to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.</p> <p>(d) If you qualify for exemption of the payment of any fee, please state the reason therefor.</p>
--

Reason for exemption from payment of fees:

N/A

**F. Form of access to record**

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 hereunder, state your disability and indicate in which form the record is required.

Disability: N/A		Form in which record is required:	
<p>Mark the appropriate box with an "X".</p> <p>NOTES:</p> <p>(a) Your indication as to the required form of access depends on the form in which the record is available.</p> <p>(b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.</p> <p>(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.</p>			
<b>1. If the record is in written or printed form -</b>			
<input checked="" type="checkbox"/>	copy of record*	<input type="checkbox"/>	inspection of record

N.N

**2. If record consists of visual images -**  
 (this includes photographs, slides, video recordings, computer-generated images, sketches, etc.)

<input type="checkbox"/>	view the images	<input checked="" type="checkbox"/>	copy of the images*	<input type="checkbox"/>	transcription of the images*
--------------------------	-----------------	-------------------------------------	---------------------	--------------------------	------------------------------

**3. If record consists of recorded words or information which can be reproduced in sound -**

<input type="checkbox"/>	listen to the soundtrack (audio cassette)	<input checked="" type="checkbox"/>	transcription of soundtrack* (written or printed document)
--------------------------	---	-------------------------------------	---

**4. If record is held on computer or in an electronic or machine-readable form -**

<input type="checkbox"/>	printed copy of record*	<input type="checkbox"/>	printed copy of information derived from the record*	<input checked="" type="checkbox"/>	copy in computer readable form* (on compact disc)
--------------------------	-------------------------	--------------------------	--	-------------------------------------	--

*If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?				YES	<input type="checkbox"/>
A postal fee is payable.					

*Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.*

In which language would you prefer the record? **English**

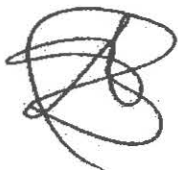
N. N

**G. Notice of decision regarding request for access**

*You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.*

How would you prefer to be informed of the decision regarding your request for access to the record? **By email**

Signed at Eshowe on 25 November 2014



SIGNATURE OF REQUESTER

N.N



26

## ANNEXURE: RECORDS REQUIRED

Note: The Promotion of Access to Information Act 2 of 2000 will be referred to herein as 'PAIA', and the records requester as 'Brink'.

1. Judge Cele's suggestion to LASA that Brink's request for a directive that LASA hand over the copy of the trial record it printed for him in case LC D529/11 be satisfied by giving him 'an electronic copy of the record' instead.

Note: CSE Mtati alleged in paragraph 7 of his letter to the registrar of 1 October 2014, later copied to Brink:

'Cele J, through his office, suggested that the Respondent accommodate the Applicant by providing him with an electronic copy of the record which the Respondent did.'

This alleged suggestion was not conveyed to Brink by Cele J's secretary/associate or by the registrar; and Brink's written request on 22 October 2014 that Mtati provide him with a copy of this alleged suggestion of 'Cele J, through his office', was ignored.

2. The transcript of the trial record in case LC D529/11.

Note: The request for access to this document will be satisfied (i) by providing Brink with a PDF copy of the record, or (ii) by providing Brink with the extra hard copy of the record at the Durban Justice Centre that LASA printed for Brink (to be collected by him), or (iii) by providing Brink with a copy of this copy (to be collected by him), or (iv) by making the extra hard copy of the record at the Durban Justice Centre available to Brink for copying. If the deputy information officer picks this latter option, Brink will need to uplift the copy at the Durban Justice Centre to scan every page in order to make multiple copies of the record for his appeal, and return it once he's done so.

As a special favour, the registrar of the Durban Labour Court photocopied part of the record for Brink, viz. Nair's evidence, for which Brink paid a copying charge. The whole record, a public document in LASA's possession, is required.

3. All and any records vouching that a meeting took place between the SAHRC and LASA's 'CEO and some of our senior members' to discuss the SAHRC's allegedly 'incorrect finding' contained in its section 84 report for 2011/12 on public body compliance with PAIA, presented to the National Assembly in October 2012, namely the finding that LASA (Vedalankar) had failed to comply with its (her) reporting obligations under section 32. The record(s) will show the date and place of the meeting, who attended it, and the outcome.

Note: In paragraph 183.2 of his answering affidavit in Brink's application in the Eshowe Magistrate's Court under case number 258/14 to compel Vedalankar's compliance with his PAIA request in October 2013, CSE Thembile Mtati swore to a commissioner of oaths under penalty of perjury:

'As an organisation, we denied the said finding by SAHRC and I am aware that the CEO and some of our senior members met with SAHRC to deal with the said incorrect finding.'

N.N

In paragraph 2 of her confirmatory affidavit 'TM3', Vedalankar swore to a commissioner of oaths under penalty of perjury that this allegation was true:

'I have read the Answering Affidavit of Thembile Vuyo Mtati and I confirm that the content therein, in so far as it relates to me, are both true and correct.'

In evidence at the trial of case LC D529/11, Nair alleged differently under oath:

'I am aware of engagements that Legal Aid South Africa has made with the Human Rights Commission in terms of our concern with [the SAHRC's section 84 report about LASA]. And our Corporate Services Executive was requested to take it on directly with the respective officials from there, and I believe that engagement did take place. ... We were quite concerned with this report and we did address it with the Human Rights Commission ourselves.'<sup>1</sup>

- 4. The record reflecting that, as ordered by the Legal Services Technical Committee on 24 March 2010, then 'Manager: Legal Administration, National Operations'<sup>2</sup> Bee-Mari Schoeman (responsible for 'Legal Services Delivery')<sup>3</sup> 'Immediate[ly]<sup>4</sup> ... facilitate[d] the transfer of the budget'<sup>5</sup> that existed for a Senior Litigator post at the Kimberly Justice Centre<sup>6</sup> to the Mthatha Justice Centre.
- 5. The records of CEO Vedalankar's and National Operations Executive Brian Nair's respective 'Final approval' and 'agree[ment]'<sup>7</sup> (as he 'Must') of the abolition of the Kimberly Senior Litigator post and establishment of the Mthatha Senior Litigator post under section 8.1.2(b) of the Approval Framework as required,<sup>7</sup> before the Mthatha post was advertised.<sup>8</sup>

Note: The recruitment/vacancy/budget statistics for June 2010<sup>9</sup> supplied to Brink before trial show that the Kimberly Senior Litigator post had indeed been abolished and the Mthatha post established by that month, with the Mthatha post duly noted as vacant.

- 6. After the selection panel's interviews of shortlisted candidates for the Mthatha Senior Litigator post in May 2010,<sup>10</sup> all and any records showing the form of 'transit' that 'a file that was to be delivered to Legal Aid SA Head Office in re the position of senior litigator position for Mthatha was lost in', in the form of a registered post slip, courier waybill, covering email, telefax covering page and transmission report, or other such voucher.

---

<sup>1</sup> Record, page 474, lines 13-22.  
<sup>2</sup> Per Schoeman's CV posted online at LinkedIn: <http://linkd.in/17DpY3F>.  
<sup>3</sup> Bundle addendum (trial documents in LC D529/11), page 708, 'Members Present'.  
<sup>4</sup> Bundle addendum, page 709, section 4.1.7 under 'Due Date' column.  
<sup>5</sup> Bundle addendum, page 709, section 4.1.7.  
<sup>6</sup> Bundle addendum page 707.  
<sup>7</sup> Bundle addendum, page 1036.  
<sup>8</sup> Bundle, page 46.  
<sup>9</sup> Bundle addendum, page 1066.  
<sup>10</sup> Bundle addendum, page 994.

N.N 

Note: In paragraph 183 of Eastern Cape deputy information officer Hope Bambiso’s answering affidavit in Brink’s application in the Eshowe Magistrate’s Court under case number 257/14 to compel his compliance with Brink’s PAIA request in October 2013, Bambiso stated:

‘183.2. I am responsible for the Port Elizabeth, Eastern Cape Region and I am advised by Mr Sekgota that a file that was to be delivered to Legal Aid SA Head Office in re the position of senior litigator position for Mthatha was lost in transit. I believe Ms Magazi informed Mr Sekgota telephonically sometime last year.

183.4. The Applicant was informed of the lost file and he still does not believe the explanation given to him. I am unable to take this issue any further.’

In paragraph 2 of his confirmatory affidavit ‘HB6’, Corporate Legal Manager Solly Sekgota swore to a commissioner of oaths under penalty of perjury that these allegations were true:

‘I have read the Answering Affidavit of Hope Bambiso and I confirm that the content therein, in so far as it relates to me, are both true and correct.’

In paragraph 2 of her confirmatory affidavit ‘HB7’, Eastern Cape Regional Human Resources Manager Thenjiwe Magazi also swore to a commissioner of oaths under penalty of perjury that these allegations were true:

‘I have read the Answering Affidavit of Hope Bambiso and I confirm that the content therein, in so far as it relates to me, are both true and correct.’

(Provision of these records may assist a criminal court magistrate ‘believe the explanation given to him’ when later dealing with ‘the issue’ of whether or not Magazi and Sekgota committed perjury.)

- 7. Copies of the contents of the ‘file ... in re the position of senior litigator position for Mthatha’ retained by Eastern Cape Regional Human Resources Manager Thenjiwe Magazi before dispatching the original or a copy ‘to Legal Aid SA Head Office’.

Note: As above.

- 8. The complete contents of Human Resources Executive Amanda Clark’s file or computer folder on the Mthatha Senior Litigator post.
- 9. All records of communications between LASA’s national office and its Eastern Cape Regional Office after the discovery that ‘a file that was to be delivered to Legal Aid SA Head Office in re the position of senior litigator position for Mthatha was lost in transit’ – including any request for the file, or a copy of it, to be sent again.

Note: The minute of the LSTC’s March 2010 meeting, chaired by Nair, records that it prioritised the Mthatha Senior Litigator recruitment for ‘Immediate’<sup>11</sup> implementation; and the post was

<sup>11</sup> Bundle addendum, page 709, paragraph 4.1.7.

N. N 

advertised in April,<sup>12</sup> with interviews held in May<sup>13</sup> in short order. Nair would accordingly have been awaiting the selection panel's recommendation in 'Legal Aid SA Head Office'.

10. The Strategic Plan 2009–12.

Note: Brink has only a draft version.<sup>14</sup>

11. The minute of the September 2008 Board meeting at which the Strategic Plan 2009–12 was approved.<sup>15</sup>

12. The minutes of all Legal Services Technical Committee meetings held in the period October 2009 to February 2011, besides the minute of its March 2010 meeting, which Brink already has.<sup>16</sup>

13. The minutes of all management executive committee meetings held in the period October 2009 to February 2011.

14. The minutes of all Board Executive Committee meetings held in the period October 2009 to February 2011.

15. The minutes of all Board meetings held in the period October 2009 to February 2011.

Note: Brink has the first page only of the minute of the July 2010 meeting.<sup>17</sup>

According to Nair's sworn evidence at trial:

'...the Board would have been informed at the May meeting of 2010 that ... we did not receive the [OSD] funding and what steps were being taken.'<sup>18</sup>

16. LASA's Business Plans for 2009/10 and 2010/11. And for 2012/13 and 2013/14.

Note: Brink has only the 'Business Plan 2011/12'.

In her<sup>19</sup> entry in section P26-10 of LASA's 'Business Plan 2011/12', under the heading, 'Talent acquisition and retention', Clark didn't disclose to the Board, to the Portfolio Committee, and to the South African public, the fact that three of the respondent's critical Senior Litigator posts had long been vacant, despite the selection of suitable candidates for appointment. Contrariwise Clark falsely claimed: 'No longstanding vacancies'.<sup>20</sup> There's a similar false entry in the 'Executive Summary' of

<sup>12</sup> Bundle, page 46.

<sup>13</sup> Bundle addendum, page 994.

<sup>14</sup> Bundle, pages 444–50.

<sup>15</sup> Bundle addendum, page 1060, paragraph 3.2.1.

<sup>16</sup> Bundle addendum, pages 708–10.

<sup>17</sup> Bundle, page 251.

<sup>18</sup> Record, page 425, lines 19–23.

<sup>19</sup> Bundle addendum, page 877, 'Responsible Executive': 'HRE'.

<sup>20</sup> Bundle addendum, page 877.

N. N.  

the 'Budget 2011/12': 'The recruitment level was also increased from 97% in 2010/11 financial year to 100% in 2011/12.'<sup>21</sup>

These requests will be satisfied by the furnishing of excerpts comprising the cover or first identifying pages, and the pages dealing with 'Talent acquisition and retention'.

- 17. Excerpts comprising the cover or first identifying page, and the pages containing provision for Senior Litigator salaries in LASA's budget for 2013/14.
- 18. The minute of the Board meeting at which LASA's budget for 2013/14 was approved.
- 19. LASA's 2013/14 report to the SAHRC under section 32 of PAIA.
- 20. The payment voucher of the Department of Justice and Constitutional Development (as it was then called) reflecting the date of its transfer of OSD phase 1 funding for 2009/10.

