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# **SPECIAL REPORT ON LEGAL AID SA**

**AN AGGRAVATED CASE OF REPEATED WILFUL  
NON-COMPLIANCE WITH THE PROMOTION OF  
ACCESS TO INFORMATION ACT 2 OF 2000 TO  
ILLEGALLY OBSTRUCT ACCESS TO DULY  
REQUESTED RECORDS, AND REPEATED FALSE  
ANNUAL AND 'CONFIDENTIAL' REPORTING TO  
CONCEAL THIS FROM THE NATIONAL ASSEMBLY**

A specimen report prepared by Adv AR Brink for the PAIA Unit of the South African Human Rights Commission to assist it perform its monitoring and intervention functions under section 83, and its reporting obligations to the National Assembly imposed by section 84, in regard to regard to public body compliance with the Promotion of Access to Information Act.

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# SPECIAL REPORT ON LEGAL AID SA



## **AN AGGRAVATED CASE OF REPEATED WILFUL NON-COMPLIANCE WITH THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 TO ILLEGALLY OBSTRUCT ACCESS TO DULY REQUESTED RECORDS, AND REPEATED FALSE ANNUAL AND 'CONFIDENTIAL' REPORTING TO CONCEAL THIS FROM THE NATIONAL ASSEMBLY**

### **EXECUTIVE SUMMARY**

This report describes an egregious case of persistent, wilful, recalcitrant PAIA delinquency by an organ of state, Legal Aid South Africa ('LASA'), escalated into a criminal cover-up of its repeated non-compliance with the Act carried out at the highest level of the organisation.

It details how since 2010 LASA has deliberately neglected to comply with its constitutional information transparency obligations by repeatedly illegally refusing access to its business records duly requested under PAIA; and how, to conceal this, it has repeatedly, for five years, falsely reported to the Commission, to the Minister of Justice and Correctional Services, and to the Portfolio Committee for that Department in the National Assembly.

It relates how, after receiving a detailed complaint about LASA CEO and information officer Vidhu Vedalankar's illegal denial of access to LASA's records on wholly spurious grounds, including on the basis of a fraudulently manufactured quotation alleged to be from a reported judgment, LASA Board chairperson Dunstan Mlambo JP dishonoured his judge's oath to 'uphold and protect the Constitution and the human rights entrenched in it' by actively colluding with her to continue violating the record requester's constitutional right to information; and how in a cover-up perpetrated in concert with Vedalankar and National Operations Executive Brian Nair, Mlambo JP furnished the chairperson of the Justice Portfolio Committee with a false 'Confidential Report' containing multiple objectively demonstrable lies, under cover of a defamatory letter containing more such lies, in criminal contravention of sections 17(2)(d) and (e) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, to successfully



pervert the Committee's enquiry into a complaint about Vedalankar's repeated illegal denials of access to LASA's records – thus stultifying and defeating the Portfolio Committee's oversight responsibility over LASA as a public entity, imposed by section 55(2)(b)(ii) of the Constitution, and successfully evading detection and accountability for its illegal refusals to comply with PAIA and its repeated violations of section 32(1)(a) of the Constitution, 'Everyone has the right of access to ... any information held by the state'.

It describes the Commission's repeated failed interventions in its attempts to achieve LASA's compliance with PAIA.

It quotes false pleading and perjury repeatedly committed in judicial proceedings to mislead and defraud judicial officers, falsely alleging LASA's due compliance with PAIA to dishonestly counter and discredit true complaints to the contrary.

And it reports protracted, filibustering, factually and legally groundless opposition maintained for years to five applications to court for orders compelling LASA's compliance with PAIA – opposition persisted with in bad faith as a delaying tactic and abuse of court – culminating in LASA's total capitulation and reversal at court on the day of trial and its recorded undertaking within two months to surrender all requested documents or to certify any that do not exist on oath. And then on the agreed date for delivery, LASA's gross non-compliance with its undertaking; its persistence in illegally withholding duly requested records; and its disregard for repeated demands for full and proper compliance, necessitating a return to court to compel, which it continues opposing to avoid surrendering records it formally undertook to furnish, or to duly certify where any do not exist.

All at the cost of massive, corruptly motivated 'irregular and fruitless and wasteful expenditure' of public revenue, prohibited by section 38(1)(c)(ii) of the Public Finance Management Act 1 of 1999.

And all in a determined bid to suppress (further) documentary evidence of (i) gross maladministration involving millions of rands and directly affecting service delivery; (ii) the wholesale breakdown of the rule of law and due process at LASA, involving, inter alia, the routine illegal flouting of LASA's internal regulations by Board chairperson Mlambo JP and national management executives; and (iii) pervasive systemic corruption in the conduct of LASA's recruitment operations.



## INTRODUCTION AND REASON FOR PAIA AUDIT OF LASA

1. This is a special report to the National Assembly made under section 84 of the Promotion of Access to Information Act 2 of 2000 ('PAIA' or 'the Act'), pursuant to the performance of a comprehensive PAIA audit of LASA, interrogating its compliance with the Act and its reports and claims in this regard since 2010.
2. The audit was conducted by the Commission under its powers imposed by section 83(3)(b) of PAIA 'to monitor the implementation of this Act', and by section 83(3)(i) to 'inquire into any matter ... connected with the objects of this Act'.
3. The Commission's decision to audit LASA for PAIA compliance was occasioned by repeated complaints made to it and to the Public Protector by a record requester, Adv Anthony Brink, charging inter alia that since 2010 LASA has:
  - repeatedly and persistently unlawfully refused him access to its business records, duly requested under the Act, in repeated violation of his fundamental right to information guaranteed by section 32(1)(a) of the Bill of Rights in the Constitution;
  - repeatedly concealed from the Commission its illegal suppression of requested information by falsely reporting to it under section 32 of PAIA, for the ultimate misinformation of the National Assembly via the Commission's annual PAIA section 84 reports, thus concealing from the National Assembly its unlawful failures to comply with the Act and preventing it from carrying out its constitutional oversight function and holding the responsible officers to account;
  - further concealed its repeated illegal denials of access to its records by way of a deliberately false and misleading 'Confidential Report' signed and submitted by LASA Board chairperson Dunstan Mlambo JP to the Minister of Justice, and later, in 'updated' form, to the chairperson of the Justice Portfolio Committee in the National Assembly, to pervert separate, independent enquiries they had instituted inter alia into Brink's complaint that LASA information officer Vidhu Vedalankar had repeatedly illegally refused him access to its records;
  - repeatedly falsely alleged due compliance with PAIA in pleadings and on affidavit in legal proceedings to mislead and defraud judicial officers;
  - continued illegally refusing his further PAIA requests, despite the Commission's repeated remedial interventions;
  - continued concealing these further illegal refusals from the National Assembly by falsely reporting to the Commission under section 32 of PAIA – five times in all to date;



- opposed on wholly spurious grounds five applications to court under section 78 of the Act to compel the delivery of duly requested records – only to capitulate at court on the day of trial of all his cases, reverse all its manifestly unlawful refusals, abandon all its obviously idle defences, and finally undertake, after years of legally unjustifiable deliberate delay, to furnish him with copies of all requested records or certify on oath any that do not exist; and in this manner abused the judicial process to obstruct his access to duly requested documents and to frustrate his exercise of his fundamental right to information; and,
- then, on the due date for performance under its settlement agreement handed into court, breached it in multiple critical respects, inter alia by continuing to silently withhold and expressly refuse duly requested documents that it had undertaken to deliver, and by filing grossly defective, non-compliant, incomplete and internally contradictory section 23 affidavits, and refusing to remedy these breaches enumerated in a notice of breach and demand for full and proper compliance, and two further demands for full and proper compliance, thereby continuing to unlawfully fail to comply with PAIA, as it had undertaken to do at legal gun-point in court, and continuing to violate his fundamental right to information held by the state, entrenched by section 32(i)(a) of the Constitution.

4. In its PAIA section 84 report for 2010/11 presented to the Justice Portfolio Committee of the National Assembly in October 2011, the Commission recorded that ‘non-compliance of public bodies with Section 32 is ... often the basis for an audit of a particular public body’. In other words, where a public body has been found to have falsely reported to the Commission under section 32 of PAIA, such ‘malicious compliance’ with the section (as the Commission describes it) will frequently trigger an audit for substantive compliance with the Act.

5. Satisfied that LASA’s refusals of Brink’s first three PAIA requests in 2010 and 2011 were unjustified and unlawful, and directly on account of this, the Commission held a special PAIA training workshop for its head office legal staff in October 2011, conducted under its power vested by section 83(3)(e) of the Act to ‘train information officers and deputy information officers of public bodies’, and specifically to instruct them on how to lawfully respond to PAIA requests made under section 18 and how to properly report the handling of such requests to the Commission under section 32.

6. In 2012, after investigating Brink’s complaints about this, the Commission found that LASA’s section 32 reports for 2010/11 and 2011/12 indeed failed to fully and

properly detail its refusals of his PAIA requests in the prescribed manner – the first report was defective, the second silent – thereby obscuring and concealing from the National Assembly the unlawfulness of LASA’s refusals of access to its records.

7. Called upon in August 2012 to file an amended report for 2011/12, to include its refusals on 8 April 2011 of Brink’s PAIA requests made in the previous reporting cycle, LASA objected to the Commission’s demand on spurious grounds and failed to comply with it, leaving its illegal refusals of Brink’s PAIA requests unreported.

8. Dissatisfied with LASA’s wilful non-cooperation, the Commission responded by notifying it of its intention to conduct a PAIA compliance audit.

9. In its section 84 report to the National Assembly for 2011/12 presented in October 2012, the Commission duly reported LASA to the National Assembly for its repeated non-compliance with its reporting obligations under section 32, and notified the National Assembly of its intention to conduct a full audit of LASA for PAIA compliance.

10. Repeatedly taxed by two members of the Justice Portfolio Committee on 9 October 2012 about the Commission’s negative PAIA report on LASA, CEO and information officer Vedalankar falsely repudiated the report as ‘untrue’ and made other untruthful and obfuscatory statements to falsely discredit it and maintain the pretence that LASA had duly complied with PAIA in handling Brink’s record requests, to which she unambiguously alluded.