Note: This payment is mentioned in LASA's annual report for 2009/10:

'The Occupational Specific Dispensation (OSD) phase 1 shortfall of R23million in the 2009/10 financial year was received from the DoJ.'<sup>22</sup>

- 21. The record of any Strategic Plan Annual Review workshop or Board meeting<sup>23</sup> at which it was resolved not to fill LASA's remaining three vacant Senior Litigator posts.

Note: 'The Strategic Plan is reviewed annually to assess changes in the external and internal environment in which Legal Aid South Africa operates. The changes in the external and internal context are taken into account in the development of each year's business plans.'<sup>24</sup> In his 'Report to Board' in November 2011, Nair alleged:

'Six Senior Litigators were filled during our recruitment processes. The other three posts have remained vacant due to recruitment challenges. We have since decided not to fill the remaining positions until we are reassured that our objectives determined for this position is being achieved by the current incumbents.'<sup>25</sup>

- 22. The record showing mention or discussion by any LASA executive(s) of the issue alleged by Nair in his November 2011 'Report to Board' that Senior Litigators may not be fulfilling LASA's objectives for such posts.
- 23. All and any reviews of Senior Litigator performance pertaining to whether or not LASA's 'objectives' for such posts were 'being achieved by the current incumbents' or not.
- 24. The record of the decision not to fill Senior Litigator posts for the said reason, referred to in Nair's Report to Board of November 2011.



<sup>21</sup> Bundle addendum, page 883, section 4.1.

<sup>22</sup> Bundle, page 1057.

<sup>23</sup> Bundle addendum, page 1061, section F2-C2-P1.

<sup>24</sup> Bundle addendum, page 1060.

<sup>25</sup> Bundle addendum, page 869.

N.N  

25. All and any records vouching that NOE Nair was among the 'senior executives' who 'began to deliberate quite intensively'<sup>26</sup> in regard to the 'budgetary issues that suddenly confronted'<sup>27</sup> them on 10 March 2010, on learning that LASA's expected OSD phase 1 funding hadn't been included in the baseline budget for 2010/11<sup>28</sup> as had been assured in January 2010,<sup>29</sup> alternatively all and any records vouching that Nair was involved in pursuing the Department's payment of LASA's OSD phase 1 funding for 2010/11 in any manner whatsoever.

26. Excerpts of LASA's recruitment statistics showing Senior Litigator post occupancies and vacancies for March, April and May 2010, and July, August, September, October, and November 2010.

Note: The June<sup>30</sup> and December<sup>31</sup> 2010 statistics were supplied to Brink before trial.

27. The executive instruction issued to transfer the Senior Litigator budget from Mthatha back to Kimberly (from which it had been transferred).

Note: Whereas the June 2010 recruitment/vacancy/budget statistics reflect a budgeted vacant Senior Litigator post at Mthatha,<sup>32</sup> the December 2010 statistics show the post and budget had reverted to Kimberly.<sup>33</sup>

28. Following COO Makokoane's memorandum circulated to them on 30 September 2010, soliciting cost-cutting proposals in view of the slow recovery from the international financial recession,<sup>34</sup> the proposals submitted by:

- (a) CEO Vidhu Vedalankar,
- (b) NOE Brian Nair,
- (c) KZN ROE Vela Mdaka,
- (d) then Pietermaritzburg JCE Bertus Appel, and,
- (e) then Durban Justice Centre Executive Kishore Mehta.

29. The 'Treasury ... budget allocations letter ... released ... at the end of 2009' to which Nair referred in his evidence.<sup>35</sup>

<sup>26</sup> Record, page 344, line 9.

<sup>27</sup> Pleadings bundle, original response, page 144, paragraph 11.

<sup>28</sup> Bundle, page 236, paragraph 6.

<sup>29</sup> Bundle, pages 235-6, paragraphs 3 and 5.


<sup>30</sup> Bundle addendum, page 1066.

<sup>31</sup> Bundle addendum, page 1070.

<sup>32</sup> Bundle addendum, page 1066.

<sup>33</sup> Bundle addendum, page 1070.

<sup>34</sup> Bundle, pages 241-3.

N. N. 

30. The records of all Nair's 'decisions ... take[n] ... to freeze posts' with or without CEO Vedalankar's agreement, and without the approval of the Board.

Note: At trial, Nair testified, on oath, under penalty of perjury, that:

'... it was a very routine decision to freeze three posts. And I take decisions to freeze posts continuously in the organisation, and I consult with the CEO. ... It is a normal part of operations that we have got a staff establishment and for various reasons we freeze posts, we do not proceed with it. What we plan to do and what we actually do, the decisions may change. So it was not something that was abnormal.'<sup>36</sup>

Contrariwise, Nair also testified (correctly, in light of the requirement of the Approval Framework that the Board be consulted before any change to the Business Plan based on it Strategic Plan):<sup>37</sup>

'The implementation continues until the Board revisits that issue.'<sup>38</sup>

31. The email or letter to Durban High Court Unit Manager Bongani Mngadi, who was interviewed for and recommended for the Durban Senior Litigator post, informing him in about 'April/May' 2010 (his words)<sup>39</sup> that the KwaZulu-Natal Senior Litigator recruitments had been cancelled.

Note: Brink doesn't need the subsequent letter sent Mngadi on 23 August 2010, which he already has,<sup>40</sup> identical to the letters sent the other interviewed candidates Brink<sup>41</sup> and van Wyk,<sup>42</sup> but very interestingly not Ngcamu,<sup>43</sup> subsequently employed as Children's Court Practitioner at the Durban Justice Centre.

Paragraphs 178-9 of Brink's heads of argument, quoted below, drawn without sight of the record, deal with LASA's communication with Mngadi in about 'April/May' 2010, the record of which certainly exists, having regard to LASA's pleaded and sworn case before trial.

[178] Nair's claim that Mngadi was 'definitely not' told in April or May 2010 that the Senior Litigator recruitment had been cancelled, and that 'if such a statement was made to him it didn't come from [him, Nair] because the decision was only made in July' is contradicted on all counts by the respondent's pleadings. Answering the applicant's averment in his original statement of claim that "'in April/May"<sup>44</sup> 2010 Mngadi was notified ... that the respondent had decided not to fill the post for which he had applied, alternatively that the respondent had decided not to fill its remaining vacant Senior Litigator posts',<sup>45</sup> the respondent admitted in its

<sup>35</sup> Record, page 342, lines 14-15.

<sup>36</sup> Record, page 434, lines 3-18. (The Minister explicitly told Mlambo JP that he 'didn't want' any posts frozen, as Vedalankar mentioned to the Portfolio Committee on 11 October 2010. Bundle, page 184.)

<sup>37</sup> Heads of argument, paragraph 61.

<sup>38</sup> Record, page 424, line 25 to page 425 line 1.

<sup>39</sup> Bundle, pages 146-7, paragraph 179.

<sup>40</sup> Bundle addendum, page 831.

<sup>41</sup> Bundle, page 20.

<sup>42</sup> Bundle addendum, page 829.

<sup>43</sup> Bundle, page 383, paragraph 36: 'to two other applicants', not three.

<sup>44</sup> Ibid.

<sup>45</sup> Pleadings bundle, original statement of claim, pages 55-6, paragraph 55.

N.N

original response that it took a 'decision to inform Mr B Mngadi who was an internal candidate of the Respondent's decision not to proceed with the filling in of the Senior Litigator posts instead of the Applicant'.<sup>46</sup> Among the facts listed by the applicant for admission in his agenda for the pre-trial conference in October 2011 was: 'At the end of April or in May 2010, even as the respondent was busy recruiting for a Senior Litigator for Mthatha, Nair or Clark telephoned Mdaka or Brijlal and instructed him to tell Mngadi that the Senior Litigator recruitment wasn't being proceeded with.'<sup>47</sup> The respondent 'Agreed'<sup>48</sup> with this and volunteered: 'It was Mr Nair who gave the instruction.'<sup>49</sup> In denying it in court, Nair lied.

[179] Further contradicting Nair's lying denial in court that he had Mngadi put off in April or May 2010 while the applicant was callously left twisting in the wind, the respondent not only confirmed this, it went on to advance a flaccid reason why Mngadi was informed 'of the Respondent's decision not to proceed with the filling in of the Senior Litigator posts instead of the Applicant',<sup>50</sup> despite the applicant's repeated pleas for information about the upshot of the interviews held five months earlier: 'For Mr Mngadi, his appointment as a Senior Litigator was going to result as an internal promotion instead of a new employment hence it was not much of a problem to inform him well in time of Legal Aid South Africa's decision to freeze the recruitment process'.<sup>51</sup> ...

(This latter sworn statement is contradicted by Vedalankar's allegation to Brink in her letter on 18 October 2010: 'In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would be immediately frozen.'<sup>52</sup> Which she confirmed on affidavit.)<sup>53</sup>

32. All counsel's feenotes for his professional services rendered LASA in the handling of Brink's first three record requests under PAIA in August and December 2010 and March 2011, and his involvement, if any, in the drafting of Mlambo JP's 'Confidential ... Report ... Re: Advocate Anthony Brink' to the Minister in March 2011 and in 'updated' form to the Portfolio Committee in June 2011, to put down Brink's complaints.

Note: CSE Mtati has stated on affidavit that after 'the CEO ... felt justified to refuse him access' to the records Brink had requested, his PAIA requests were 'given to counsel for his opinion ... to be safe.'<sup>54</sup>

33. All counsel's opinions in regard to the handling of Brink's said PAIA requests, and the responses to them that he drafted for LASA.

Note: Since these were not furnished in the course of litigation, no question of privilege arises.

<sup>46</sup> Pleadings bundle, original response, page 162, paragraph 41.4.

<sup>47</sup> Pre-trial conference bundle, applicant's agenda, page 13, paragraph 31.

<sup>48</sup> Pre-trial conference bundle, respondent's answer to agenda, page 55, paragraph 31.1.

<sup>49</sup> Pre-trial conference bundle, respondent's answer to agenda, page 55, paragraph 31.2.

<sup>50</sup> Pleadings bundle, original response, page 162, paragraph 41.4.

<sup>51</sup> Application to subpoena Mlambo JP, Mtati's answering affidavit, page 105, paragraph 81.6.

<sup>52</sup> Bundle, page 103, paragraph 6.7.

<sup>53</sup> Bundle addendum, page 390-1, with reference to page 380, paragraph 13.

<sup>54</sup> Application to subpoena Mlambo JP, page 102, paragraph 75.2.

34. LASA's current/most recent list of critical legal posts, or other record(s), identifying what legal posts are included under the category 'Critical Occupation'.

Note: For instance, at page 123 of LASA's annual report for 2011/12, Table 13 reports 229 critical legal posts:

Table 13: Employment and vacancies per critical occupation

Critical Occupation	Number of Posts	Number of Posts Filled	Vacancy Rate %
Legal	229	200	12,66%

The report doesn't identify what these 229 critical legal posts are, but LASA's HR department will have a spreadsheet or other record including and identifying these critical legal posts, the sum of which is annually reported, as above.

In evidence, Nair alleged that 'practitioners' in the Labour [sic: lower] Courts', the 'criminal court[s] ... were our critical posts; there was nothing more important than these posts.'<sup>55</sup> 'I described the critical positions as being those very same lower court positions ... the Practitioner positions who serve the lower courts per district ... those were the critical positions.'<sup>56</sup> 'The critical posts we are, I am referring or we are referring to there are link[ed] to the lower court positions.'<sup>57</sup> 'So when we are talking about critical, it was linking to coverage of courts.'<sup>58</sup> Nair's evidence contradicted LASA's pleaded case.<sup>59</sup> See further: heads of argument, paragraph 229.

35. Former Board Secretary Bee-Marie Schoeman's resignation or dismissal letter, and/or any other record vouching her information to Brink that she left LASA on account of permanent or long-term mentally disabling concussion and amnesia sustained in a motor vehicle accident, alternatively identifying any other reason she quit LASA.

Note: According to Schoeman's CV at LinkedIn, she was employed at LASA until 'March 2012'.<sup>60</sup> On 19 July 2013, having been located by tracing agents engaged by Brink, and telephoned by him at her home on the eve of trial for her possible provision of relevant information about his case, Schoeman made this claim, which Brink immediately reported to his accountant Rawlins by email:

'Nice but sad call.  
She had a terrible car crash, wrote off her car, very severe concussion, memory wrecked, forced to "leave a job I loved", unable to cope.  
When I remarked on her fine CV, she yes, yes but "I can't remember any law anymore".  
Just surviving.

<sup>55</sup> Record, pages 373, lines 20-5 to page 374, line 1.


<sup>56</sup> Record, page 480, lines 19-23.

<sup>57</sup> Record, page 375, lines 10-11.

<sup>58</sup> Record, page 375, lines 17.

<sup>59</sup> Pleadings bundle, original response, page 170, paragraph 48.9; and pre-trial conference bundle, answer to agenda, page 57, paragraph 43.1, and page 58, paragraph 52.1. The respondent contradicts itself in the same pleading: page 63, paragraph 79.1.