11. In January 2013, the Commission conducted a preliminary probe of LASA’s performance under PAIA by way of a standard-form audit questionnaire, providing for LASA to self-report any PAIA compliance problems. None were declared.

12. In January 2016, the Commission notified information officer Vedalankar that the contents of LASA’s PAIA manual were substantially inconsistent with PAIA on several scores and that it contained false and seriously misleading information, including incompetent and unlawful internal appeal provisions not provided by PAIA for such public bodies as defined by section 1 of the Act. Despite this notice, to date Vedalankar has taken no action to amend LASA’s false and misleading PAIA manual to bring its provisions into conformity with PAIA. Moreover, the hyperlink to the PAIA manual on LASA’s website calls up a red malware hazard notice warning viewers not to proceed, and that they risk infection with malware if they do, thus hindering access to it. Brink’s information about this to Vedalankar and



two other responsible executives on 22 March 2016 was ignored, and to date the problem persists.

13. Despite the Commission's several interventions, and as described in Brink's further complaints to the Commission and to the Public Protector, LASA:

- continued illegally refusing his further PAIA requests made in October 2013, November 2014 and March 2015 on the same spurious grounds as before, including spurious grounds identified as incompetent and unlawful at the Commission's PAIA training workshop in October 2011 – until 11 February 2016 when, facing a calamitous judgment against it and enormous reputational damage, LASA capitulated at court before the argument of Brink's applications for declaratory orders that LASA had violated his fundamental rights and for orders compelling its delivery of the requested records that had illegally been refused, and undertook to surrender all requested documents or certify any that do not exist – only to renege on its agreement handed into court, and to continue silently withholding or expressly suppressing duly requested records that it had undertaken to hand over;
- continued concealing the unlawfulness of its refusals of Brink's PAIA requests from the Commission and from the National Assembly with more false and misleading section 32 reports for 2013/14, 2014/15 and 2015/16 (in total, five false and defective reports to the Commission since 2010/11), and concealing Brink's applications to court to compel LASA's compliance with PAIA – the first three falsely reported as '0', the next two disingenuously reported in such a way as to conceal that LASA had conceded them at court before argument;
- failed to amend its false and misleading PAIA manual, most importantly its incompetent and unlawful internal appeal provisions, and failed to remedy the malware infection problem hindering access to the manual online; and,
- failed to comply with the Act and acted grossly at odds with it in several other respects, described below.

14. Hence the Commission's decision to subject LASA to a full PAIA audit, as undertaken to the National Assembly in its section 84 report for 2011/12, and to report its findings to enable it to exercise its constitutional oversight powers over LASA on the basis of information LASA has hitherto dishonestly concealed from it, and to take appropriate action including imposing disciplinary sanctions against LASA Board chairperson Mlambo JP, Chief Executive Officer and information officer Vedalankar, National Operations Executive and deputy information officer Adv Nair, Corporate Services Executive attorney Thembile Mtati and other officers



mentioned herein who the Commission finds have gravely misconducted themselves in this matter.<sup>1</sup>

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<sup>1</sup> All supporting documents referenced in this report, contained in Bundles 1–4, are accessible online at <http://goo.gl/28gKRu>. *{As at mid-September 2016, Bundles 3 and 4 are still being assembled. For copies of any documents in these bundles urgently required, email anthonybrink.sa (at) gmail.com.}*

Bundles 3 and 4 contain documents obtained and generated subsequent to Brink's action in the Durban Labour Court tried in mid-2013, in which Brink claimed his instatement to LASA's Senior Litigator post at Pietermaritzburg for which he had been unanimously recommended by a duly constituted selection panel, following his interview for the post in November 2009 along with other shortlisted applicants. Brink's founded his claim on covert unfair discrimination, seemingly the most probable reason on the available information at the time. The judge was unpersuaded, and the claim failed – correctly, albeit for the wrong reasons, as now appears from recently unearthed facts which LASA had sedulously suppressed.

(Before all the papers were in and the matter was ripe for decision, Brink's petition for leave to appeal was prematurely dismissed after being perverted by an anonymous 'memorandum' slipped under the counter to the Judge President (it is unstamped by the registrar), defaming Brink and lying about his case with the object of improperly influencing the court against him to prejudice the decision of his petition. Fortunately for Brink, the document was inadvertently left in the court file (Bundle 3, ...), and the matter – defeating the ends of justice – will shortly be in the hands of the Judicial Services Commission. In its enquiry as to who drew and delivered the 'memorandum' to the current Judge President of the Labour and Labour Appeal Courts to improperly influence him, the JSC will undoubtedly be considering who had the power, influence, and professional connections to achieve this, and who was especially concerned that Brink's petition should fail. Similar fact evidence (evidence of a characteristic modus operandi) described in this report may assist the JSC in its enquiry.)

After five months of peculiar silence following Brink's interview, then stonewalling and palpably dishonest evasion of his enquiries about the outcome of the selection process, then mute refusal of his first PAIA request probing the reason his recruitment had been cancelled, then express refusal of it on indefensible grounds later abandoned, numerous totally different reasons for this were given to Brink, to LASA's Board, to the Commission, to the Minister, to the Portfolio Committee, to the Labour Court, to the Labour Appeal Court, and to the Eshowe Magistrate's Court.

After Brink categorically exposed one of the false excuses given by LASA Board chairperson Mlambo JP to the Minister and to the Portfolio Committee as a lie, it was quietly dropped; and when Brink again fingered this lie that Mlambo JP told the Minister and the Portfolio Committee, it was expressly and insistently retracted as 'an error', 'palpably an error'. (Like calling a flat tyre excuse for coming late to court 'an error', 'palpably an error', after being exposed by the judge as an outright lie.)

Another reason advanced to Brink, as well as to the Minister and to the Portfolio Committee, also exposed as a lie by LASA's business records, which did not support and indeed contradicted it, was also dropped when explaining the cancellation of the recruitment to the Board (totally different reasons were given to it), but was persisted with at trial, only to be radically contradicted by LASA's single witness in his evidence.

All these wildly different, radically contradictory, shifting and changing excuses, all unsupported and/or contradicted by the documentary record, for not appointing Brink to the top professional post for which he was duly recommended are catalogued, with references, in the schedule entitled 'ALL THE DIFFERENT STORIES' (Bundle 3, ...).

After first unlawfully refusing Brink access to the selection panel's full and unredacted



## HISTORY AND FINDINGS

*It's only when people have things they are not proud of that they try to hide things.<sup>2</sup>*

Ela Gandhi, LASA Board member

15. On 30 August 2010,<sup>3</sup> Brink delivered a PAIA request<sup>4</sup> to LASA information officer Vidhu Vedalankar, seeking access to 51 specified records. Like all subsequent ones, his request duly complied with the formalities prescribed by

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recommendation report, and then opposing his application to court to disgorge it, LASA ultimately abandoned its meritless defences and surrendered the report on 15 April 2016 (Bundle 3 ...).

Six-and-a-half years after the silent, unauthorized, off-the-record abortion of Brink's appointment in November 2009, under cover of a false budgetary insufficiency excuse, and the unauthorized, off-the-record, permanent freezing of recruitment to the critical post (in contravention of the Public Finance Management Act, proscribing unauthorized diversion of budgeted revenue: the post is budgeted and fully funded by vote of the National Assembly year after year), the complete, unredacted recommendation report finally revealed that one of the shortlisted applicants for the post, beaten out by Brink at the interviews, and in fact eliminated by the selection panel for not meeting the qualifying criteria, was Mlambo JP's long-time judicial colleague Mzochitwayo Ngcamu, for '± six and a half years' an acting judge of the Labour Court headed by Mlambo JP at the time.

Mlambo JP's peculiar and egregious misconduct in the matter, detailed in this report, following the irregular, unauthorised off-the-record, unlawful abortion of Brink's appointment, and the repeated, determined obstruction of his access to LASA's records as he was testing the excuses given him for this, finally becomes comprehensible. (When the matter returns to court, Brink will present newly sourced evidence of Mlambo JP's history of job-fixing for his friends: nepotism and cronyism.)

Having regard to LASA's Code on Recruitment and its Approval Framework, recruitment operations are the preserve of executive management – with the exception of the CEO and NOE, whose appointments require Board approval. It is common cause, however, that Mlambo JP, a *non-executive* director of LASA, has – ultra vires and illegally – intruded himself in LASA's recruitment operations, inter alia, by (a) conducting further interviews of candidates duly recommended for Senior Litigator posts by duly constituted selection panels, (b) making final approval decisions regarding their appointment, and (c) rejecting three recommended candidates – all without the authority to do any of this under the said regulatory instruments, and in flagrant breach of the rule of law and due process. In at least one case, a Senior Litigator candidate duly recommended by a selection panel was unlawfully passed over, and a rejected candidate unlawfully appointed instead. In another case, involving the same rejected but nonetheless appointed candidate (who sought a transfer from his post to another equivalent post closer to home) the selection process was a sham, with no proper advertising of the top-level post in the print media (Bundle 2, 1021, paragraph 15) and no properly constituted selection panel convened to conduct the interviews, with only two lawyers on the panel and a non-lawyer also scoring the candidates on their professional acumen (Bundle 2, 994). The systemic, pervasive corruption of recruitment operations at LASA, at all levels, will be addressed in Brink's draft report in preparation for the Public Protector, the Minister, and the Portfolio Committee: 'ROTTEN TO THE CORE: RECRUITMENT CORRUPTION AT LEGAL AID SOUTH AFRICA'.

<sup>2</sup> Bundle 3, {interview in the *Mercury*, 23 November 2011}

<sup>3</sup> Bundle 1, 69.

<sup>4</sup> Bundle 1, 53–68.



section 18. As LASA had not yet published its PAIA manual on its website to advise requesters of the request fee prescribed by section 22, Brink tendered to pay whatever the fee might be upon being informed of it.<sup>5</sup>

16. Section 25 of PAIA afforded Vedalankar 30 calendar days<sup>6</sup> within which to respond to the request. She neglected to do so by the end of this period, so section 27 deemed her silence a refusal.

17. Brink thereupon telephoned to seek the Commission's support under section 83(3)(c) of the Act, which provides that it may, 'on request, assist any person wishing to exercise a right contemplated in this Act'.

18. Then PAIA Unit director Chantal Kisoona agreed to intercede, and promptly obtained LASA Chief Legal Executive<sup>7</sup> Patrick Hundermark's assurance that Brink would have a response to his request by 20 October 2010.<sup>8</sup>

19. On 18 October 2010, Vedalankar<sup>9</sup> responded to Brink's PAIA request by now expressly refusing it in toto. Her reasons for doing so were entirely spurious and unlawful, and as will appear below were later implicitly abandoned and replaced with other justifications, themselves later abandoned.

20. Vedalankar's first justification for refusing Brink access to the records he requested was:<sup>10</sup>

The test to be applied to a request for information in terms of the PAIA, as laid down by the court in the case of *National Teachers Union v*

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<sup>5</sup> Bundle 1, 52.

<sup>6</sup> Per section 4 of the Interpretation Act 33 of 1957, prescribing the computation of days prescribed in a statute.

<sup>7</sup> Then 'Legal Development Executive'.

<sup>8</sup> Bundle 3, {the email}

<sup>9</sup> Under oath at the trial of Brink's labour claim, National Operations Executive Brian Nair denied having done so (Bundle 3, {transcript}), but repeated unusual idiosyncratic and syntactically incoherent stylistic indications in the letter – his unusual characteristic sentence-opening expression 'Noting ...', which he admitted as his own – suggest that he ghost-wrote or participated in writing it (Bundle 3, {transcript}). As to the veracity of Nair's denial, several other denials and claims under oath were later shown to have been perjured; see *infra*. In paragraph 57 of his judgment, the judge duly found that Brink had shown that on 'a number' of occasions Nair had been 'not generous with the truth'. That is, Nair repeatedly perjured himself, having regard to the oath he took 'to tell ... the whole truth', and not to deceptively conceal any of the true facts from court.

<sup>10</sup> Bundle 1, 101, numbered paragraphs 1 and 2.



*Superintendent General: Department of Education & Culture, Kwazulu-Natal and Another (D38/08) [2008] ZALC 18, is as follows:*<sup>[11]</sup>

- a) *In dealing with a request in terms of the Act, the question is not whether the requester is entitled to information but about whether the information is relevant for the purpose of enabling the requester to exercise a right that maybe breached, rendered unenforceable or weakened by the non disclosure.*<sup>[12]</sup>

In considering your request for information we were guided by this principle, together with Section 32 of the Constitution and the relevant provisions of the PAIA.

21. In truth and in fact, and contrary to this absolutely false, fake, manufactured quotation from the cited judgment, set in an italicized and indented block-quote paragraph to deceptively signify a direct quotation from it when it was not, Pillay J stated precisely the opposite:

Unlike access to information from another person, access to information from the state is manifestly not constrained by the requirement that information should be for the exercise or protection of any rights.

22. Pillay J's trite restatement of South African constitutional information law in relation to public body records accorded with that of the Supreme Court of Appeal, two years earlier, in *Mittalsteel SA Ltd v Hlatshwayo* [2006] SCA 94 (RSA):

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

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<sup>11</sup> The phrase 'is as follows' is italicized in the original.

<sup>12</sup> There is no paragraph 'b'.

23. Vedalankar's second justification for refusing Brink's request was an incoherent jumble of reasons,<sup>13</sup> based on her enumeration of sections 62 to 70<sup>14</sup> of PAIA – quite irrelevantly, since these apply to private and not public bodies:

Your request for information was considered against this background and it was in terms whereof that it was decided that (i) your request for information goes beyond your individual circumstances and extends to information on third parties, (ii) the information on third parties does not fall within the section 46 category above.

24. It is elementary that a request under PAIA for access to public body records need not pertain to the requester's 'personal circumstances'.

25. And as is plain from the list of documents<sup>15</sup> Brink had requested, he was not seeking 'information on third parties' at all, even less within the meaning of section 34, i.e. 'the unreasonable disclosure of personal information about a third party'; he was duly seeking access to LASA's business records to which he was entitled under section 32(1)(a) of the Constitution:

Everyone has the right of access to ... any information held by the state.

26. Vedalankar's odd phrase 'information on third parties' is not found in PAIA.

27. In twice using this peculiar phrase to justify refusing Brink's entire records request, including the selection panel's recommendation he wanted,<sup>16</sup> it seems clear that Vedalankar was pertinently alluding to the critically material 'information on third parties' contained in the recommendation report<sup>17</sup> that one of Brink's rivals for the top professional post<sup>18</sup> for which Brink had been selected and recommended,<sup>19</sup> who was also interviewed but rejected,<sup>20</sup> was a former long-time acting judge of the Labour Court<sup>21</sup> of which LASA chairperson Mlambo JP was

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<sup>13</sup> Bundle 1, 102–3, paragraph 5.

<sup>14</sup> Bundle 1, 102, paragraph 3.

<sup>15</sup> Bundle 1, 59–68.

<sup>16</sup> Bundle 1, 62, items 1–3.

<sup>17</sup> This appears from a full, unredacted copy of the report, finally given Brink in April 2016, after protracted unlawful resistance and only by agreement at court in a surrender treaty signed at the point of an imminent judgment to compel; see further below.

<sup>18</sup> Bundle 1, 246.

<sup>19</sup> Ibid.

<sup>20</sup> Bundle 1, 245.

<sup>21</sup> Bundle 3, {put up his appointments to LC when delivered under PAIA by the DIO of the Dept Justice}



Judge President at the time.<sup>22</sup> More especially because none of the other records Brink requested contained ‘information on third parties’.<sup>23</sup>

28. As described below, after first being mutely refused in September then expressly refused in October 2010, the selection panel’s recommendation report was supplied under Commission pressure in January 2011, with this critically material ‘information on third parties’ blacked out.<sup>24</sup>

29. Vedalankar’s concealment from Brink of the fact that his rival for the post was Mlambo JP’s long-time judicial colleague – at the time Brink was probing with PAIA the true reason for the abortion of his recruitment – first by suppressing the entire recommendation report in October 2010, then by redacting it before it was handed over under Commission pressure in January 2011, was unjustified and illegal.

30. The potently relevant information in the recommendation report that Ngcamu had served with Mlambo JP as a fellow judge in the Labour Court for about six-and-a-half years, and was a long-time judicial colleague of LASA’s Board chairperson, was not ‘personal information about a third party’ hit by section 34 of PAIA, whose ‘disclosure’ would be ‘unreasonable’. LASA implicitly conceded this by eventually surrendering the complete unredacted report to Brink in April 2016 – but only after it had been illegally refused again, and Brink had had to sue for it and haul LASA into court on 11 February 2016, as more fully described below.

31. Vedalankar concluded her refusal (in October 2010) to allow Brink access to the records he had requested<sup>25</sup> by reverting to her first reason:

the detailed information requested in your letter, other than the information and explanation provided above,<sup>[26]</sup> is declined as it is not relevant to you exercising any right you may have in law.

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<sup>22</sup> Bundle 3, {put up his appointments to LC, LAC and Gauteng HC when delivered under PAIA by the Department}. See further, footnote 1. LASA chairperson Mlambo JP was still Judge President of the Labour Court when Brink sued LASA in that court for his instatement to the Pietermaritzburg Senior Litigator post. That is, he ran the court in which Brink was constrained to seek justice, and in which court Brink had impeached his misconduct in his statement of claim: an appalling conflict of interest in the circumstances.

<sup>23</sup> Bundle 1, 59–68.

<sup>24</sup> Bundle 1, 246.

<sup>25</sup> Bundle 1, 104, paragraph 8.

<sup>26</sup> Vedalankar’s ‘information and explanation provided above’ comprised her several audacious lies, refuted by records later disgorged, inter alia:

32. As noted above, a request for access to public body records need not be ‘relevant to ... exercising any right ... in law’, and Vedalankar’s refusal of Brink’s request on the basis of this completely false ‘test to be applied to a request for information in

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- (i) that Brink had not alone been selected for the post for which he had applied (the very object of the interview process), but that he had been ‘recommended together with other candidates’ (Bundle 1, 104, paragraph 7.2); and Vedalankar repeated this lie in January 2011 (Bundle 1, 211, the last two lines of paragraph 3). The recommendation report later furnished in January 2011 refuted the lie: Brink and Mngadi were recommended for the Pietermaritzburg and Durban posts for which they had respectively applied, and no one else (Bundle 1, 244–8); quite the opposite, the unredacted report eventually surrendered in April 2016 reveals that the other candidates were entirely eliminated by the selection panel for not meeting the qualifying criteria (Bundle 3, ...);
  - (ii) that LASA lacked the budget to fill the post: ‘Due to the effects of the recession, anticipated funding for the 2010/11 financial year did not materialise’ (Bundle 1, 103, paragraph 6.7). In truth and in fact, the record shows that executive management concern arising in March 2010 about the delayed payment of additional budget for salary increases, and the recorded steps taken to address it, never had any bearing on Senior Litigator recruitment, or any other – to the contrary, in the first quarter April–June 2010 recruitment and new post creation soared – not until 31 July 2010 when, to spur the Department into paying (per Nair’s evidence (Bundle 3, ...), it temporarily froze, with Board approval, recruitment to some entry-level public defender posts servicing the lower criminal courts; and in the event for just two months, as the uncertainty passed with the inclusion of this additional budget in the mid-term budget in October and payment in December: see Brink’s heads of argument in LC D529/11, finely footnoted to the documentary record (<http://goo.gl/WAuLK6>); And,
  - (iii) that in light of this alleged ‘cutting [of] our baseline budget by a significant amount’ (Bundle 1, 103, paragraph 6.7) (in truth and in fact, and contrary to this lie, LASA’s baseline budget substantially increased (Bundle 3, ...)), Nair had ‘motivate[d] a change in the organizational structure, including the freezing of positions for discussion and finalization with the CEO’ (Bundle 1, 103, paragraph 6.6). Indeed, on 15 July 2010 Nair motivated the freezing of positions, and they were ‘56 practitioner posts at JCs [Justice Centres] ... In terms of this cut, I have ensured that DC [district court] will not be lower than 80% coverage whilst RCs [regional courts] will not be lower than 90% coverage’ (Bundle 1, 240). This was duly proposed to the Board (Bundle 1, 252–4) and duly approved (Bundle 1, 251). Contrary to Vedalankar’s audacious lie to Brink that ‘In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would immediately be frozen (Bundle 103, 6.7), the freezing of recruitment to LASA’s critical (its own word) Senior Litigator posts was never considered let alone implemented; to the contrary, in April 2010 LASA advertised on its website for applicants for its Mthatha Senior Litigator post (Bundle 1, 46) and briskly interviewed and recommended for it in May (Bundle 2, 994). LASA has repeatedly admitted that no record whatsoever exists to support its story that it froze three Senior Litigator posts for want of budget, which story has chopped and changed over time: see ‘ALL THE DIFFERENT STORIES’ (Bundle 3, ...). LASA’s Senior Litigator posts were then and have remained fully funded (Bundle 3, {annual budgets for SL posts}). Vedalankar’s claim to Brink that he could not be appointed due to ‘the effects of the recession’ was a mellifluous lie. It had nothing to do with LASA’s transient financial uncertainty in 2010, and the ‘effects of the recession’ excuse did not feature again in the case. Actually, despite the recession in 2008, LASA was so amply funded, that in 2009/10 its top management executives paid themselves, unprecedented, massive bonuses – on top of large salary increases – way in excess of nearly 30% annual bonuses that the National Assembly had already queried as inappropriate (Bundle 1, 152, paragraphs 204–14; and Bundle 2, 1003).