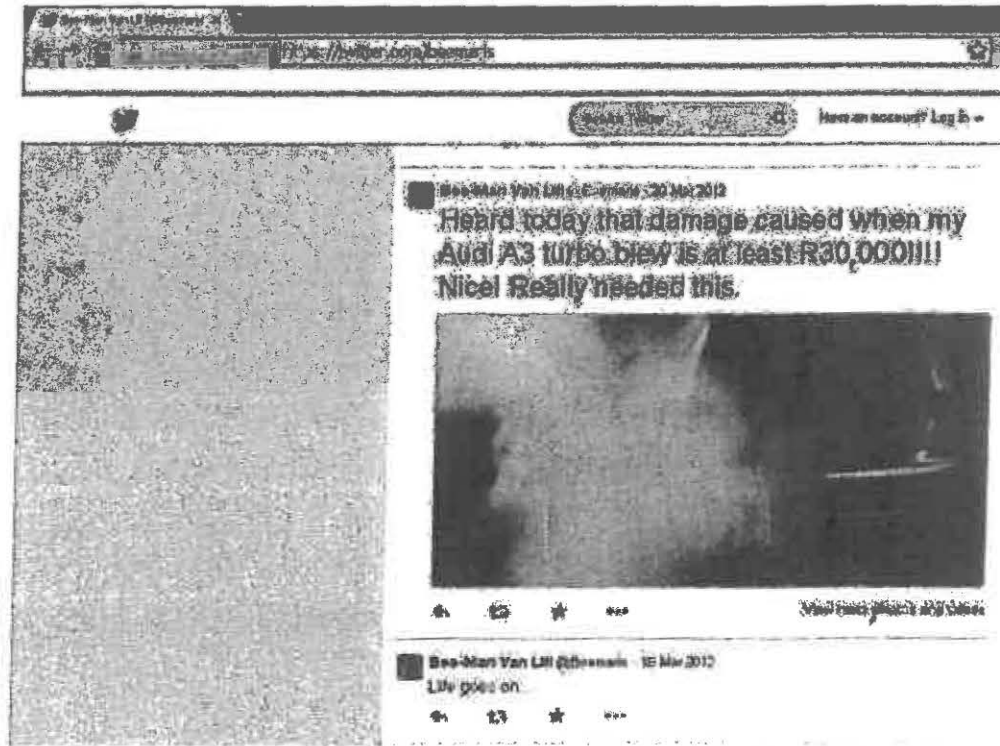
<sup>60</sup> <http://linkd.in/17DpY3F>.

N.N 

Completely blank on my name, genuinely apologetic.'

After Schoeman acknowledged Brink's first petition to the Board on Mlambo JP's behalf,<sup>61</sup> Brink had twice written to her,<sup>62</sup> asking that she ensure that his November 2010 petition to the Board be brought to the attention of all Board members (not having all their email addresses). She did not respond.

On 18 March 2012, Schoeman blithely remarked 'Life goes on' on her Twitter account. Two days later on 20 March 2012, and ten days before she quit LASA, she posted a report and a photograph of her car's engine turbocharger having failed, with no mention or sign of any collision damage.



In November 2013, a few months after claiming to Brink to be mentally disabled, Schoeman commenced employment by the 'Department of Justice and Constitutional Development' on 'contract' as a 'Senior Legal Administrative Officer' to conduct a 'Review of the Criminal Justice System', and is still so employed, according to her CV at LinkedIn.<sup>63</sup>

- 36. The minutes of the Board meetings in February and May 2012.
- 37. The minutes of the Board Executive Committee meetings in February and May 2012.
- 38. The Charter of the Board Executive Committee.<sup>64</sup>

<sup>61</sup> Bundle, page 168, email quoted.

<sup>62</sup> Bundle, pages 168–72; and 188.

<sup>63</sup> <http://linkd.in/17DpY3F>.

<sup>64</sup> Annual report 2012/13, page 73, top of the page: each board committee has a Charter which details its responsibilities and duties.

N.N

39. The agenda and the minute of the Board Executive Committee meeting on Friday 23 March 2012; alternatively, if no such meeting was held on that date, the agenda and the minute of the extraordinary extra fifth Board Executive Committee meeting in 2011/12.

Note: According to LASA' annual report for 2011/12 there was an extra Board Executive Committee meeting in that year,<sup>65</sup> seemingly on Friday 23 March 2012.<sup>66</sup>

40. Vedalankar's confirmatory affidavit, made in support of CSE Mtati's answering affidavit in Brink's application for leave to subpoena Mlambo JP, and referred to in paragraph 107 thereof as annexure 'DM14'.

Note: Nair also made a confirmatory affidavit – referred to in the same paragraph as 'DM15'. Neither Vedalankar's nor Nair's affidavits were annexed to Mtati's affidavit at the time the latter was delivered to Brink. Nair's confirmatory affidavit was delivered to Brink only after the trial; and Vedalankar's confirmatory affidavit remains outstanding.

41. The records of Board chairperson Mlambo JP's requests to other Board members on 24 January 2011 that they should ignore Brink's repeated appeals for Board intervention in Vedalankar's illegal, falsely justified refusal to comply with his first PAIA request and the manifestly irregular abortion of his appointment on the several indications he identified.<sup>67</sup>

Note: In his email to Brink rebuking Brink's second petition to the Board,<sup>68</sup> in which he again pleaded for its intervention in Vedalankar's illegal, falsely justified refusal to comply with his first PAIA request and the manifestly irregular abortion of his appointment,<sup>69</sup> Mlambo JP alleged:

'I have, in turn, requested Board members to ignore all communications from you and/or on your behalf.'<sup>70</sup>

Unless Mlambo JP telephoned each and every Board member between the time he read Brink's second petition and the time he wrote this late-night email on the same day, records will exist to vouch the truth of his allegation that he requested each of them 'to ignore' Brink's future appeals that the Board see to it that LASA's management executives conduct themselves in accordance with with the Constitution and the law.

<sup>65</sup> Page 21 of LASA's annual report for 2011/12 shows five meetings of the Board Executive Committee, not the usual four.


<sup>66</sup> On 23 March 2012, Board member Judge Edwin Molahlehi's secretary stated to Brink's accountant Christopher Rawlins that he was attending a LASA meeting on that day, which information Rawlins immediately emailed to Brink: 'Just spoken again with his assistant who told me that he was out at a meeting with LASA.'

<sup>67</sup> Bundle, pages 109–65; and 197–208.

<sup>68</sup> Bundle, pages 197–208.

<sup>69</sup> Bundle, pages 109–65.

<sup>70</sup> Bundle, page 209.

N.N. 

42. The decision originally taken to employ two Professional Assistants ('PAs') per backlog court at Pietermaritzburg, or generally, provincially or nationally.

Note: Then Pietermaritzburg Justice Centre Executive Bertus Appel twice refers to this decision: in his motivation for the employment of Arnold Mahlobo in August 2008,<sup>71</sup> and in his email correspondence with KwaZulu-Natal Regional Operations executive Vela Mdaka in February 2011.<sup>72</sup>

43. The 2010/11, 2011/12, and 2012/13 budgets provided by the Department for salaries for PAs serving the backlog courts at Pietermaritzburg.

Note: LASA's budget for 2011/12 was approved by the Board on 26 Nov 2010,<sup>73</sup> and it presumably would have provided for 8 contract PA posts at Pietermaritzburg for the four backlog courts, because this number of posts was reduced some months later.<sup>74</sup>

44. The minutes of all Kwazulu-Natal regional executive management meetings over the period October 2010 to June 2011.

45. The record of KwaZulu-Natal Regional Operations Executive Vela Mdaka's discussions with National Operations Executive Brian Nair about streamlining the backlog courts.

Note: Mdaka refers to this in email correspondence with Appel.<sup>75</sup>

46. All and any records identifying the nature of the Stanger court incident.

Note: Mdaka refers to this in his email correspondence with Appel.<sup>76</sup>

47. All records sent to then Board Secretary Bee-Mari Schoeman over the period October 2010 to June 2011 informing her performance of her function: 'Monitoring of Backlog Court Staffing and compilation of costings to distribute budget received for this purpose to various cost centres'<sup>77</sup>, including but not limited to (i) any changes to the number of backlog court posts at the Pietermaritzburg Justice Centre, and (ii) any changes to the budget received for the employment of PAs in the backlog courts at Pietermaritzburg.

48. The decision to reduce the number of PAs serving the backlog courts at Pietermaritzburg from two to one, according to Nair's emailed announcement of this to LASA's Regional Operations Executives on 21 February 2011.<sup>78</sup>

<sup>71</sup> PA bundle (document bundle in Richards Bay CCMA case KNRB1481-14: Brink/LASA), page 116. The PA bundle is also accessible at the case document archive online: [www.tig.org.za/LASA](http://www.tig.org.za/LASA) username: lasa password: LASA2010.

<sup>72</sup> PA bundle, page 222.

<sup>73</sup> Bundle addendum (second trial document bundle, in case LC D 529/11), page 881.

<sup>74</sup> PA bundle, pages 220 and 221.

<sup>75</sup> PA bundle, page 231.

<sup>76</sup> Ibid.

<sup>77</sup> Per Schoeman's CV posted online at LinkedIn: <http://linkd.in/17DpY3F>.

<sup>78</sup> PA bundle, page 123.

N.N

- 49. The spreadsheet attached to Nair’s email to the ROEs on 21 February 2011, named ‘Backlog courts – 2011 approved courts.xlsx’.<sup>79</sup>
- 50. The minute of the ‘meeting’ in February 2011 ‘to identify the sites that will continue to function [and be] funded’, to which Mdaka referred in his email to then Pietermaritzburg Justice Centre Executive Bertus Appel and other JCEs on 7 February 2011.<sup>80</sup>
- 51. The responses that the members of the selection panel, Manickum, Holtzhauzen, and Shelembe furnished Appel following his referral to them of Mdaka’s objections to Brink’s appointment to the annual contract PA post for which they’d unanimously recommended him.<sup>81</sup>

Note: On 17 November 2010, the day after receiving Mdaka’s objections to Brink’s appointment,<sup>82</sup> Appel emailed Mdaka: ‘I will refer the issues raised by you to the interviewing panel and will revert to you.’<sup>83</sup>

- 52. Appel’s transmission to Mdaka of the selection panel’s responses to Mdaka’s objections to Brink’s appointment.
- 53. Appel’s leave application covering 14 and 15 December 2010, alternatively an excerpt from the leave register, reflecting that he was on leave for those two days, and reflecting further the full period he was on leave at that time.
- 54. The record of Jeffrey Mthimkhulu’s appointment as acting Pietermaritzburg Justice Centre Executive<sup>84</sup> in Appel’s absence on leave at the said time.
- 55. The selection panel’s recommendation of Brink for the Pietermaritzburg temporary backlog PA post, showing the names of the other candidates interviewed.

Note: The identities of the other shortlisted, interviewed applicants is not confidential information about them. (Such information appears unconcealed on the KwaZulu-Natal Senior Litigator post recommendation provided to Brink.)<sup>85</sup>

- 56. Any employment contracts subsequently signed between LASA and any of the rejected candidates.

*IT’S SUGGESTED THAT THE REQUESTED DOCUMENTS BE DELIVERED TO BRINK ON A DVD, OR OVER THE INTERNET VIA ‘DROPBOX’ OR SIMILAR SECURE ELECTRONIC FILE DELIVERY SYSTEM.*

<sup>79</sup> Ibid.

<sup>80</sup> PA bundle, page 219.

<sup>81</sup> PA bundle, pages 18–21.

<sup>82</sup> PA bundle, page 23.

<sup>83</sup> PA bundle, page 212.

<sup>84</sup> PA bundle, page 53.

<sup>85</sup> Bundle, pages 244–8.

N.N



PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

23 Records that cannot be found or do not exist

(1) If-

(a) all reasonable steps have been taken to find a record requested; and

(b) there are reasonable grounds for believing that the record-

(i) is in the public body's possession but cannot be found; or

(ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

90 Offences



(1) A person who with intent to deny a right of access in terms of this Act-

(a) destroys, damages or alters a record;

(b) conceals a record; or

(c) falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

N. N.  

FA14  
280



REPUBLIC OF SOUTH AFRICA  
IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

CASE NO: D529/11

In the matter between

ANTHONY ROBIN BRINK

Applicant

and

LEGAL AID SOUTH AFRICA

Respondent

Heard: In chambers

Delivered: 27 November 2014

Summary: Application for leave to appeal – matter concerns a claim based on unfair discrimination under section 6 (1) of the Employment Equity Act – was a failure to appoint him to the post of Senior Litigator unfair discrimination on prohibited grounds namely, his conscience, belief or political opinion – whether applicant has shown reasonable prospects of another court reaching a conclusion materially different from one reached by this court – no prospects - application dismissed.