terms of the PAIA', which she falsely imputed to Pillay J in the Teachers Union case, was absolutely spurious and illegal.

33. In view of the Board's internal oversight responsibility to ensure statutory compliance by LASA's management executives, including their compliance with PAIA, in other words, the Board's fiduciary duty to ensure that in conducting LASA's operations its management executives comport themselves ethically and in conformity with the Constitution and the law,<sup>27</sup> Brink petitioned Board chairperson Dunstan Mlambo JP and other Board members on 30 November 2010<sup>28</sup> and over the next few days,<sup>29</sup> seeking their intervention and remediation of Vedalankar's illegal, unconstitutional refusal of his PAIA request, as plainly and incontestably demonstrated in paragraphs 17 to 43 of his petition.<sup>30</sup>

34. It is relevant to mention here that section 4(1)(a) of the Legal Aid Act 22 of 1969, then in operation, required that LASA's Board include a judge – impliedly and in practice to chair it. Indeed, section 8(1) of the succeeding and current Legal Aid South Africa Act 39 of 2014 now explicitly prescribes:

The judge appointed in terms of section 6(1)(a) is the chairperson of the Board.

35. This is to say, LASA's top officer must be a person who has taken the judge's oath to 'uphold and protect the Constitution and the human rights entrenched in it'.<sup>31</sup>

36. The Legislature evidently intended by this unique qualifying requirement for the head of a public entity – that it be headed by a judge – that LASA's most senior public officer can be confidently relied on to always tell the truth and only the truth, and to take seriously the country's hard-won constitutional rights, the rule of law, and ethical conduct at LASA; to see to it that LASA's management executives respect the public's basic civil liberties guaranteed by the Constitution in the democratic era, obey the law, comply with LASA's internal regulations, and act honestly at all times; and himself/herself 'uphold and protect the Constitution and the human rights entrenched in it' as sworn to do, uphold the law, and always

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<sup>27</sup> Bundle 1, 111–12, paragraphs 8–13.

<sup>28</sup> Bundle 1, 109ff.

<sup>29</sup> All by email attachment.

<sup>30</sup> Bundle 1, 113–19.

<sup>31</sup> Bundle 3, {judge's oath}



communicate truthfully – and that he/she would be especially cognisant of section 195 in Chapter 10 of the Constitution, headed ‘Public Administration’:

195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

...

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(2) The above principles apply to –

...

(b) organs of state[.]

37. Mlambo JP was abroad when he received Brink’s petition by email attachment, and via the Board Secretary on 6 December 2010 conveyed his intention to respond to it on his return.<sup>32</sup>

38. In breach of his said fiduciary obligation to LASA as chairperson of its Board, Mlambo JP did not act to remedy Brink’s extraordinarily serious complaint that in contravention of PAIA and in violation of his constitutional right to information Vedalankar had illegally refused him access to LASA’s business records specified in his request that he had duly made under the Act.<sup>33</sup>

39. Instead, after his ‘interaction with’<sup>34</sup> Vedalankar about Brink’s petition to him and the Board about, inter alia, her illegal total refusal to comply with his PAIA request, Mlambo JP connived with Vedalankar, the very subject of Brink’s petition and complaint, by permitting her to forge a letter responding to Brink’s petition on her own office computer<sup>35</sup> on 15 December 2010 and, ‘with his knowledge and consent’,<sup>36</sup> to paste a scanned image of his signature below it to dissemble to Brink

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<sup>32</sup> Bundle 1, 168.

<sup>33</sup> And his complaint that she had told an elaborate lie, already evident from the then available information, about why his appointment had been aborted.

<sup>34</sup> Bundle 3, {pre-trial conference Bundle 1, LASA’s answer to Brink’s agenda, page 61, paragraph 69.2}

<sup>35</sup> Bundle 1, 187: ‘Author’ properties of the PDF of the letter sent Brink: ‘VidhuV’.

<sup>36</sup> Bundle 3, {pre-trial conference Bundle 1, LASA’s answer to Brink’s agenda, page 61, paragraph 69.2}



that he had written it.<sup>37</sup> Vedalankar emailed Mlambo JP the PDF of the letter she had thus prepared for him, and he emailed it on to Brink two weeks later on the 30th.<sup>38</sup>

40. In two sentences the letter dismissed Brink's 57-page, 254-paragraph petition, which had commenced with a closely detailed, unanswerable complaint about Vedalankar's illegal refusal of his PAIA request:

I have reviewed the actions of Legal Aid South Africa regarding your candidature for the Senior Litigator post in KwaZulu-Natal. I could find no unfairness or arbitrariness towards you as alleged or at all.<sup>39</sup>

41. In sum, in the words of Chief Justice Mogoeng delivering the Constitutional Court's unanimous judgment in the Nkandla case,<sup>40</sup> Mlambo JP 'failed to uphold, defend and respect the Constitution'<sup>41</sup> when as LASA chairperson his attention was pertinently called to Vedalankar's illegal and indeed dishonest refusal of Brink's PAIA requests for access to LASA's records, and her violation of his constitutional right to information.

42. Obviously as one of South Africa's most senior judges, no defence that 'He might have been following wrong legal advice and therefore acting in good faith' (per the Nkandla judgment)<sup>42</sup> is available to Mlambo JP to raise against the charge that he disgracefully 'failed to uphold, defend and respect the Constitution'. In other words, it is not open to him to answer that he was too ignorant to know what he was doing when conniving in Vedalankar's illegal obstruction of Brink's request for access to LASA's records.

43. More especially because LASA's Code of Ethics and Conduct – 'which applies equally to all employees, Board Members, and other representatives of [LASA]',<sup>43</sup> and requires all of them to 'act honestly and in good faith at all times and report

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<sup>37</sup> Bundle 3, {ptc agenda, page17, para 80; and response page15, para 69.2}.

<sup>38</sup> Bundle 1, 201, paragraph 27. The letter is wrongly dated 9 November, a date three weeks before Brink emailed his petition.

<sup>39</sup> Bundle 186. Mlambo JP knew full well that the financial excuse advanced by Vedalankar for not proceeding with Brink's appointment was a lie. In his petition Brink presented the then already available clear evidence of this; much more would later emerge.

<sup>40</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

<sup>41</sup> Paragraph 83 of the judgment.

<sup>42</sup> *Ibid.*

<sup>43</sup> Bundle 2, 772, section 1.2.

any harmful activity they observe in the workplace’,<sup>44</sup> also to ‘support and assist the LEGAL AID BOARD to fulfil its commercial and ethical obligations and objectives as set out in this Code’<sup>45</sup> – requires that such Board members ‘maintain knowledge of and comply with all applicable laws’,<sup>46</sup> and ‘ensure that their conduct cannot be interpreted as being in any way in contravention of applicable laws’<sup>47</sup> such as PAIA – concerning which: ‘A prompt, courteous and accurate response should be made to all reasonable requests for information’.<sup>48</sup>

44. Compounding his demonstrated contempt for sections 32 and 195 of the Constitution, Mlambo JP did not fail ‘to uphold, defend and respect the Constitution’ through mere passive dereliction and neglect of his obligation to do so. By conspiring with Vedalankar, the very subject of Brink’s complaint, to forge a letter dismissing it, he actively ‘failed to uphold, defend and respect the Constitution’ in contempt of his oath of office in the manner of a corrupt judge conniving behind the scenes with an obviously guilty criminal accused facing an extraordinarily serious charge, batting aside the complaint’s clearly substantiated case, and allowing the accused with whom he has long been a friendly colleague, and who he well knows is guilty, to write a brief judgment for him, falsely pretending he has given the matter his careful attention and acquitting him.

45. Concerning Vedalankar’s manifestly illegal refusal of Brink’s PAIA requests on the basis of a fraudulent misquotation from a reported judgment and other utterly spurious grounds, all pertinently brought to his attention in paragraphs 17–43 of Brink’s petition, Mlambo JP could not possibly have found in good faith that all was well and above board; that Vedalankar had acted lawfully; and that Brink’s complaint about her violation of his fundamental right to information was unfounded. That is, Mlambo JP dismissed Brink’s petition in bad faith, which is to say dishonestly.

46. In this manner Mlambo JP further contravened LASA’s Code of Ethics and Conduct, which requires that ‘All employees must ... act honestly and in good faith at all times’.<sup>49</sup> LASA ‘will not condone any violation of the law or unethical business

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<sup>44</sup> Bundle 2, 780, section 15.1.5.

<sup>45</sup> Bundle 2, 780, section 15.1.1.

<sup>46</sup> Bundle 2, 775, section 7.5.

<sup>47</sup> Bundle 2, 775, section 7.3.

<sup>48</sup> Bundle 2, 778, section 13.

<sup>49</sup> Bundle 2, 780, section 15.1.5.



dealing<sup>50</sup> such as putting words in a judge's mouth that she never spoke to fabricate a fake legal cover for illegally refusing a PAIA request in order to conceal from a recommended applicant for a top professional post in LASA, whose appointment has strangely silently stalled, that an unsuccessful applicant for the same post was a long-time colleague in the Labour Court with LASA's chairperson Mlambo JP, then Judge President of that court.

47. And since 'Compliance with the code by all employees is mandatory',<sup>51</sup> no one is above the law at LASA, not even the Board chairperson, just because he is a senior judge.

48. Board members Jan Maree,<sup>52</sup> Len Konar,<sup>53</sup> and Adv Pieter du Rand,<sup>54</sup> representing the Department of Justice and Constitutional Development (as the Department was then called), all acknowledged receipt of Brink's petition about Vedalankar's illegal refusal of his PAIA request and violation of his fundamental right to information.

49. Du Rand assured Brink that his petition 'will be taken up with the Secretary to the Board for further attention',<sup>55</sup> but dishonoured this undertaking and failed to see to it that the Board Secretary indeed tabled Brink's petition for discussion and resolution at the next Board meeting – because it never was.

50. No other Board member contacted by Brink even acknowledged receipt of his petition. Two of them, Ela Gandhi and Yusuf Vawda, a law professor, acted to close ranks against him, with Gandhi going as far as to falsely accuse Brink of attempted blackmail and defamation.<sup>56</sup>

51. In view of Mlambo JP's connivance in Vedalankar's illegal blanket refusal of his PAIA request and in her violation of his fundamental right to information, by corruptly colluding with her in the dismissal of his petition in the manner described above, Brink again appealed to the Justice Department's Board representative

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<sup>50</sup> Bundle 2, 774, section 7.2.

<sup>51</sup> Bundle 2, 772, paragraph 1.2.

<sup>52</sup> Bundle 1, 958.

<sup>53</sup> Bundle 3,

<sup>54</sup> Bundle 1, 735.

<sup>55</sup> Ibid.

<sup>56</sup> Bundle 1, 207–8.



du Rand on 10 January 2011, now directly, imploring him to see to Vedalankar's compliance with his PAIA request.<sup>57</sup> This time du Rand ignored Brink's appeal.

52. On 15 December 2010, Brink emailed Vedalankar a second PAIA request for access to several further documents substantiating the budgetary insufficiency excuse for the abortion of his appointment to the senior professional post for which he had been recommended,<sup>58</sup> which excuse Vedalankar had given him in her October letter totally refusing his first PAIA request.

53. By now, LASA's PAIA manual stipulating the prescribed request fee had been posted on its website, and Brink sent Vedalankar a cheque by post to cover the fee.<sup>59</sup>

54. On 10 January 2011, Brink sought the Commission's support and assistance again.<sup>60</sup>

55. On 24 January 2011, Brink petitioned Mlambo JP and the Board a second time about Vedalankar's illegal refusal of his first PAIA request.<sup>61</sup>

56. With the corrupt intention of cowing and inducing Brink to abandon his effort to vindicate his fundamental rights, Mlambo JP responded at 23h12 that night:<sup>62</sup>

- by again dismissing Brink's repeated plea for the Board's intervention, by dissembling that 'I could find nothing untoward in how you have been treated by Legal Aid SA. I reiterate this view'. In truth and in fact, Mlambo knew full well from paragraphs 17–43 of Brink's first petition<sup>63</sup> that Vedalankar's reasons for refusing Brink's first PAIA request were unlawful and indefensible (and indeed, they were implicitly abandoned and replaced with other reasons four days

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<sup>57</sup> Bundle 1, 190.

<sup>58</sup> In April 2010 Clark unambiguously implied that Brink had been recommended by suggesting he withdraw his application for the post (Bundle 1, 256); because had Brink been eliminated by the selection panel and another candidate chosen, he would not still have been in the running to withdraw. That Brink was indeed chosen was later positively confirmed by the selection panel's unanimous recommendation report, reluctantly provided under Commission pressure after first being refused, in January 2011, more than five months after Brink had requested it under PAIA.

<sup>59</sup> Bundle 2, 1041. The cheque was eventually posted back to Brink unrepresented.

<sup>60</sup> Bundle 1, 192. In the event, with time running out to launch his labour claim, Brink did not proceed with his then intended application to court to compel compliance with his PAIA requests, mentioned in his letter to Kisoon, but elected to pursue the withheld records via document discovery procedure after the close of pleadings in the Labour Court.

<sup>61</sup> Bundle 1, 197ff.

<sup>62</sup> Bundle 1, 209. As to Mlambo JP's reference to 'a friend of yours', namely Christopher Rawlins a retired accountant assisting Brink, Rawlins reported his engagement with the two strangely hostile Board members in question: Bundle 1, 207–8.

<sup>63</sup> Bundle 1, 113–19, paragraphs 17–43.



later),<sup>64</sup> and that contrary to his dissimulation otherwise, ‘how you [Brink] have been treated by Legal Aid SA’ was manifestly ‘untoward’. This is to say, it was not truly Mlambo JP’s ‘view’ that ‘I could find nothing untoward in how you have been treated by Legal Aid SA’, inter alia in its illegal violation of Brink’s constitutional right to information, and he was dishonestly misrepresenting his actual ‘view’ to shake Brink off, in continuing dereliction of his fiduciary responsibility to LASA as a public entity and breach of his judge’s oath;

- by falsely asserting that ‘the Board of Directors of Legal Aid SA is not the appropriate forum to raise your matter’ – part of which ‘matter’ was Vedalankar’s illegal refusal of Brink’s first PAIA request – because ‘the matter was handled at Executive Management level, being the level at which such matters are handled’. In truth and in fact, it was precisely the unlawful, unconstitutional conduct of ‘Executive Management’ that Mlambo JP and his Board were responsible for correcting;<sup>65</sup>
- by ‘call[ing] on you [Brink] to desist from communicating with Board Members in this regard’. Mlambo JP’s demand was grossly irregular, because naturally unless alerted to Vedalankar’s unlawful and unconstitutional conduct, the Board would not be placed to intervene to remedy it – more especially because then Board Secretary Bee-Mari Schoeman, responsible for tabling matters of importance for the attention of the Board at its meetings, was unresponsive to Brink’s communications with her;<sup>66</sup>
- by falsely and outrageously accusing Brink of impropriety, suggesting he was acting professionally disgracefully and potentially unlawfully, in duly pressing for Board’s intervention inter alia in Vedalankar’s violation of his fundamental right to information: ‘Your conduct is unbecoming and borders on harassment.’ In truth and in fact, Brink’s conduct in pursuit of his rights was impeccably proper, whereas Mlambo JP’s false charge fitted his own deplorable misconduct; and,
- by telling Brink, ‘I have, in turn, requested Board Members to ignore all communications from you and/or on your behalf. I trust you find this in order.’

57. Testing the truth of Mlambo JP’s claim to have requested the other Board members to ignore his petitions inter alia about Vedalankar’s illegal refusal of his PAIA requests, which is to say his alleged request to them that they should not exercise their collective responsibility to oversee and ensure statutory compliance

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<sup>64</sup> Bundle 1, 217–22.

<sup>65</sup> Bundle 3, {Board and Board Executive Committee charters}

<sup>66</sup> Bundle 1, 168 and 188.



by LASA's management executives, Brink requested the records of Mlambo JP's email communication that day with the other members of the Board, as alleged.<sup>67</sup>

58. Corporate Services Executive Thembile Mtati confirmed on oath: 'No such record exists'<sup>68</sup> – implicitly confirming that Mlambo JP lied to Brink about this, because obviously he would not have individually telephoned each and every one of the sixteen<sup>69</sup> other Board members that night when he could have sent a single email jointly addressed to all of them.

59. Even had Mlambo JP's lie to Brink been true, such a request to the rest of the Board to abdicate their collective oversight responsibility to ensure that Vedalankar responded lawfully to Brink's PAIA request would have been egregiously out of 'order'.

60. Besides his wilful dereliction of his fiduciary duty to LASA as a director of the Board to ensure that in conducting its business its management executives do not contravene LASA's Code of Ethics and Conduct, do not break the law, and do not violate the Constitution, Mlambo JP's failure to intervene in Vedalankar's violation of Brink's constitutional right to information, and his dissembling to Brink that he found nothing remiss in her unlawful suppression of LASA's records that he wished to examine, constituted a further, repeated deliberate failure by him to 'uphold and protect the Constitution and the human rights entrenched in it'.

61. Mlambo JP's repeated transparent dishonesty on display in dismissing Brink's second petition disclosed multiple contraventions of LASA's Code of Ethics and Conduct again, as quoted above.

62. On 28 January 2011, Vedalankar responded to Brink's second PAIA request:

- by unlawfully refusing it in toto, on the false and untruthful basis that it was a mere repetition of the first;<sup>70</sup>
- by revisiting his first PAIA request and refusing it again, now for a fresh set of factually and legally spurious reasons;<sup>71</sup>
- by rejecting his prescribed request fee,<sup>72</sup> and returning his cheque for it,<sup>73</sup> making unambiguously plain her absolute rejection and refusal of both his first and

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<sup>67</sup> Bundle 3,

<sup>68</sup> Bundle 3,

<sup>69</sup> Bundle 1, 1043.

<sup>70</sup> The two lists of requested documents are plainly different: c.f. Bundle 1, 181ff and 351ff.

<sup>71</sup> These are canvassed in Brink's first memorandum to the Commission, discussed *infra*.