---

JUDGMENT

---

CELE J

N.N

Introduction

- [1] Twelve grounds of appeal have been outlined and expatiated upon by the applicant in his application for leave to appeal against a final decision of this court dated 18 September 2014. The applicant further seeks to be granted leave to lead further evidence. The respondent did not oppose this application.
- [2] In his introductory note to the application the applicant articulates a difficulty he experienced in obtaining a transcript of the trial. This court had no reason to order one of the litigants before it, the respondent, to supply the applicant with a copy of the trial record free of charge.
- [3] In summary, the pleaded case of the applicant when seen against his final version was that, on learning of applicant's identity, Mr Nair exercised his prerogative not to agree with the applicant's appointment by aborting his recruitment by camouflaging the true reason for such refusal as lack of funding.
- [4] Through circumstantial evidence the applicant had to prove the allegation that he was unfairly discriminated upon by the respondent<sup>1</sup>. The amendment to section 11 which the applicant refers to in the application for leave to appeal came into effect after all evidence had been led, closing submissions had been made and the judgment was reserved for consideration. The amendment is clearly not retrospective.
- [5] The applicant has not succeeded in showing that the Labour Appeal Court is likely to reach a conclusion materially different from the one this court reached in this matter, with particular reference to paragraphs 68 to 72 of the judgment sought to appeal against. In my view, these findings constitute the critical and decisive findings on which the allegations of unfair discrimination depended. To the extent that the onus of proof might be said to have lied on the respondent as contended by the applicant, evidence showed on a balance of probabilities that the respondent discharged the same and such evidence on alleged

---

<sup>1</sup> In terms of section 11 of the Employment Equity Act number 55 of 1998, the Act.

N.N



discrimination evinced that the applicant's version was a mere speculation. I consider that the further elaborate submissions of the applicant do not take the matter any further.

[6] The result is that:

1. The application for leave to appeal and to lead further evidence is dismissed.
2. This application was unopposed and so no costs order is made.

Cele J

Judge of the Labour Court of South Africa.

Appearances

For the applicant: in person

For the respondent: Adv. P.Mokoena SC and Adv. T.Machaba

LABOUR COURT

N. N





FAIS  
Legal Aid  
South Africa  
1  
283

Date: 3 February 2015

Advocate Anthony Brink;

1 Boast Road;

Eshowe

3815

29 De Beer Street

Braamfontein

Johannesburg 2017

Private Box X76

Braamfontein 2017

Tel: 011 877 2000

Fax: 011 877 2222

[www.legal-aid.co.za](http://www.legal-aid.co.za)

Dear Advocate Brink,

**REQUEST FOR RECORDS OR INFORMATION IN TERMS OF PROMOTION OF  
ACCESS TO INFORMATION ACT 2 OF 2000 DATED 10 AND 17 NOVEMBER 2014**

I have had an opportunity of perusing your two requests dated the 10 and 17 November 2014 respectively. I further wish to record that you have consented to a further 30 days extension in terms of section 26(1) of the Promotion of Access to Information Act 2 of 2000 (hereinafter referred as the "Act").

I must further state that due to the lengthy background to the requests, which required me to refer to the bundle of document relating to the proceedings of the Labour Court, references to the various review applications in the Magistrate Court and your specific requests as outlined in your annexure to the letters of 10 and 17 November 2014, I have had to commit Legal Aid SA resources to the preparation of a response. We have accordingly spent approximately 181 hours in excess of the allowed 6 hours in preparation of the reply.

Therefore, in terms of section 22 of the Act you are required to pay the amount of R900 (R15 per hour X 180) being the one third of the amount allowed for the search fees. I have attached for ease of reference the SAHRC fees structure.

Your voice. For justice.

N. N

Kindly make the payment into the Legal Aid SA bank account, which bank account details are already known to you, to enable me to finalise the reply.

Yours Faithfully



Mr Patrick Hundermark

Deputy Information Officer

Legal Aid South Africa

N.N



Schedule of Fess	
Description	Fee
The fee for a copy of the manual as contemplated in regulation 5(c) is R0, 60 for every photocopy of an A4-size page or part thereof.	R0.60
<b>Reproduction Fess: Regulation 7(1):</b>	
For every photocopy of an A4-size page or part thereof	R0.60
For every printed copy of an A4-size page or part thereof held on a computer or in electronic or machine-readable form	R0.40
For a copy in a computer- readable form on:	
(i) Stiff disc	R5.00
(ii) Compact disc	R40.00
For a transcription of visual images:	
(i) for A4-size page or part thereof	R22.00
(ii) copy of visual images	R60.00
(iii) transcription of an audio record, A4 size page or part thereof	R12.00
(iv) copy of an audio record	R17.00
Request fee payable by a requester, other than a personal requester	R35.00
Search Fees- to search and prepare a record for disclosure. The fee is charged per hour (or part of the hour); however the first hour is free.	R15.00-
For purposes of section 22(2) of the Act, the following applies:	
(a) Six hours as the hours to be exceeded before a deposit is payable; and	
(b) one third of the access fee is payable as a deposit by the requester.	
The actual postage is payable when a copy of a record must be posted to a requester.	

1 Boast Street  
Eshowe  
KwaZulu-Natal  
19 March 2015

COE and Information Officer Vidhu Vedalankar  
Legal Aid South Africa  
29 De Beer Street  
Braamfontein

Per email and per registered post

Dear Ms Vedalankar

**NATIONAL DEPUTY INFORMATION OFFICERS' FAILURE TO COMPLY WITH  
THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 ('PAIA');**

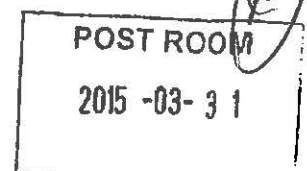
**REQUEST FOR YOUR INTERVENTION UNDER SECTION 17;**

**NOTICE OF INTENTION TO APPLY TO THE HIGH COURT TO COMPEL UNDER SECTION 78**

**FURTHER PAIA REQUEST ADDRESSED TO YOU UNDER SECTION 18, ENCLOSED.**

1. Your national office deputy information officers Chief Legal Executive Patrick Hundermark, Chief Operations Officer Jerry Makokoane, and National Operations Brian Nair have all unlawfully failed to comply with my PAIA requests addressed to them in November 2014 (with one amendment in December), in contravention of the Act and in violation of my fundamental civil right to freedom of information guaranteed by section 32 in the Bill of Rights contained in Chapter 2 of the Constitution.
2. Subsequent to the expiry in January of the extended sixty calendar days allowed them to respond to my requests, to which I'd generously consented under section 26(1)(e), knowing they wanted to go away on their Christmas holiday – which is to say they were already out of extra time and therefore unlawfully non-compliant with the Act – Hundermark and Makokoane unlawfully demanded money from me, purportedly under section 22 (while failing to comply with subsection 3).
3. Hundermark's claim is for reading (both himself, 'me', and other staff, 'we');

N.N



- o ~~'the bundle of documents relating to the proceedings of the Labour Court' (in fact, there were numerous different bundles, including two volumes of documents admitted into the evidence comprising 1073 pages in all);~~
  - o my three pending 'applications in the Magistrate's Court' to compel you and your Eastern Cape- and Free State and North West regional information officers to comply with my PAIA requests which you all illegally refused in November 2013; and,
  - o my 'specific requests as outlined in' the annexures to my Form A PAIA requests addressed to him, listing the documents I require or, where they don't exist, sworn certification of this under section 23.
4. They spent 187 hours reading these, Hundermark said.
  5. He doesn't say whether he and his staff all read all these thousands of pages of documents, thereby multiplying the effort; or whether they divided them up and shared them out, with each of them reading different bundles to lighten the load, thus resulting in each of them being half-educated about my labour case against LASA and my applications to court to disgorge illegally withheld documents from it.
  6. Nor does he say whether the very many hours of reading he claims they all did included taking a few minutes out to read the Act.
  7. I sent Hundermark two requests.
  8. With a couple of exceptions, the first request concerned the Durban Justice Centre's Children's Court Practitioner post, which featured nowhere in my labour case or my applications to compel you and your regional deputy information officers' compliance with my November 2013 PAIA requests.
  9. The exceptions, items 20-23, are:
    - o Hundermark's delegation as deputy information officer;
    - o a copy of my recommendation for the Pietermaritzburg Senior Litigator post in November 2009, in a form less redacted than one you eventually very reluctantly surrendered to me under SAHRC pressure in January 2011, five months after I requested it in August 2010, after first mutely, and then expressly, illegally refusing to allow me to see it, not wanting me to read that I'd indeed been selected and recommended for the post, and no one else, contrary to your lie to

me in October 2010 that I'd been 'recommended together with other candidates', even as you refused me sight of the recommendation refuting your lie;


- o two documents that I want Hundermark to certify on oath don't exist, thereby providing me with his sworn evidence about this to tender later on:
  - the letter (strangely not) sent former Labour Court judge Mzochithwayo Ngcamu, now Durban Children's Court Practitioner, after his interview for the Pietermaritzburg or Durban Senior Litigator post in November 2009, to inform him that he'd been unsuccessful, as section '1.5 Unsuccessful candidates' of LASA's Recruitment code required be sent to him; and,
  - the letter (strangely not) sent Ngcamu in August 2010 (after I asked you in July 2010 to see to the finalisation of my appointment, now eight months after my interview) alleging that it had been decided not to fill the KwaZulu-Natal Senior Litigator posts. (In my labour case, LASA pleaded that letters to this effect were sent me and two other interviewed applicants, not all three; and later furnished me with copies of the letters sent me and two of the other candidates, Mngadi and van Wyk, but not also the third, Ngcamu.)

10. So as you can see, Hundermark and whoever else he's referring to had no reason to read the perfectly irrelevant stacks of papers he alleges they did, for which many hours they allegedly spent reading them all he insists I must first hand over my money before he'll respond to my PAIA requests.

11. My second request addressed to Hundermark comprised a mere four items and required no background reading to respond to either, because on sight of them he'd have appreciated instantly that Nair's evidence implicating him, quoted from the trial transcript in the request, was perjured.

12. After I'd exposed, in my original very detailed statement of claim in July 2011, and had refuted as lies,

- (i) the false budgetary excuse you fed me in your October 2010 and January 2011 letters, and very unwisely confirmed under oath in your PAIA confirmatory affidavit in April 2011 (expecting your cover-story about this would put me off pursuing my appointment), and fed also to the Minister and to Parliament in the secret reports Nair ghost-wrote for you to pass on to Board chairperson Mlambo JP to sign and give them to pervert their enquiries into my complaints that you'd repeatedly illegally refused to comply with my PAIA requests and had irregularly aborted my appointment (initially he dishonestly disputed (in cross-examination


N. N 

~~of me) being the ghost-writer, but in his evidence later admitted it, cornered~~  
by his electronic fingerprints ('Briann') left behind at the scene of the crime in the 'Author' properties folder of the PDF of the report to the Minister, finally surrendered to me in the final few days before trial, nearly two years after I first requested it, and never stopped requesting it);

- (ii) the additional false logistical excuse to patch a gaping hole in the financial one fed the latter authorities, via the secret reports (that I obtained by chance), for not proceeding to finalise my appointment, namely that difficulty had been encountered coordinating the so-called second round interview panel to (irregularly) interview me again (in truth and fact, as he testified, Nair took no action on receiving my recommendation, and no one was contacted to establish their availability to conduct the second interview – Nair twice retracted the lie on affidavit before the case, then revived it in court on oath, then contradicted it on oath),

Nair changed these stories completely, and in November 2011 told the Board totally different new lies about why he'd not finalised the Senior Litigator appointments, namely 'recruitment challenges' (in truth and in fact, there weren't any: three good candidates had been selected for the three posts, one already a Senior Litigator seeking a transfer closer to home) and alleged uncertainty over LASA's incumbent Senior Litigators' professional competence, which was therefore to be audited immediately by a special assessment panel 'including possibly a retired judge' (in truth and in fact, all classes of LASA practitioners had consistently and repeatedly been found to be performing well; and no such panel has ever been convened) causing executive management to hold recruitment to the remaining vacant Senior Litigator posts.

- 13. And as these new different lies Nair told the Board – different from the lies told me, the Minister and Parliament – were unravelling under my cross-examination of him in court, he amplified his perjury to make it sound more convincing by falsely implicating Hundermark in his lies.
- 14. Obviously, had Nair told the truth in court and not gushed the new lies quoted in my request, like a child caught stealing and frantically inventing stories to escape a beating, the documents requested would exist, and would be available for Hundermark to give me.

N.N 


15. On sight of my second request, Hundermark appreciated immediately that Nair had perjured himself and that the documents I'd specified don't exist; and he was placed to certify this under section 23 on the spot.

16. Hundermark appreciated immediately that a section 23 affidavit by him disposing of my second request would be going straight to the police and to the NDPP as evidence of Nair's perjury for his criminal prosecution; to the Board for his dismissal; to the GCB for his strike-off; and to court for the reopening of my labour case, which miscarried directly on account of Nair's prolific, childishly contradictory perjures about why he didn't act to finalise my appointment. (The judge recorded his finding that I'd demonstrated that Nair was 'not generous with the truth' on 'a number' of scores, without specifying his lies, even as he then believed every lie he told all the same, and tossed my case on the strength of his lies, some novel and not pleaded, others diametrically contradicting LASA's pleadings and sworn case in its interlocutory affidavits.)

17. Do you think while obstructing my exercise of my fundamental right of access to your public body records, or failing to certify they don't exist as required by section 23, to protect Nair from being sacked, struck-off, prosecuted and jailed for his lies told to me, to the Board, to the Minister, to Parliament and to court to defeat the ends of justice and pervert the true and justice determination of my claim, Hundermark was trying to extort money from me illegally with lies of his own – about reading all those completely irrelevant documents he alleged that he and his staff needed to read before he could respond to my requests?

18. I must wonder about Hundermark's personal and professional integrity and the extent of his complicity in this next leviathan scandal in all the newspapers, because who can ever forget:

- o his emailed assurance to the director of the SAHRC's PAIA Unit on 4 October 2010, 'We hereby confirm that we will be responding to Mr Brink's request by 20 October 2010', after she'd pressed him on the telephone on the 1st and again by email on the 4th asking 'LASA to respond to the request to avoid unnecessary, expensive and protracted litigation' – which proves Hundermark was centrally involved in handling my August 2010 PAIA request after I called the SAHRC in, following your deemed refusal under section 27 by illegally failing to respond to it – and then:
- o the attempted fraud on me in the ghost-written letter you signed on 18 October 2010 now expressly refusing my entire request for 51 specified records (which

N.N 

was plainly directed at exposing as a lie Nair's claim to me on 3 August 2010 that a decision had been taken not to fill the Senior Litigator posts) by misquoting a reported judgment to justify the blanket refusal of my entire request, by putting words in the judge's mouth that she never spoke, whereas her actual reported dicta, consistent with the Act, squarely supported my request. I annex the first relevant pages of my petition to LASA chairperson Mlambo JP and the Board about this on 30 November 2010 detailing this revolting chicanery.

- 19. Although Nair's distinctive stylistic fingerprint sentence-opener, 'Noting that ...', appears repeatedly in your October 2010 letter – he used it repeatedly in his evidence and admitted using it repeatedly at an international legal aid conference in the Netherlands a couple of weeks before the trial – Nair denied in court having written it.
- 20. Besides Hundermark, Mtati was also involved in the illegal refusal of my first PAIA request, because the record shows he was collecting the documents I'd asked for (they were emailed to him), before they were all illegally refused on the said crooked basis.
- 21. So was it Hundermark or Mtati or Nair who ghost-wrote your letter advancing the lying budgetary pretext for aborting my appointment and illegally refusing my entire first PAIA request under cover of a fraudulent misquotation from a reported judgment? (If indeed it was Nair, as appears from his stylistic fingerprints all over the letter, he's obviously going to prison for falsely denying it under oath.) If Hundermark or Mtati, they've got big trouble coming too. Please advise.
- 22. In a letter you forged on your own computer (author 'VidhuV') while Board chairperson Mlambo JP was abroad in the US, copying and pasting an image of his signature below it (one can see the scanning shadow around it) to make it appear to me he'd signed it (this is actually admitted in LASA's pleadings), my extraordinarily serious 59-page petition protesting your illegal refusal to comply with PAIA under cover of a fraudulent misquotation from a reported judgment, uttered in a separate indented, italicised, block quotation to sugar the lie, and the already clear indications that my appointment had been aborted illegally under cover of a lying budgetary justification, was brushed off in two sentences typed on your own computer while he was across the Atlantic:

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.



Which verdict concerning my complaint against you, on two serious counts, you then emailed him to email me, two weeks later. Like when a judge allows the accused to write his judgment for him, pretending to have given the case his careful attention, and then acquitting him without reasons given, which the accused in the dock hands up to the judge on the bench to deliver to the complainant in the gallery. What a wonderful world.

23. I didn't ask for it, but the Board Secretary has just given me your 'Confidential' report to the Board on 'Labour Matters Referred to Courts and CCMA' on 31 October 2014 (author 'VidhuV'), and the minute of the Board meeting in November noting it. (In my experience, LASA documents telling lies are invariably marked 'Confidential'; this is now the fourth time I've seen this.)

24. Your report (author 'VidhuV') shows that you've now personally told the Board the lie that the 'Senior Litigator position [at the] Pietermaritzburg JC ... was frozen owing to a management decision in relation to cost-cutting measures', well knowing that:

- (i) no record of any such decision exists whatsoever; and,
- (ii) had such decision been taken, the Approval Framework required that the Board approve this deviation from the Business/Performance Plan, based on its Strategic Plan to employ Senior Litigators.

25. A quick look at the chronology exposes your lie to the Board last year.

26. On 16 July 2010, you, Nair and Makokoane proposed in your 'Report to Board' that some vacant public defender posts serving the lower criminal courts be temporarily frozen to save costs until resolution of the uncertainty about when the Department would be providing funds for OSD phase 1 salary increases in 2010/11. In the report you all assured the Board that recruitment to critical posts (like Senior Litigator posts at the very top of LASA's professional ranks) would be prioritised. A fortnight later on 29 July you emailed Nair to discuss my letter just received, in which I was pressing you to see to the finalisation my appointment, now eight months since my successful interview. The following day on 30 July you and Nair attended the Board Executive meeting but said nothing about also freezing Senior Litigator posts to save costs. On 31 July you were present waiting outside as the Board meeting took place, at which the Board approved your, Nair's and Makokoane's proposal to temporarily freeze some lower criminal court posts only. Again there was no talk by you of freezing top-rank critical Senior Litigator posts as a way of making more cost-savings – temporarily, let alone permanently. Then 'in July 2010 after the Board meeting' (per LASA's pleadings) – which means on 31 July after the Board meeting had




finished and the Board members had left for their homes, hotels, restaurants and airports, you and Nair took 'the decision to abort the recruitment' (LASA pleaded) of Senior Litigators for the Pietermaritzburg, Durban, and Mthatha posts -- according to your October 2010 letter to me, reiterated in your January 2011 letter, and verified on affidavit in April 2011. Only, as Nair repeatedly admitted on oath in April 2011 and at trial in mid-2013, no record whatsoever exists of this alleged decision. And the Board wasn't even told about it (LASA pleaded), let alone was its approval obtained, as the Approval Framework required.

- 27. Which story Nair also verified in his affidavit in April 2011, only to change the story completely several months later in his 'Report to Board' of November 2011 (after I'd blown it to pieces in my very detailed original statement of claim in July), telling the Board two entirely different lies about why my appointment was aborted (mentioned above).
- 28. And then in court in mid-2013, he persisted with the lie you told me in October 2010 that the Pietermaritzburg and Durban recruitments were cancelled 'In July 2010' for budgetary reasons, but, contradicting your lie, not the Mthatha one, which he said you aborted for entirely unrelated reasons, against his repeatedly expressed wishes (mentioned below).
- 29. Makokoane's money claim is for his 'team to read the bundle as referred in your footnotes to advise me with the gist of the background explanation.' This less extensive reading, which didn't include my pending applications to compel your compliance with PAIA, but included time spent advising him of 'the gist of the background explanation', allegedly took his 'team' a much longer 'almost 220 hours'.
- 30. Do you think the reason for this is that Makokoane's 'team' can't read as quickly as Hundermark's 'team'? Or could it be because, after reading 'the bundle as referred in your footnotes' (there were several bundles in my labour case) but not the application papers, his 'team' then took four days without a break (33 hours, 8 hours in a working day) to convey to him the 'gist of the background explanation'.
- 31. Or do you think like Hundermark, Makokoane is also telling me lies in his scheming to obstruct my exercise of my fundamental right to information, and blocking my access to incriminating documents with a view to protecting Nair and other top officers from being brought to book?
- 32. Do you have any idea why Makokoane needed a different 'team' from Hundermark's to read the papers in my labour case before he could respond to my PAIA request?

Or is it the same team, as would appear from the similar language used in their letters, dishonestly double-charging me like crooked lawyers?

- 33. Did they possibly think I wouldn't notice, and the High Court wouldn't notice, the substantially identical headings of their letters (Nair's too) containing the same superfluous wrong words 'or information' after the correct words 'request for records' (contrary to its name, PAIA doesn't permit requests for information per se, only for records); and the selfsame opening phrase too, 'I have had an opportunity of perusing' etc, giving the game away, like bumbling criminals leaving their ID books on the floor at the bank for the police to find afterwards?
- 34. And can you explain why, unlike Hundermark's 'team', Makokoane's 'team' didn't find it necessary to read the application papers compelling you and your regional deputy information officers to comply with my November 2013 PAIA requests, which you illegally refused, in order to provide him with the 'gist of the background explanation' giving rise to my PAIA request addressed to him?
- 35. Whatever the answers to these very perplexing questions, Hundermark's and Makokoane's demands are illegal. The Act doesn't permit reading fees of any kind by information officers, by deputy information officers, or by their 'teams'. Including a fee for time spent reading a PAIA request.
- 36. Nor does the Act permit a record requester to be charged a fee for time spent by some person in a deputy information officer's 'team' briefing him on the context in which records have been requested, which is to say the requester's apparent purpose in making his request.
- 37. More especially, because section 11(3) holds a record requester's purpose, whether stated or surmised, in seeking access to the record of a public body to be immaterial. Such as collecting evidence for a perjury prosecution on a score of different counts, a sacking, a professional strike-off, and an application for leave to appeal with further cold print evidence of perjury on multiple scores.
- 38. The 'background explanation' allegedly summarised for Makokoane is consequently irrelevant.
- 39. In truth and in fact, however, Makokoane well knew the 'background explanation' of my request already, because back in September 2010 I'd appealed to him to intervene in the irregular abortion of my appointment to the top professional post for which I'd been recommended (he was then Nair's superior according to LASA's

N.N 

organogram at the time, later changed to elevate Nair to equivalent rank), and I copied Hundermark in, so he knew the 'background explanation' too:

- o Both Makokoane and Hundermark already knew full well that the story Nair had told me on 3 August 2010 to cover the true reason for the abortion of my appointment, namely that it had been decided not to fill LASA's Senior Litigator posts, was a lie.

No such decision had duly been taken, and accordingly no record of it exists, as Nair repeatedly confirmed on oath on affidavit in April 2011 and again in court in July/August 2013.

- o Makokoane knew better than anyone that had such a major decision been taken at national executive management level not to fill these critical budgeted and funded posts, Board approval of the decision would have been necessary, because the Approval Framework requires Board approval for any deviation from the Business/Performance Plan based on the Board's Strategic Plan 2009-12, drawn in accordance with the requirements of the Public Finance Management Act and the Treasury Regulations and duly presented to the Minister and to Parliament – which Strategic Plan included employing Senior Litigators, as you repeatedly mentioned in your CEO report on the completion of the Strategic Plan for that period, and which information LASA's annual report repeated a third time.

Makokoane knew this very well, because he himself had applied to the Board on 16 July 2010 for such similar approval when proposing on the management executive committee's behalf, at Nair's suggestion the previous day (to spur payment, Nair testified), to temporarily freeze recruitment to some non-critical public defender posts serving the lower criminal courts – and none other – until the uncertainty in 2010 about when LASA's OSD phase 1 funding would be paid had been resolved. All fully documented.

- o Both Makokoane and Hundermark knew full well that the story fed me in your first letter of 18 October 2010, even as you were illegally refusing my entire PAIA request in August under cover of a fraudulent misquotation from a reported judgment, namely that budgetary insufficiency prevented LASA filling its remaining vacant Pietermaritzburg, Durban and Mthatha Senior Litigator posts, was another lie, amplifying, with a financial justification, Nair's lie to me on 3 August 2010 that it had been decided not to fill the posts.

N.N 

They knew this because in truth and in fact your Senior Litigator posts at the top of LASA's professional staff establishment were not affected by the Board's decision on 30 July 2010 to temporarily freeze recruitment to a limited number of vacant public defender posts serving the lower criminal courts at the bottom of LASA's professional ranks. (The approved brake was lifted on such recruitment just two months later, and all the posts were filled '100%', you later reported). To the contrary, as said, Makokoane assured the Board in his Report to Board that recruitment to such critical posts would be prioritised. (Although he foolishly denied it, and testified that LASA's most junior posts were critical, not its most senior ones, it was common cause on the pleadings that Senior Litigator posts are 'critical' (LASA's word).

- 40. Incidentally, did you know that testifying under oath in court, Nair practically called you a liar on two counts, trying to pass the buck to you (i) for his egregious misconduct in unlawfully obstructing the implementation of the Board's Strategic Plan regarding the employment of Senior Litigators for grossly improper reasons, and then (ii) for the cover-up going as far as lying to the Minister and to Parliament via secret reports he ghost-wrote for you to give Mlambo JP to sign and submit to these authorities (which you did, knowing they were full of lies) to pervert their independent enquiries into my complaints that you'd repeatedly illegally refused to comply with my first two PAIA requests in 2010 and that my appointment had been irregularly aborted?
  - o Radically contradicting the story you told me in your October 2010 letter, repeated in your January 2011 letter, and swore to under penalty of perjury in your PAIA affidavit in April 2011, which story, after I sued for reinstatement to the post I was recommended for, was consistently repeated in LASA's pleadings and interlocutory affidavits (but not in Nair's completely different November 2011 Report to Board), namely that due to budgetary insufficiency, LASA had decided not to fill its three vacant Senior Litigator posts at Pietermaritzburg, Durban and Mthatha, Nair alleged quite differently in court, and admitted that the cancellation of the Mthatha recruitment had nothing to do with any budgetary consideration.