<sup>72</sup> Bundle 1, 224, paragraph 44.



second requests for access to LASA's public records, which he needed to verify or expose and refute the financial insufficiency story she had told him in October 2010 for the cancellation of his appointment to the post for which he had been selected;

- by reiterating her financial insufficiency excuse,<sup>74</sup> and putting up several documents claimed to support it (in fact they flatly refuted it),<sup>75</sup> four of which coincidentally more or less met certain of Brink's requests;
- by concealing from him a key record reflecting the Department's delayed payment on 15 December 2010 of LASA's OSD allocation for legal staff salary increases,<sup>76</sup> utterly negating her financial insufficiency excuse for not concluding his appointment;
- by attempting to put him off pursuing his fundamental right of access to the public records he had requested, like Mlambo JP did, by trying to intimidate him with a threat to sue him for defamation;<sup>77</sup> and,
- by concluding that she would not communicate with him any further.<sup>78</sup>

63. Vedalankar copied this letter to Mlambo JP.<sup>79</sup> As a senior judge, sworn to 'uphold and protect the Constitution and the human rights entrenched in it', he did nothing about the very obvious illegality of Vedalankar's persistent refusals of Brink's PAIA requests in violation of his fundamental right to information,<sup>80</sup> in further continuing breach of his judge's oath, fiduciary obligation to LASA as a public entity, and ethical obligations under LASA's Code of Ethics and Conduct.

64. On 17 February 2011, Brink made a further appeal to the Commission to assist him access documents that LASA was determinedly illegally withholding from him.<sup>81</sup>

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<sup>73</sup> In fact, Brink's cheque for the request fee was not returned with the letter, as stated at its conclusion, but later in August 2012: (Bundle 1, 1041; see PAIA folder for copies of PO tracking etc).

<sup>74</sup> As noted above, the budgetary insufficiency excuse was not supported, but actually contradicted, by the few documents Vedalankar put up 'To demonstrate' it; see documents referenced in following footnote.

<sup>75</sup> Bundle 1, 240; 252-4; and 251, paragraph 4.2.

<sup>76</sup> Bundle 2, 713. This critically material document surfaced during document discovery proceedings after Brink had sued in the Labour Court.

<sup>77</sup> Bundle 1, 212, paragraph 5.

<sup>78</sup> Bundle 1, 224, paragraph 44.

<sup>79</sup> Bundle 1, 957.

<sup>80</sup> Nor did Mlambo JP contradict the false explanation Vedalankar gave Brink for the abortion of his appointment, which he personally knew to be false from his direct knowledge of the true facts.

<sup>81</sup> Bundle 1, 262.



65. On 25 February 2011, the day before its next meeting, Brink petitioned Mlambo JP and the Board a third time about Vedalankar's illegal refusals of his first and now second PAIA requests.<sup>82</sup>

66. Brink's third petition to the Board went completely ignored. None of its members acted to remedy Vedalankar's violation of his fundamental right to information, about which he had repeatedly complained. All looked the other way.

67. Brink copied<sup>83</sup> his third petition both to LASA's Executive Authority, the Minister of Justice and Constitutional Development, and to the chairperson of the Parliamentary Portfolio Committee for the said Department in the National Assembly – charged by section 55(2)(b)(ii) of the Constitution with oversight of LASA as a public entity.

68. Unlike LASA chairperson Mlambo JP and the rest of the Board, the Minister and the chairperson of the Portfolio Committee did not just ignore Brink's third petition concerning Vedalankar's repeated and persistent illegal refusals to allow him access to LASA's public business records and her violation of his constitutional right to information. Both the Minister<sup>84</sup> and the chairperson of the Portfolio Committee<sup>85</sup> took Brink's fundamental rights violation complaints seriously, and instituted separate and independent enquiries into them.

69. Brink chanced to learn of these ministerial and parliamentary enquiries from the chairperson of the Portfolio Committee several months later, when in June 2011, after Brink had approached him in a different connection, the chairperson furnished him with copies of:

- his letter to Mlambo JP calling on him, the Board, and Vedalankar to respond to Brink's extraordinarily serious complaints;<sup>86</sup>
- an 'updated'<sup>87</sup> version of the report to the Minister that he had received from Mlambo JP;<sup>88</sup>
- Mlambo JP's covering letter for the report, in which he quoted his email to Brink on 24 January 2011<sup>89</sup> accusing him of serious misconduct in prosecuting his complaint;<sup>90</sup> and,

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<sup>82</sup> Bundle 1, 310ff.

<sup>83</sup> Bundle 1, 314. Both reacted; see next paragraph.

<sup>84</sup> Bundle 3, {Minister's demand PAIA'd, but yet to be delivered}

<sup>85</sup> Bundle 1, 503.

<sup>86</sup> Bundle 1, 503.

<sup>87</sup> Bundle 1, 507, postscript.

<sup>88</sup> Bundle 1, 505–7.



- his decision in light of its contents (canvassed below) to close the matter.<sup>91</sup>

70. To put down the Minister's enquiry and to avoid his further investigation of Brink's complaints about the violation of his basic civil rights to information and equal employment opportunity, and the already clear indications that he had been given a false excuse for the abortion of his appointment, Mlambo JP asked Vedalankar<sup>92</sup> to provide him with a report refuting Brink's complaints – complaints that Mlambo JP had himself already twice batted aside in his correspondence with Brink.

71. Vedalankar instructed Nair to write the report for Mlambo JP, and Nair ghost-wrote it as told.<sup>93</sup> He then passed it to Vedalankar,<sup>94</sup> to forward to Mlambo JP to sign and submit to the Minister.

72. Although there was nothing secret about the contents of the report in any proper sense, it was marked '*Confidential*' in the header of every page.<sup>95</sup> LASA did not provide a copy of this report to Brink about him, and he was unaware of it at the time. That is, the report was kept confidential from Brink. As said, Brink only chanced to learn of the report some months later.

73. LASA's lead in-house attorney Mtati received an electronic copy of the report to the Minister in Microsoft Word,<sup>96</sup> which is to say, he was in on it.

74. On 1 March 2011, Vedalankar delegated Nair<sup>97</sup> and COO Jerry Makokoane<sup>98</sup> as deputy information officers.

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<sup>89</sup> Bundle 1, 209.

<sup>90</sup> Bundle 1, 504.

<sup>91</sup> Bundle 1, 502.

<sup>92</sup> Bundle 3, {record of Nair testifying he gave it to Vedalankar}

<sup>93</sup> Bundle 1, 1015. At trial, Nair eventually admitted this. On his instructions, his authorship of the report was initially falsely and dishonestly disputed persistently during Brink's cross-examination at the trial of his labour claim (Bundle 3, {record of LASA counsel's cross-examination of Brink on the point}); but cornered by the electronic finger-print evidence of his name, 'Briann', found in the 'Author' properties of the PDF of the report (Bundle 2, 1015) emailed to Brink just before the trial, Nair finally admitted the truth of the matter in the witness stand, namely that that he had indeed ghost-written the report (Bundle 3, {record of Nair's admission}).

<sup>94</sup> Bundle 3, {record of Nair's evidence}

<sup>95</sup> Bundle 1, 505–7.

<sup>96</sup> At the second pre-trial conference at court in June 2011, shortly before the trial of his labour claim a couple of weeks later, Brink noticed a copy of the report to the Minister in a folder on Mtati's notebook computer as they were searching together for a different document; and as requested, Mtati emailed it to him after the conference.

75. To facilitate the Commission's mediation in the matter, following his request for assistance on 17 February 2011, on 3 March Brink delivered a memorandum to the Commission's PAIA Unit, demonstrating the irrelevance and unlawfulness of Vedalankar's reasons for refusing his first two PAIA requests.<sup>99</sup>

76. On 9 March 2011, Brink filed a third PAIA request with LASA for access to a few further records.<sup>100</sup>

77. On the same day, 9 March 2011, Mlambo JP signed the 'Confidential Report to the Honourable Minister of Justice and Constitutional Development Re: Adv Anthony Brink'<sup>101</sup> that Nair had ghost-written for him, and which Nair had given Vedalankar to pass on to him to sign and deliver to pervert the Minister's enquiry.

78. Mlambo JP neglected to respond immediately to the enquiry instituted by the chairperson of the Portfolio Committee, and, as mentioned below, only did so several months later.<sup>102</sup>

79. LASA did not favour Brink with a copy of the 'Confidential Report ... Re: Adv Anthony Brink' delivered to the Minister at the time, and it was submitted without his knowledge.<sup>103</sup>

80. Concerning Brink's complaint about Vedalankar's repeated and persistent illegal refusals of his PAIA requests and thus her violation of his fundamental right to information, the report stated unctuously and dishonestly:<sup>104</sup>

We are satisfied that we have been open and transparent with Adv Brink in terms of the provision of information as it relates to his core complaint. We are in the process of ensuring that any outstanding requests for information are attended to in terms of PAIA, notwithstanding the fact that many of his requests do not relate to his complaint regarding non appointment. Whilst

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<sup>97</sup> Bundle 1, 369. LASA's PAIA manual amended in 2010 falsely alleged Nair to be a deputy information officer before he was actually delegated as such (Bundle 3, ...).

<sup>98</sup> Bundle 3, {his recently, eventually, produced delegation}

<sup>99</sup> Bundle 1, 315.

<sup>100</sup> Bundle 1, 344ff.

<sup>101</sup> Bundle 2, 1012.

<sup>102</sup> Bundle 1, 504.

<sup>103</sup> As said above, Brink only obtained the original report to the Minister in March 2011 from Mtati in July 2013 (after spotting it in a folder on his notebook computer at the second pre-trial conference at court, while they were searching it for a different document), having received a copy of the 'updated' version of the report from the chairperson of the Portfolio Committee in June 2011.

<sup>104</sup> Bundle 2, 1012ff.



Adv Brink has threatened legal action in his correspondence to us, we remain confident that we have acted properly in this matter and that we have complied with the provisions of PAIA. ... Notwithstanding the insulting and malicious tone of most of Adv Brink's correspondence with us on this matter, we have tried to convince him, by the provision of relevant documentary evidence, that the basis of his conspiracy theory is unfounded. It is however clear that Adv Brink believes otherwise. ... As a result of Mr Brink's invasive conduct, the Chairperson of the Board wrote to him specifically requesting him to cease contacting Board members as the attached email attests. Despite the Board Chairperson's request Mr Brink has continued with his tirade.