He then blamed you for it, claiming that after he and the Legal Services Technical Committee (including Makokoane and Hundermark), of which he's chairperson, had unanimously resolved to recruit a Senior Litigator for the Mthatha post as an immediate priority, being sorely needed there according to then Eastern Cape Regional Operations Executive Thembile Mtati's pressing motivation for the

N. N. (circled)

~~transfer of the redundant, long-vacant Kimberley Senior Litigator post, you – very~~  
unreasonably, and to the detriment of service delivery by LASA – refused to approve the LSTC’s unanimous decision (as required of you by the Approval Framework), despite his repeated attempts to persuade you to agree.

- o Nair also blamed you, and then Mlambo JP, and then you again, for telling the several fresh lies that he (Nair) added to the ‘updated’ report to Parliament in June 2011 which he’d ghost-written for Mlambo JP to sign and give the Minister in March to pervert his enquiry into my complaints.

41. And did you know that at trial Nair blamed you for the abortion of my recruitment, alleging that it was your idea, and that you had suggested that the Pietermaritzburg Senior Litigator post for which I’d been selected be frozen (off the record, and without Board approval as required by the Approval Framework)?
42. That is, in his cowardly, pathologically dishonest manoeuvring to evade culpability for his capital misconduct, Nair gave evidence on oath behind your back to frame you for it as principal perpetrator, rather than as his accomplice in the cover-up.
43. Now that you’re aware that Nair told the judge these lies about you, all of which, among so many others, he swore, with his hand in the air were the perfect truth, please advise me what you intend doing as CEO about his repeated perjury in implicating you in and blaming you for his own misconduct. You can be sure that at the enquiry to follow you’ll be questioned about your reaction to this news of Nair’s lies about you told under oath in court.
44. In November 2012, directly on account of my repeated complaints to the SAHRC about your and Nair’s persistent illegal refusal of my PAIA requests in 2010/11 and false section 32 reporting about it afterwards to conceal from the SAHRC and from the National Assembly in turn your illegal suppression of documentary evidence (to obstruct and defeat the ends of justice), the SAHRC found it necessary to deliver your national office lawyers a special remedial lesson on how PAIA works.
45. Lying under oath, as usual, Nair told the judge he knew nothing of this workshop. Email records I obtained from you after trial (the very few you duly surrendered, the majority refused) prove categorically that Nair knew all about it.
46. Nair also denied any knowledge of the SAHRC’s PAIA audit of LASA; again, the email records prove he contemptuously lied to the judge about this too.

N.N 

47. As CEO, what are you going to do about this further interminable, compulsive perjury of his? As said, you will certainly be asked this again at the enquiry to follow this case.

48. The SAHRC's report of the PAIA training workshop records your national office attorneys' admission that on account of their 'lack of application based knowledge' causing them 'challenges complying with PAIA' they felt 'overwhelmed by the requirements of the legislation', and that 'LASA compliance history was flagged with participants and most responded to the reporting of LASA as non-compliant to Parliament with concern'.

49. The SAHRC was referring to the 'reporting of the Brink saga (you may be familiar with it – Patrick [Hundermark] is) to Parliament', as its PAIA Unit director mentioned in her email to the Open Democracy Advice Centre on 12 July 2011, copying Hundermark in.

50. Indeed, in its Annual Report for 2011/12, the SAHRC reported LASA to the National Assembly as a PAIA defaulter in its section 84 report. Concerning the failure of public institutions to comply with their PAIA compliance reporting obligations, the SAHRC cited:

A case in point ... where a complainant brought to the attention of the Commission a number of requests made to LASA which were not reported in LASA's 2010/11 section 32 report despite the fact that the requests were made in that financial year.

51. Strangely the SAHRC neglected to report to the National Assembly LASA's substantial repeated illegal refusal to comply with my first three PAIA requests, even as it had noted the 'unlawfulness' of this in its correspondence with me. (Nearly all records illegally refused were later released, but only under persistent pressure, in the labour litigation.)

52. The SAHRC's training workshop report further records that 'LASA has identified the need to have a clear budget dedicated to PAIA compliance and implementation', and that it had undertaken 'to create guidelines within the organisation to ensure misapplication does not recur' in the handling of PAIA requests like mine, particularly since 'misinterpretation and misapplication was identified as being high risk to LASA', having regard to 'the status of PAIA as a fundamental right' (sic), a matter 'reiterated and emphasized at different points of the training'.

N.N 

~~53. Likewise underscored was 'the need to break the culture of secrecy which shrouds the public service in general' and LASA in particular – maintained by its highest officers in their illegal collusion to cover up the most extraordinarily serious misconduct.~~

54. And then on 25 October 2011, right after LASA's attorneys had very frankly conceded to the SAHRC that it hadn't complied with PAIA in the handling of my record requests (besides me, no other records requesters were obstructed), LASA (Nair instructing, Mtati signing) blithely lied to court in its pleadings in my labour case:

The Respondent contends that the Applicant's requests in terms of the Promotion of Access to Information Act, 2000 ("PAIA") were answered completely and lawfully and those documents that were refused were refused in terms of the law.

55. Which brazen lie Mtati repeated on oath in his prodigiously perjurious interlocutory affidavit on 16 January 2013 supported by a confirmatory affidavit by Nair.

56. And which lie Mtati repeated again in his even more massively perjurious affidavit of 22 January 2015 opposing my petition for leave to appeal, telling fresh new lies contradicting the old ones told in court; in which affidavit, filed out of time, he sought condonation for LASA's non-compliance with the rules of the Labour Appeal Court with yet more bare-faced perjury, lying to the Judge President that he hadn't known I'd filed my signed and attested petition before he went off on holiday on 12 December 2014 – his excuse given on oath for his inaction flatly refuted and exposed as a lie by the record of an email I sent him on the 8th, which he admits he read on the same day, before pushing off without attending to my petition.

57. It's evident from the illegal responses to my current four PAIA requests in November 2014, and from the illegal responses to my three requests in November 2013 now before the Magistrate's Court, that your 'team' of national office 'legal representatives' were unable to learn anything from the SAHRC's training workshop. (The attendance register shows that Hundermark, Makokoane, Nair and Corporate Service Executive Thembile Mtati didn't think they needed to go.) The special lesson on how to apply PAIA to give effect to the fundamental right to information, and consequently the importance of complying with it, just didn't sink in.

58. Here's a refresher course then on how PAIA works for the slow learners in LASA's national office.

59. After a record requester has lodged his request in the form prescribed by section 18 and paid his request fee prescribed by section 22(1), as I did, section 25(1) requires that the

information officer to whom the request is made ... must, as soon as reasonably possible, but in any event, within 30 days, after the request is received –

- (a) decide in accordance with this Act whether to grant the request; and
- (b) notify the requester of the decision ...

60. Section 26 allows the timeframe to be extended by a maximum of another 30 days – i.e. calendar days, not court or business days, according to section 4 of the Interpretation Act 33 of 1957 on the 'Reckoning of number of days' prescribed by a statute.

61. Section 25(2)(a) provides that:

If the request for access is granted, the notice in terms of subsection 1 (b) must state –

- (a) the access fee (if any) to be paid upon access.

62. Section 1, 'Definitions' tells us that:

"access fee" means a fee prescribed for the purpose of section 22(6).

63. Which provides:

(6) A requester whose request for access has been granted must pay an access fee for reproduction and for search and preparation contemplated in subsection (7)(a) and (b), respectively, for any time reasonably required in excess of the prescribed hours to search for and prepare ... the record for disclosure.

64. Subsection 7(a) and (b) allows:

a reasonable access fee for –

- (a) the cost of making a copy ... and ... the postal fee; and
- (b) the time reasonably required to search for the record and prepare ... the record for disclosure to the requester.'

~~65. The Act therefore required Hundermark and Makokoane to decide, within the prescribed time allowed, which of my record requests they were granting and which they were refusing (with reasons, referenced to Chapter 4, 'GROUNDS FOR REFUSAL OF ACCESS TO RECORDS'), and to notify me of (i) their decisions regarding each record allowed or refused, and (ii) their reasonable access fees for searching and copying those allowed.~~

66. Hundermark and Makokoane have failed to comply with their obligations under the Act.

67. Nair has unlawfully expressly refused, also out of time, my entire request addressed to him, citing various obviously irrelevant and inapplicable sections of PAIA – including section 7, which isn't even included in Chapter 4.

68. To read Nair telling me that his 'response is given to you on the basis of the advice of my legal representatives, which I verily accept' is to recall:

- (i) LASA's head office attorneys' concession to the SAHRC that when it comes to PAIA they don't know what's going on; and,
- (ii) Nair's evidence in court that his legal studies through the mail hadn't included a course on PAIA.

69. Apparently the same 'team' of 'legal representatives' advising Hundermark and Makokoane to obstruct my requests gave Nair the 'advice' to refuse my entire request addressed to him. (Centrally involved in my labour case, Nair couldn't sensibly claim to have needed to read all the bundles to be placed to respond.) Their letters have substantially the same headings, as mentioned above, and display the same pitiful legal ignorance.

70. And like Nair's letter, Hundermark's and Makokoane's letters contain the same meretricious statement that I consented to an extension within which to respond. Sure I did; I'm an obliging sort of guy. I knew they all wanted to go away on for their Christmas holiday, and I'm playing a long and patient game to collar the rogues. None of the letters mention that the extensions had expired, and that all three deputy information officers were unlawfully outside the extended time limit for responding when their 'team' of 'legal representatives' wrote to me. Like when a used car salesman declaims brightly that the lemon he's trying to flog has just been serviced. Without mentioning the crack in the block.

71. It's apparent from a glance at my request addressed to Nair that it's directed at categorically exposing some of his more obviously foolish perjury in court. My request practically asks Nair to supply the rope for his own hanging. Naturally he's unwilling, for as Board director Ela Gandhi explained very perspicaciously in the Mercury on 23 November 2011:

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

72. Section 17(2) gives you 'direction and control over every deputy information officer' you've delegated.

73. Section 17(6)(b) provides that your delegation of your responsibility as information officer to them:

does not prohibit the person who made the delegation from exercising the power concerned or performing the duty concerned himself or herself.

74. That is, notwithstanding your delegations to these other persons, you remain the person primarily accountable as information officer for LASA's compliance with the Act.

75. I accordingly call on you either to direct your delinquent deputy information officers to belatedly comply with my record requests or take my requests over from them and do so yourself.

76. If you do not do either of these things, I'll conclude, and later argue, that you evidently support their violation of my fundamental right of information by illegally frustrating and refusing my PAIA requests with the object of suppressing documentary evidence of egregious malfeasance, corruption and criminality in LASA's top ranks – including lying to Parliament, to the Minister, to the LASA Board, and internally contradictory and objectively contradicted perjury, going off chaotically in all different directions like cheap fireworks, before, during, and continuing even after the trial of my labour claim.

77. This demand is not any sort of appeal to you under the Act, because contrary to the false information contained in the latest revision of your PAIA manual, to be quoted presently, you have no appeal authority in the matter of PAIA requests.

78. This is because LASA is a section 1(b)(ii) 'institution' among the sorts of 'public body' contemplated by section 1 of the Act under the heading 'Definitions'.

79. A 'public body' is variously defined by section 1 as (I've italicised the pertinent bits for emphasis):

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) *any other functionary or institution when –*
  - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or *performing a public function in terms of any legislation.*

80. Such as the Legal Aid South Africa Act 39 of 2014, from the 1st of this month. Or the Legal Aid Act 22 of 1969 before that.

81. And section 78(2)(c) of PAIA provides (I've redacted it for relevance):

A requester - ...

- (c) aggrieved by the decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 –
  - (i) to refuse a request for access ...

may, by way of an application, within 180 days apply to court for appropriate relief in terms of section 82.

82. In short, no internal appeal lies against the refusal of a request for access to the records of a public body such as LASA, and my remedy for non-compliance stipulated by the Act is to apply directly to court.

83. The SAHRC's PAIA Unit alerted me to this right at the beginning of my troubles with LASA over PAIA, and will confirm it to you.

84. So the requirement of section 20 of LASA's PAIA manual revised in 2010\* and approved by the Board –

20. Remedies available for noncompliance with the Act

In case of non compliance with any request by the Deputy Information Officer, the Designated Deputy Information Officer or any other personnel authorised by



the Information Officer, the requester shall appeal to the Information Officer who shall consider such appeal within 15 days and after which the requester may resolve the dispute by approaching the relevant court directly.

- is inconsistent with the Act and seriously misleads the public.

- 85. (\*The 2013 revision of the PAIA manual hasn't yet been published online for easy public access, but I've seen this section quoted by LASA as section 18, apparently renumbered but otherwise unchanged. Apart from the legal nonsense the section contains about appealing to you against 'non compliance with any request', its impressive-sounding but spurious distinctions between 'Deputy Information Officer, the Designated Deputy Information Officer or any other personnel authorised by the Information Officer' are more legal nonsense unsupported by section 17 of the Act.)
- 86. Given your repeated persistent past illegal refusals of my PAIA requests in October 2010, January 2011, and November 2013, and your pointless, dilatory opposition on your very junior counsel's clueless advice of my pending application to compel your compliance with the last-mentioned request, I've no reason to expect you'll now begin complying with your constitutional and statutory obligations as LASA's information officer and see to it that my PAIA requests are duly complied with.
- 87. It also seems unlikely that your very most senior attorney Patrick Hundermark and your very most senior advocate Brian Nair in your national management executive committee will reverse themselves and concede that as deputy information officers of a major public entity, when it comes to responding to PAIA requests they've no idea what they're doing.
- 88. Or maybe they do, and what they're doing is outrageously abusing their offices as deputy information officers to suppress documentary evidence of exceedingly grave wrongdoing at the top of LASA's directorate and executive, including, in Nair's case, his own.
- 89. I've asked the SAHRC to intervene, but in view of LASA national executive management's evident united determination to obstruct and defeat the ends of justice by suppressing documentary evidence of Nair's many perjuries at the trial of my claim to my appointment, I'm not optimistic. My past interactions with the SAHRC as our constitutionally appointed fundamental rights watchdog have been bitterly disappointing, time and again.
- 90. I'm consequently preparing an application to the High Court at Pietermaritzburg under section 78 for an order compelling compliance with my four requests in



131

~~November 2014, and I intend citing you as first respondent in your capacity as LASA's information officer ultimately responsible and accountable for PAIA compliance at LASA.~~

91. But if after consulting the SAHRC you decide it would be better for LASA as a public entity to start complying with the Act, and stop illegally contravening it, and to start respecting my fundamental right to information, and stop illegally violating it, I'll call off my intended application. The same goes for my pending applications in the Magistrate's Court.
92. Please let me know your intentions within ten working days of receiving this letter. This will give you time to consult the SAHRC for its guidance and training on PAIA delivered under section 83(3)(d) and (e). Believe me madam you need it.
93. If I need to sue, as I anticipate from dismal past experience I inevitably will, I'll include this letter in my papers for the High Court's information about the attempt I made to avert the unnecessary, avoidable litigation to vindicate my fundamental right to information.
94. Finally, I enclose another PAIA request addressed to you for your attention, inter alia testing Hundermark's and Makokoane's money claims against me, and seeking sight of LASA's insurance policy with Camargue, referred to in your report to the Board on 31 October 2014 about my case, and all requests for and reports to this insurer to assist it in 'managing the matter'.
95. If my request for access is granted, I'll naturally be cross-checking with your insurer to verify the completeness of the records provided me. I anticipate that the content of the reports will support a criminal charge and a civil action for insurance fraud, and I intend claiming the R5000 reward they tout for reporting it. I need a new wristwatch.
96. I remind you that section 25(1), quoted above, requires that you:  
must, as soon as reasonably possible, but in any event within 30 days, after the request is received –
  - (a) decide in accordance with this Act whether to grant the request; and
  - (b) notify the requester of the decision ...

N. N



31

97. My request is simple, so to conform yourself with your obligation to decide and notify me 'as soon as reasonably possible', your decision whether to grant it or not 'must' be immediate. The records can follow later.

98. If you decide to grant my request there'll be no access fee for searching, because the extant records are electronically stored and easily located, nor for copying, because I've asked that they be emailed to me, not sent by post. I've paid the prescribed request fee by EFT reference: PAIA/VV.

99. If you refuse my request or any part of it, I'll sue you immediately for the records I want, or your sworn certification that they don't exist.

100. Let me conclude by giving you my sincere assurance that there will be no end to this matter until I have justice (the multiple gross basic irregularities in the premature, hasty dismissal of my petition to the Judge President of the Labour Appeal Court beggar belief), and until all those who've gravely misconducted themselves and lied to me, to the Board, to the SAHRC, to the Minister, to Parliament, and to court in the cover-up are held to account.

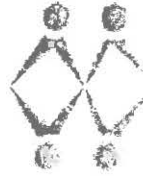


ANTHONY BRINK

Cc: Adv Lawrence Mushwana: Chairperson, South African Human Rights Commission

Langa Lethiba: LASA Board Secretary, for the information of the Board





Legal Aid  
South Africa

FAI

301

26 May 2015  
Advocate Brink  
The Flat  
1 Boast Street  
Eshowe  
3815

29 De Beer Street  
Braamfontein  
Johannesburg 2017  
Private Box X76  
Braamfontein 2017  
Tel: 011 877 2000  
Fax: 011 877 2222  
www.legal-aid.co.za

Dear Adv. Brink,

**NATIONAL DEPUTY INFORMATION OFFICERS' FAILURE TO COMPLY WITH THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000; REQUEST FOR THE INFORMATION OFFICER'S INTERVENTION UNDER SECTION 17 (6) (b)**

1. We have read your letter of 19 March 2015 annexed thereto being a request in terms of Promotion of Access to Information Act (PAIA) dated 9 March 2015 as well your further letter of 4 May 2015. I have been delegated by the CEO to reply to all.
2. Your continued use of abusive and/or derogatory language against management through use of words like *"liars, scheming up, dishonest, contemptuous, slow learners"* etcetera is again very apparent in your letters and you are called upon to desist from this custom.
3. Once again, we record that at the time the letter of 19 March 2015 was received, namely 31 March 2015, the CEO was on leave and the following officials were appointed to act in her absence-
  - 3.1. Mr Patrick Hundermark was the acting CEO for the period 30 March 2015 to 2 April 2015.
  - 3.2. Mr Jerry Makokoane was the acting CEO for the period 13 April 2015 to 17 April 2015.

N.N

31

3.3. Mr Brian Nair was the acting CEO for the period 28 April 2015 to 30 April 2015.

4. As all the aforesaid officials were party to the complaint, they could not reply in their acting capacities.
5. In order to apply her mind on the allegations, I felt it prudent to seek an extension to which you agreed. I will deal with the issue of her absence in this reply.

**LETTER OF 19 MARCH 2015**

6. The common salient features of your letter and in summary makes the following submissions.
  - 6.1. That the Deputy Information Officers have failed to provide the records requested within the timelines of 60 days as required in terms of the Promotion of Access to Information Act.
  - 6.2. The Deputy Information Officers are extorting money from you as they are not entitled to require the search fees in terms of the Act, more specifically making reference to the provisions of section 22 of the Act.
  - 6.3. That you are seeking CEO's intervention to direct them to provide such records or failing which she must provide such records.

△  
SHERIFF  
2016 Page - 31  
HIGH COURT  
NIN

**RECORDS REQUESTED FROM MR PATRICK HUNDERMARK IN THE LETTER OF 10 NOVEMBER 2014**

7. There are 23 records sought in the letters referred to above and they quoted below:-

Item	Record requested
1	The minutes of the Regional Management Meeting at which it was decided that the Durban Justice Centre required a Children's Court Practitioner and to apply for the creation of such post at such Centre
2	Kwazulu Natal's Regional Operations Executive Vela Mdaka's motivation under section 8.1.2(b) of the Approval Framework to Legal Services Committee to recommend (he "originates") the creation of the post at the Durban Justice Centre.
3	The record showing that the Human Resources Executive was consulted before the post was created as required by 8.1.2(b) of the Approval Framework
4	The LSTC resolution to recommend the creation of the post
5	National Operations Executive Brian Nair's and Chief Executive Officer Vidhu Vedalankar's approval of the LSTC's resolution to recommend the creation of the post, in their capacities as executing authorities delegated by section 8.1.2(b) of the Approval Framework to co-approve the creation of new posts at 'levels 11-13 and 'OSD-LP - 9 & 10'
6	The record of HRE Amanda Clark's confirmation, under Note 17 of the Approval Framework, that the vacancy and budget for the post existed before it was advertised.
7	The record showing the vacancy existed prior to the advertisement.
8.	The record showing the post was budgeted for prior to the advertisement.
9	The advertisement for the post.
10	The shortlist of applicants for the post.
11.	The portion of the interview minute showing that Ngcamu disclosed to Legal Aid SA his two convictions for professional misconduct by the Law Society, and his rebuke by the Judicial Service Commission for not disclosing these when applying for a Labour Court judgeship in 2007.
12.	The selection panel's recommendation of Ngcamu, showing the names of the members, the names of the interviewed candidates, and whether or not they met the advertised



	qualifying criteria. (Confidential information within the meaning of section 34(1) of PAIA may be blacked out)
13.	The covering letter or email transmitting the recommendation to NOE Nair for his approval under section 8.2.2(b) of the Approval Framework.
14.	The record of Nair's approval of the recommendation, and if applicable to the level of the post, Vedalankar's agreement per the said section.
15.	Ngcamu's contract of employment as Children's Practitioner.
16.	The letters to the other shortlisted, interviewed candidates informing them that they had been unsuccessful, as required by section 1.5 of the policies and procedures on Recruitment.
17.	If it's not indicated on the advertisement or Ngcamu's employment contract, any record showing the grade of the post (e.g LP9).
<b>PART TWO</b>	
18.	All and any contracts(s) of employment between Ngcamu and Legal Aid SA, at any Justice Centre, entered into prior to his employment as Children's Practitioners at the Durban Justice Centre.
19.	All email or letter communications between Ngcamu and Legal Aid SA prior to his employment as Children's Practitioner at the Durban Justice Center or any other employment by Legal Aid SA.
20.	The selection panel's recommendation of Brink and Mngadi for the Pietermaritzburg and Durban senior Litigator posts, showing (i) Ngcamu's fulfilment or otherwise of the advertisement qualifying criteria, and (ii) the reason he was not recommended.
21.	The letter sent to Ngcamu informing him that he had been unsuccessful as a shortlisted candidate in his application for the Senior Litigator post, as required by section 1.5 of the Policies and Procedures on Recruitment.
22.	The letter sent to Ngcamu informing him that Legal Aid SA has decided not to fill the KwaZulu Natal Senior Litigator posts (like the identical letters sent to the other shortlisted and interviewed candidates Brink, Mngadi and Van Wyk on 23 August 2010).
23.	Deputy Information Officer Patrick Hundermark's written delegation by information officer Vedalankar under section 17(3) of PAIA.

RECORDS REQUESTED FROM MR PATRICK HUNDERMARK IN THE LETTER OF 17 NOVEMBER 2014

8. There are 4 records sought in the letter referred to above and once again quoted verbatim:-

Item	Records Requested
1.	Apropos of National Operations Executive Brian Nair's allegation in his 'Report to Board' on Senior Litigators in November 2011, concerning which he volunteered at the trial of case LC D529/11, "I was the author of this," it is felt the current system of evaluating their performance by the High Court Unit Managers and thereafter by our Legal Quality Assurance Unit may not be appropriate <sup>2</sup> , the minute of the meeting at which this alleged view was expressed, and/or the record of the communication of this view to Nair or other executive.
2.	The record of Nair's instruction 'the Chief Legal Executive, then the Legal Development Executive' Patrick Hundermark to draft the 'terms of reference' <sup>3</sup> of a 'review panel' <sup>4</sup> to conduct 'performance reviews or quality reviews' for 'senior litigators', <sup>5</sup> being the 'person' to whom Nair claimed at the trial to have 'allocated the responsibility' <sup>5</sup> for doing this
3.	The minutes of the number of meetings' that Nair claimed that Hundermark has 'hosted' in the allegedly 'on-going...process...still being attended to 'by him, in the two years since Nair claimed to have 'allocated responsibility' to him ' to properly develop terms of reference ,to identify possible people to contribute to the panel, and to consult' <sup>7</sup> with a view to conducting ' performance reviews or quality 'performance reviews' for senior litigators <sup>8</sup>
4.	All and any records vouching that Hundermark has acted to (i) 'develop [the] terms of reference' set out in Nair's said Report to Board,(ii) 'to identify possible people to contribute to the panel', and (iii) ' to consult' anyone about it.