81. The report was self-evidently calculated to defraud the Minister by inducing him to believe incorrectly that:

- Brink's complaints about Vedalankar's illegal refusals of his PAIA requests were baseless;
- Vedalankar had duly complied with his PAIA requests and had refused him nothing;
- a few outstanding records that Vedalankar had agreed to provide him were still being gathered for delivery to him;
- Vedalankar had duly furnished him with all the documents Brink needed to see for himself that the financial explanation she had given for the abortion of his appointment was true;
- Brink was evidently mentally perturbed for not accepting Vedalankar's financial insufficiency explanation for the abortion of his appointment, and for complaining that the documents that she had put up, and others he had sourced, did not support and contradicted her claim that LASA's three remaining vacant critical Senior Litigator posts had been frozen indefinitely for want of sufficient budget from the Department to fill them;
- he had asked for and was wasting LASA's time in seeking access to irrelevant documents that had no bearing on the abortion of his appointment;
- his correspondence with LASA's executive management and Board was 'insulting and malicious' and his 'conduct' in approaching them 'invasive' – which is to say, in repeatedly entreating the Board to see to it that Vedalankar comply with PAIA by granting him access to the records he had duly requested, thereby respecting his fundamental right to information held by the state guaranteed by section



32(1)(a) in the Bill of Rights of the Constitution, Brink had grievously misconducted himself and was continuing to do so; and,

- in his communications with LASA's officers, as he pursued entirely misconceived claims and complaints, he was raving like a demented person.

82. All these claims and clear implications by Mlambo JP to the Minister were lies.

83. With the corrupt intention of prejudicing the Minister against Brink and his complaint, the better to pervert his enquiry inter alia into Brink's complaint about Vedalankar's repeated illegal refusals of his requests for access to LASA's public records in the exercise of his constitutional right to do so, Mlambo JP furnished the Minister with a copy of his false and defamatory late-night email sent Brink on 24 January 2010.<sup>105</sup>

84. Since the lies in the report were subscribed by a senior judge, the Minister naturally believed them to be true, and Brink received no reply from him.

85. Mlambo JP, Vedalankar and Nair thus succeeded in corruptly misleading the Minister and thereby perverting his enquiry.

86. Having received a copy of the fraudulent report, Mtati was aware of the perversion of the Minister's enquiry by means of it, and went along with it.

87. On 11 March 2011, Brink delivered a formal fundamental rights violation complaint<sup>106</sup> to the Commission about LASA's repeated and persistent illegal refusals to comply with his PAIA requests for access to its records. It was later updated and amplified.<sup>107</sup>

88. Between 11 and 31 March 2011, Mtati sought the advice of junior counsel in private practice, Adv Thabiso Machaba,<sup>108</sup> on how to respond to Brink's third PAIA request and his complaint to the Commission about the refusals of his first two requests, and regarding draft section 23 affidavits drawn for or by Nair.<sup>109</sup> As Mtati later put it on affidavit, this was 'to be safe'.<sup>110</sup>

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<sup>105</sup> Bundle 1, 1014, last sentence, penultimate paragraph: it refers to 'the attached email'.

<sup>106</sup> Bundle 1, 353.

<sup>107</sup> Bundle 1, 395.

<sup>108</sup> Bundle 3, {fee-notes}

<sup>109</sup> Bundle 3, {Machaba's feenote}

<sup>110</sup> Bundle 3, {answer in app to subpoena DM, para 75.2}



89. Mtati did not consult and call on the high-level professional expertise of any of LASA's six available Senior Litigators<sup>111</sup> at the top of LASA's legal ranks: 'some of our most senior and experienced lawyers',<sup>112</sup> as Nair has correctly described them, part of whose professional function is to 'Provide legal opinion[s] for the LAB as requested'<sup>113</sup> at no additional cost to LASA. Instead, in this exceedingly important matter involving Brink's fundamental right to information, and his repeated protests that Vedalankar was violating it, Mtati preferred to rely on the advice of the said junior advocate.<sup>114</sup>

90. As will appear below, Machaba, who repeatedly demonstrated his failure to have even read the Act about whose application he was charging enormous professional fees for his professionally incompetent advice (see below), consistently advocated the refusal of Brink's PAIA requests year after year, and likewise consistently advocated opposing Brink's subsequent applications to court for orders compelling the production of records illegally denied him, which he helped obstruct by raising heaps of completely spurious defences in answering papers he drew, filling many lever-arch files, all later abandoned.<sup>115</sup> And milking LASA of vast sums in legal fees for this service.<sup>116</sup> But wanting to keep suppressed the incriminating documents Brink had requested, LASA's head office executives gladly followed this legal novice's advice to hamper Brink's exercise of his fundamental right to information, and disregarded his rebuttals in his replying affidavits of all the inept and empty defences raised in LASA's answering affidavits.

91. Satchwell J of the South Gauteng Division of the High Court has sharply deplored the deliberate employment of inexperienced and incompetent junior lawyers by public bodies to obstruct access to their public records duly requested for the purpose of exposing evidence of their corruption.<sup>117</sup>

92. On 8 April 2011, Nair responded to Brink's third PAIA request addressed to Vedalankar, and revisited his first two,<sup>118</sup> now narrowed and reduced<sup>119</sup> by Brink in

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<sup>111</sup> Bundle 3, {budget records showing six of nine filled posts}

<sup>112</sup> Bundle 2, 870, paragraph 4.

<sup>113</sup> Bundle 1, 45.

<sup>114</sup> Bundle 3, {answer in app to subpoena DM, para 75.2; include counsel's fee-note for advice}

<sup>115</sup> Filed at the Eshowe Magistrate's Court.

<sup>116</sup> Bundle 3, {When eventually delivered, put up all fee-notes, including for groundless opposition to five applications to court to compel: many lever arch files of answering affidavits, eventually abandoned by LASA}

<sup>117</sup> Bundle 3,

<sup>118</sup> Bundle 1, 363.

<sup>119</sup> Bundle 1, 401ff.



light of the specific budgetary excuse for his non-appointment which Vedalankar had given him in her October letter<sup>120</sup> and repeated in her January one.<sup>121</sup>

93. That is, Vedalankar permitted the very management executive involved in blocking Brink's appointment<sup>122</sup> to control and restrict his access to records bearing on the veracity of the excuses that he<sup>123</sup> and she<sup>124</sup> had given him for not appointing him<sup>125</sup> – a grossly improper conflict of interest<sup>126</sup> and abuse of power.

94. As noted above, both Nair and Makokoane were designated deputy information officers the month before. Having been uninvolved in the abortion of Brink's recruitment,<sup>127</sup> Makokoane could have dealt with Brink's requests, and he ought to have done so, not Nair.

95. Supported by Machaba,<sup>128</sup> after allegedly spending eight days 'researching the law' and writing up his advice to refuse most of Brink's PAIA requests into a 'memo',<sup>129</sup> Nair persisted in unlawfully refusing most of Brink's requests on factually and legally spurious grounds (the Commission later agreed,<sup>130</sup> and LASA later conceded),<sup>131</sup> but at last furnished affidavits under section 23 of PAIA,

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<sup>120</sup> At the trial of Brink's claim for his appointment, Nair later radically deviated from her explanation and told a different story: Bundle 3, {record of Nair's evidence changing the story}

<sup>121</sup> Bundle 1, 223, paragraph 39.

<sup>122</sup> When in July 2010 Brink appealed to Vedalankar to finalize his appointment, she was unaware that it had been blocked (Bundle 1, 714). She referred the matter to Nair to deal with (ibid), which he did by telling Brink that 'due to various reasons' LASA had decided not to appoint the candidates selected for its three vacant Senior Litigator posts (Bundle 1, 19). In October 2010 Vedalankar actively joined the cover-up by advancing a false budgetary excuse for this (Bundle 1, 103) – which Nair contradicted by telling totally different stories in his 'Report to Board' of November 2011 (Bundle 1, 869, section 1) after Brink had sued for his appointment in July 2011 and refuted the financial excuse in his detailed statement of claim referenced to LASA's records; and contradicted again in his evidence, reviving the financial excuse but radically contradicting it as regards the Mthatha post, about which he told a totally different new story.

<sup>123</sup> Bundle 1, 19.

<sup>124</sup> Bundle 1, 103, paragraph 6.7.

<sup>125</sup> Their joint prerogative under section 8.2.2(b) of the Approval Framework (Bundle 2, 1036).

<sup>126</sup> Bundle 3, {quote Aboobaker SC in *The Mercury* on such conflict}

<sup>127</sup> Bundle 3, {paragraph 37.5 of original response to statement of claim: 'the COO was deliberately left out of the decision to abort the vacant [Senior Litigator] posts'}

<sup>128</sup> Bundle 3, {'Counsel advised that limited access to information be granted to the Applicant.' : answer in app to subpoena DM, para 75.2}. Bundle 3, {'the CEO sought an external opinion which resulted in the grant of limited access to certain documents/information': answer in app to subpoena DM, para 91.3}

<sup>129</sup> Bundle 3, {the feenote using this word}

<sup>130</sup> Bundle 1, 499, paragraph 2: 'A cogent opinion demonstrating the unlawfulness of the action of the deputy information officer of LASA is made in your memorandum.'

<sup>131</sup> At the Commission's PAIA training workshop held on 6 October 2011 (Bundle 2, 915–21). LASA's concessions are quoted below.



certifying that certain requested records did not exist, and most relevantly that no record whatsoever exists to support the allegation Vedalankar made to Brink in October 2010 that LASA's Senior Litigator posts at Pietermaritzburg, Durban and Mthatha had been frozen for lack of budget to fill them.<sup>132</sup> (Nair's incompetent and unlawful reasons for refusing Brink's requests are dealt with below.)

96. For his advice to refuse most of Brink's PAIA requests, Machaba charged LASA a total fee of R159 600 including VAT,<sup>133</sup> and noting 'Recommended for payment',<sup>134</sup> LASA Corporate Legal Manager Solly Sekgota approved this expenditure on obstructing Brink's access to the records he had duly requested, without demur.