N.N



RECORDS REQUESTED FROM MR JERRY MAKOKOANE IN BOTH LETTERS OF 25 NOVEMBER 2014 AND 15 DECEMBER 2014

9. There are 56 records sought in the letters referred to above with an amendment to item 34 and these are:-

No	Record requested
1	Cele J's suggestion that Legal Aid South Africa accommodate the Applicant by providing him with the electronic copy of the record which Legal Aid South Africa did.
2	The transcript of the trial record in case LC D529/11
3	All and any records vouching that a meeting took place between SAHRC and Legal Aid SA's CEO and some of our senior to discuss the SAHRC's allegedly incorrect finding contained in its section 84 report for 2011/12 on public body compliance with PAIA, presented to the National Assembly in October 2012, namely the finding that Legal Aid SA (Vedalankar) had failed to comply with its (her) reporting obligations under section 32. The record will show the date and place of the meeting, who attended it and the outcome.
4	The record reflecting that, as ordered by the Legal Services Technical Committee on 24 March 2010, then Manager: Legal Administration, National Operations, Bee-Mari Schoeman (responsible for Legal Services Delivery) immediately facilitate the transfer of the budget that existed for a Senior Litigator post at Kimberly Justice centre to the Mthatha Justice Centre.
5	The records of CEO Vedalankar and NOE's respective "Final Approval" and "Agree" as he must of the abolition of the Kimberly Senior Litigator post and establishment of the Mthatha Senior Litigator post under section 8.1.2(b) of the Approval Framework as required before the Mthatha post was advertised.
6	After the selection panel's interviews of shortlisted candidates for the Mthatha Senior Litigator post in May 2010, all and any records showing the form of transit that a file that was to be delivered to Legal Aid SA Head Office in respect of the position of Senior Litigator



- position for Mthatha was lost in the form of a registered post slip, courier waybill, covering email, telefax, covering page and transmission report, or other such voucher
- 7 Copies of the contents of the file in respect of the position of Senior Litigator for Mthatha retained by Eastern Cape Regional Human Resources Manager, Thenjiwe Magazi before dispatching the original or copy to Legal Aid SA's Head Office
- 8 The complete contents of Human Resources Executive Clark's file or computer folder on the Mthatha Senior Litigator post
- 9 All records of communications between Legal Aid SA's national office and its Eastern Cape Regional Office after the discovery that a file that was to be delivered to Legal Aid Head Office in respect of the position of the Senior Litigator for Mthatha was lost in transit- including any request for the file, or a copy, to be sent again.
- 10 Strategic Plan 2009-12.
- 11 Minutes of the September 2008 Board Meeting at which the Strategic Plan 2009-12 was approved
- 12 The minutes of all Legal Services Technical Committee meetings held in the period October 2009 to February 2011, besides the minutes of its March 2010 meeting, which Brink already has.
- 13 The minutes of all Management Executive Committee meetings held in the period October 2009 to February 2011.
- 14 The minutes of all Board Executive Committee meetings held in the period October 2009 to February 2011.
- 15 The minutes of all Board meetings held in the period October 2009 to February 2011.
- 16 Legal Aid SA's Business Plans for 2009/10, 2010/11, 2012/13, and 2013/14
- 17 Excerpts comprising the cover or first identifying page, and the pages containing provision for Senior Litigator salaries' budget for 2013/14
- 18 The minute of the Board meeting at which Legal Aid SA's budget for 2013/14 was approved



- 19 Legal Aid SA's 2013/14 report to SAHRC under section 32
- 20 The payment voucher of the Department of Justice and Constitutional Development reflecting the date of its transfer of the OSD phase 1 funding for 2009/10
- 21 The record of any Strategic Plan Annual Review workshop or Board Meeting at which it was resolved not to fill Legal Aid SA's remaining three vacant Senior Litigator posts
- 22 Record showing mention or discussion by any Legal Aid SA Executive(s) of the issue alleged by Nair in his November 2011 Report to Board that Senior Litigators may not be fulfilling Legal Aid SA's objectives for such posts.
- 23 All and any reviews of Senior Litigator performance pertaining to whether or not Legal Aid SA's objectives for such posts were being achieved by the current incumbents or not.
- 24 The record of the decision not to fill Senior Litigator posts for the said reason, referred to in Nair's Report to Board of November 2011
- 25 All and any records vouching that NOE Nair was among the senior executives who began to deliberate quite intensively in regard to the budgetary issues that suddenly confronted them on 10 March 2010, on learning that Legal Aid SA's expected OSD phase 1 funding hadn't been included in the baseline budget for 2010/11 as had been assured in January 2010, alternatively all and any records vouching that Nair was involved in pursuing the Department's payment of Legal Aid SA's OSD phase 1 funding for 2010/11 in any manner whatsoever.
- 26 Excerpts of Legal Aid SA's recruitment statistics showing Senior Litigator post occupancies and vacancies for March, April and May 2010, and July, August, September, October and November 2010.
- 27 The executive instruction issued to transfer the Senior Litigator budget from Mthatha back to Kimberley (from which it had been transferred).
- 28 Following COO Makokoane's memorandum circulated to them on 30 September 2010, soliciting cost-cutting proposals in view of the slow recovery from the international financial recession, the proposals submitted by:
  - (a) CEO Vidhu Vedalankar,

N.N



- (b) NOE Brian Nair,
- (c) KZN ROE Vela Mdaka,
- (d) then Pietermaritzburg JCE Bertus Appel, and,  
then Durban Justice Centre Executive Kishore Mehta.

- 29 The Treasury budget allocations letter released at the end of 2009 to which Nair referred in his evidence.
- 30 The records of all Nair's decisions taken to freeze posts with or without CEO Vedalankar's agreement, and without the approval of the Board.
- 31 The email or letter to Durban High Court Unit Manager Bongani Mngadi, who was interviewed for and recommended for the Durban Senior Litigator post, informing him in about April/May 2010 (his words) that the Kwazulu-Natal Senior Litigator recruitments had been cancelled.
- 32 All counsel's fee notes for his professional services rendered Legal Aid SA in the handling of Brink's first three record requests under PAIA in August and December 2010 and March 2011, and his involvement, if any, in the drafting of Mlambo JP's Confidential Report Re: Advocate Anthony Brink to the Minister in March 2011 and in updated form to the Portfolio Committee in June 2011, to put down Brink's complaints.
- 33 All counsel's opinions in regard to the handling of Brink's said PAIA requests, and the responses to them that he drafted for Legal Aid SA.
- 34 (a) Legal Aid SA's list of 231 critical legal posts, or other record(s), identifying what legal posts were included under category Critical Occupation in Legal Aid SA's annual report for 2012/13; and (b) the subsequent motivation and resolution to exclude all but the JCE posts from the category of critical legal posts in Legal Aid SA's annual reports to the Minister and to Parliament.
- 35 Former Board Secretary Bee-Marie Schoeman's resignation or dismissal letter, and/or any other record vouching her information to Brink that she left Legal Aid SA on account of permanent or long-term mentally disabling concussion and amnesia sustained in a motor vehicle accident, alternatively identifying any other reason she quit Legal Aid SA.
- 36 The minutes of the Board meetings in February and May 2012.



- 37 The minutes of the Board Executive Committee meetings in February and May 2012.
- 38 The Charter of the Board Executive Committee.
- 39 The agenda and the minute of the Board Executive Committee meeting on Friday 23 March 2012; alternatively, if no such meeting was held on that date, the agenda and the minute of the extraordinary extra fifth Board Executive Committee meeting in 2011/12.
- 40 Vedalankar's confirmatory affidavit, made in support of CSE Mtati's answering affidavit in Brink's application for leave to subpoena Mlambo JP, and referred to in paragraph 107 thereof as annexure DM14.
- 41 The records of Board Chairperson Mlambo JP's requests to other Board members on 24 January 2011 that they should ignore Brink's repeated appeals for Board investigation in Vedalankar's illegal, falsely justified refusal to comply with his first PAIA request and the manifestly irregular abortion of his appointment on the several indications he identified.
- 42 The decision originally taken to employ two Professional Assistants (PA's) per backlog court at Pietermaritzburg, or generally, provincially or nationally.
- 43 The 2010/11, 2011/12, and 2012/13 budgets provided by the Department for salaries for PA's serving the backlog courts at Pietermaritzburg.
- 44 The minutes of all Kwazulu-Natal regional executive management meetings over the period October 2010 to June 2011.
- 45 The record of Kwazulu-Natal Regional Operations Executive Vela Mdaka's discussions with National Operations Executive Brian Nair about the streamlining the backlog courts.
- 46 All and any records identifying the nature of the Stanger court incident.
- 47 All the records sent to then Board Secretary Bee-Marie Schoeman over the period October 2010 to June 2011 informing her performance of her function: Monitoring of Backlog Court Staffing and compilation of costing to distribute budget received for this purpose to various cost centres, including but not limited to (i) any changes to the number of backlog court posts at the Pietermaritzburg Justice Centre, and (ii) any changes to the budget received for the employment of PA's in the backlog courts at Pietermaritzburg.



- 48 The decision to reduce the number of PA's serving the backlog courts at Pietermaritzburg from two to one, according to Nair's emailed announcement of this to Legal Aid SA's Regional Operations Executives on 21 February 2011.
- 49 The spreadsheet to Nair's email to the ROE's on 21 February 2011, named Backlog courts – 2011 approved courts.
- 50 The minute of the meeting in February 2011 to identify the sites that will continue to function and be funded, to which Mdaka referred in his email to then Pietermaritzburg Justice Centre Executive Bertus Appel and other JCE's on 7 February 2011.
- 51 The responses that the members of the selection panel, Manickum, Holtzhausen, and Shelembe furnished Appel following his referral to them of Mdaka's objections to Brink's appointment to the annual contract PA post for which they'd unanimously recommended him.
- 52 Appel's transmission to Mdaka of the selection panel's responses to Mdaka's objections to Brink's appointment.
- 53 Appel's leave application covering 14 and 15 December 2010, alternatively an excerpt from the leave register, reflecting that he was on leave for those two days, and reflecting further the full period he was on leave at that time.
- 54 The record of Jeffrey Mthimkhulu's appointment as acting Pietermaritzburg Justice Centre Executive in Appel's absence on leave at the said time.
- 55 The selection panel's recommendation of Brink for the Pietermaritzburg temporary backlog PA post, showing the names of the other candidates interviewed.
- 56 Any employment contracts subsequently signed between Legal Aid SA and any of the rejected candidates.



10. I now turn to reply on your submissions made in paragraph 6 above:

10.1. That the Deputy Information Officers have failed to provide the records requested within a period of 60 days as required in terms of the PAIA. Legal Aid South Africa denies the Deputy Information Officers failed to reply within the prescribed period. It submits that this is an issue of interpretation and does not agree with your interpretation and accordingly maintains that it replied within the prescribed period. Further, as you insist that your interpretation is correct, you then should have induced section 58 of PAIA on the basis of deemed refusal.

10.2. That the Deputy Information Officers are extorting money from you as they are not entitled to require the search fees in terms of the Act, more specifically making reference to the provisions of section 22 of the Act, Legal Aid South Africa, once again submits that it is a legal issue of interpretation which cannot be canvassed in the letter but at the appropriate competent forum. We maintain that it is by your own doing that in your requests, you have provided the background to the previous case under case no. D529/11 as well as various footnotes that obliged the Deputy Information Officers to peruse a voluminous bundle of documents in order to familiarise themselves with the facts to enable them to apply their minds and reply to your requests.

10.3. That you are seeking CEO's intervention to direct them to provide such records or failing which she must provide such records. Legal Aid South Africa will not direct them to provide a response to your request for such records for the following reasons:

10.3.1 The records you are requiring relates to and are ancillary to the litigation proceeding that you have brought against Legal Aid South Africa under case number 529/11 at the Labour Court in Durban. Your claim was dismissed with costs and the judgment was further upheld by the Labour Appeal Court.

△  
SHERIFF  
2026 10-31  
HIGH COURT  
DURBAN



10.3.2. The records you are requiring further relates to and are ancillary to the litigation proceedings that you have brought against Legal Aid South Africa officials at the Eshowe Magistrate Court under case numbers: 257/14, 258/14 and 259/14. These matters are still pending.

10.3.3. Your requests are malicious and seek to divert the resources of Legal Aid South Africa and you are required to pay the required amounts as requested.

**FURTHER REQUEST IN THE LETTER OF 19 MARCH 2015**

11. There are six further requests from the letter referred to above and I provide the reply in the table below:

Item	Records sought	Reply
1	Insurance contract with Carmague	The contracts with Axi Financial Services CC as the broker and Carmague as the underwriter cannot be disclosed as it contains commercial information of a third party in terms of section 36 of the Act
2	Claims lodged with Carmague in respect of D529/11	The claim was lodged with Carmague through Axi Financial Services CC. But the information cannot be disclosed as it is relates to commercial information of a third party.
3	All enquiries or reports by Carmague in respect of D529/11	This is information protected in terms of the Act and accordingly is refused.

4	All responses and reports to Carmague by Legal Aid South Africa in respect of D529/11	This is information protected in terms of the Act and accordingly is refused.
5	All or other any records vouching that CLE and other staff spend 187 hours reading the documents relating to case 529/11	The search and preparation of the records included reading of documents referenced in the introduction to the request including the record since the requester had made reference to CLE. No specific record exists.
6	All or other any records vouching that COO and other staff spend 220 hours reading the documents relating to case 529/11	The search and preparation of the records included reading of documents referenced in the introduction to the request including the record since the COO was implicated. No specific record exists.

**FURTHER REQUEST IN THE LETTER OF 4 MAY 2015 READ WITH THE LETTER OF 15 MAY 2015**

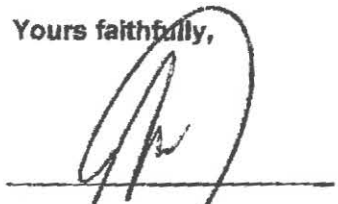
12. There are two further requests from the letter which I have summarised and provided the reply in the table below:-

Item	Records sought	Reply
1	LASA's report to SAHRC for 2014 financial year	The report as attached as requested.
2	CEO's approved leave application from office during April 2015	This is personal information that has no relevance in exercising your right in terms the Act. Please find the acting delegations of CLE, COO and NOE.

N.N



Yours faithfully,



Mr. Thembile Mtati

Legal Aid South Africa

15/12/11

N.N