97. On 8 April 2011,<sup>135</sup> LASA filed its section 32 report for 2010/11.<sup>136</sup> It was the first time<sup>137</sup> LASA reported under section 32 – ten years after this obligation was imposed by the Act. The report was grossly defective and misleading, and contained several outright lies to the Commission for the ultimate misinformation of the National Assembly:

- It reported only Brink's first 'Request for information' in August 2010, and failed to report his second in December 2010 and third in March 2011. The report thus failed to comply truthfully with section 32(a) regarding 'the number of requests received' – which was three from Brink.
- It failed to report that Brink's first two requests were totally refused (the third was responded to in the following reporting cycle). What few LASA records Vedalankar did provide, were for her own purposes, namely 'To demonstrate'<sup>138</sup> her various contentions, and not to grant Brink access to the records he had duly requested. Indeed, to underscore her refusal and rejection of Brink's requests, she

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<sup>132</sup> Bundle 1, 381, paragraphs 14, 15, 16; 382, paragraph 22; 383, paragraph 29; and 385, paragraph 35. In his section 23 affidavit, Nair swore to Vedalankar's story that in July 2010 he and she had frozen LASA's vacant Senior Litigator posts at Pietermaritzburg, Durban and Mthatha: Bundle 1, 380, paragraphs 13–16. Vedalankar and Human Resources Executive Amanda Clark made confirmatory affidavits (Bundle 1, 390 and 392). Giving evidence at trial, however, Nair repudiated and contradicted Vedalankar's story as regards the Mthatha post, which he had confirmed under penalty of perjury, and told a completely different new story: Bundle 3, {transcript} And in between telling these different stories on oath on affidavit and later in court, Nair told more totally different stories to the Board about why the Pietermaritzburg, Durban and Mthatha Senior Litigator posts were not filled with the candidates duly selected for them. See 'ALL THE DIFFERENT STORIES': Bundle 3, ... .

<sup>133</sup> Bundle 3, {feenote}

<sup>134</sup> Bundle 3, {approval}

<sup>135</sup> Bundle 2, 678.

<sup>136</sup> Bundle 2, 679.

<sup>137</sup> Bundle 2, 916, third line.

<sup>138</sup> Bundle 1, 213–16.



spurned<sup>139</sup> and returned his request fee.<sup>140</sup> The report thus failed truthfully to comply with section 32(d) regarding ‘the number of requests for access refused in full’ – which was two.

- It dishonestly misdescribed Brink’s first ‘Request for information’ as ‘relating to the process on the conduct of interviews’ only. In truth and in fact, Brink’s first request for 51 records<sup>141</sup> was manifestly directed at thoroughly interrogating the circumstances in which his appointment to the Pietermaritzburg Senior Litigator post had been aborted after his selection for it, and testing the veracity of Nair’s story told him nine silent months after his successful interview for the post that ‘the recruitment process to finalise the appointments for all vacant Senior Litigator posts were put on hold due to various reasons. I can now confirm that we will not be proceeding with the filling of these posts.’<sup>142</sup>
- It falsely and deceptively misstated the date on which Brink’s first request was delivered, so as to conceal the fact that Vedalankar had unlawfully refused it out of time, outside the 30 days prescribed by section 25 for her response. The actual true date was 30 August 2010,<sup>143</sup> whereas the report falsely stated 27 September 2010.
- Concerning Brink’s first request, it falsely and misleadingly reported ‘Access partially refused’, whereas in truth and in fact it was totally refused.
- The statement, ‘The other information was provided except for information which was refused in terms of section 65 on the basis that it was not relevant to the exercising of the right he may have in law and further that the request relates to confidential information of third parties’ was false and misleading on multiple scores. Section 32(d) pertinently required LASA, a public body, to report ‘the number of times each provision of this Act was relied on to refuse access in full’. Justifying its refusal of Brink’s first PAIA request (‘information which was refused’, as the report put it), LASA cited section 65. In truth and in fact, section 65 was never relied on; the section is anyway not part of Chapter 4 in Part 2 of the Act concerning public bodies and the permissible ‘Grounds for Refusal of Access to Records’ of a public body. Section 65 provides a ground for refusing access to the record of private body ‘if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement’, and was accordingly completely irrelevant. As the judges quoted above remarked,

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<sup>139</sup> Bundle 1, 224, paragraph 44.

<sup>140</sup> Bundle 2, 1041.

<sup>141</sup> Bundle 1, 49–68.

<sup>142</sup> Bundle 1, 19.

<sup>143</sup> Bundle 1, 69.



a PAIA request for access to public body records need not be ‘relevant to the exercising of the right [a requester] may have in law’ – this was legal nonsense. The report failed to mention Vedalankar’s repeated reliance on sections 43 (semble: section 34) and 44 in her January 2011 letter to refuse Brink access to numerous requested records.<sup>144</sup>

- It falsely reported, ‘The other information was provided’, implying that access to the records that Brink had requested had been granted. In truth and in fact, ‘the other information provided’ was Vedalankar’s insufficient budget excuse for the abortion of his appointment, advanced in her October 2010 letter<sup>145</sup> refusing his first PAIA request, and reiterated in her January 2011 letter.<sup>146</sup>
- Superfluous to the reporting requirements of section 32, and in furtherance of the lying cover-up of the true reason for not proceeding with Brink’s appointment, the report went on to tell the Commission the additional lies for the intended misinformation of the National Assembly in turn in the Commission’s section 84 report:
  - ‘No decision taken yet on who should be appointed’. In truth and in fact, and contrary to this lie to the Commission told for the ultimate misinformation of the National Assembly, the selection panel’s recommendation report<sup>147</sup> delivered to Nair on 26 November 2009<sup>148</sup> recorded its clear choice of Brink for the Pietermaritzburg post for which he had applied,<sup>149</sup> and Bongani Mngadi for the Durban post, simultaneously advertised and recruited for. This lie to the Commission echoed the same lies earlier told Brink and to Justice Portfolio Committee member Debbie Schäfer,<sup>150</sup> that ‘other candidates’<sup>151</sup> had also been recommended for the Pietermaritzburg post, whereas in truth and in fact Brink alone had been duly selected for it in

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<sup>144</sup> Bundle 1, 219, 221, and 222.

<sup>145</sup> Vedalankar’s elaborate financial story was contradicted by the then known recorded history of the matter, and then categorically by records she put up three months later; and it was repeatedly radically contradicted by Nair: in his report to the Board in November 2011 and in his evidence in the Labour Court in mid-2013.

<sup>146</sup> ‘[T]he explanation furnished by me to you on 18 October 2010 remains valid’ (Bundle 1, 212, paragraph 7). ‘I, and the Legal Aid SA under my watch, have never sought to make any decisions regarding the Senior Litigator posts on any other ground other than the budget constraints’ (Bundle 1, 223, paragraph 39).

<sup>147</sup> Bundle 1, 244.

<sup>148</sup> Bundle 2, 993.

<sup>149</sup> At the first pre-trial conference at court in Brink’s labour claim, LASA formally admitted that Brink was recommended for Pietermaritzburg and Mngadi for Durban (Bundle 2, 1020, paragraph 11).

<sup>150</sup> Bundle 2, 680.

<sup>151</sup> Bundle 1, 104, paragraph 7.2.



accordance with LASA's Recruitment code requiring the selection panel to 'identif[y] the most suitable candidate for appointment in a post'<sup>152</sup> after interviewing all short-listed candidates.<sup>153</sup> The unredacted copy of the selection panel's recommendation report, eventually surrendered in April 2016, shows that the other two candidates did not even meet the qualifying criteria for the posts;<sup>154</sup> and consequently, as LASA later conceded in its pleadings in Brink's labour case, these 'two persons were eliminated early in the selection process and were not recommended for the second round of interviews'.<sup>155</sup> Contrary to Vedalankar's lie to Brink about this, in truth and in fact no 'other candidates'<sup>156</sup> were recommended for the post for which he had been selected. Contrary to the lie to the Commission in the section 32 report, 'No decision taken yet on who should be appointed', in truth and in fact the selection panel had unequivocally recommended Brink and Mngadi for the Pietermaritzburg and Durban posts respectively. Indeed, as LASA correctly pleaded in Brink's labour case: 'we were made aware that there were two people recommended'<sup>157</sup> for the two posts, and no one else.

- 'the decision to freeze the post due to change in business needs budget.' In truth and in fact, and contrary to this lie to the Commission told for the ultimate misinformation of the National Assembly, 'the business needs budget' in relation to LASA's nine Senior Litigator posts, has never been changed, and LASA has accordingly confirmed on oath that no record exists to show it has.<sup>158</sup> Quite the contrary, since the creation of the posts to date, LASA has applied and continues to apply to the Department of Justice and Constitutional Development/Correctional Services every year for millions of rands in funding to pay salaries for all nine of its Senior Litigator posts.<sup>159</sup>

98. In its annual report for 2010/11 to the Minister, the National Assembly and the public, LASA gave quite different false information on its handling of Brink's PAIA requests:<sup>160</sup>

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<sup>152</sup> Bundle 1, 233, section 1.2.3.4.

<sup>153</sup> Bundle 1, 230–1, paragraphs 1.2.2.1–2.

<sup>154</sup> Bundle 3,

<sup>155</sup> Pre-trial conference Bundle 1, {answer to pre-trial conference agenda, page 55, paragraph 34.2}

<sup>156</sup> Bundle 1, 104, paragraph 7.2.

<sup>157</sup> Bundle 3, {answer to pre-trial conference agenda, paragraph 78.1}

<sup>158</sup> Bundle 3,

<sup>159</sup> Bundle 3, {put up all annual budget applications to the Department for SL salaries}

<sup>160</sup> Bundle 3,



- It now reported that he had made two requests in the reporting cycle, whereas he had made three, in August and December 2010 and in March 2011.
- It falsely claimed that ‘One [was] partly refused’, whereas in truth and in fact it was totally refused (the few records Vedalankar furnished were for her own purposes, namely ‘To demonstrate’<sup>161</sup> her several false contentions, and not to comply with Brink’s requests; and as said Brink’s request fee prescribed by section 22 was explicitly rejected and later returned).
- It failed to mention the total refusal of Brink’s second request (on the false basis alleged that it merely ‘repeated’<sup>162</sup> the first).
- It alleged under ‘Reason(s) for refusal’ only the new grounds advanced in Vedalankar’s letter of 28 January 2011:

Information related to third parties which are protected in terms of section 34 of the Act, and to operations of a public body which is protected in terms of section 44 of the Act.

and not the original also factually and legally spurious grounds she advanced on 18 October 2010 for refusing the entire request:<sup>163</sup>

(i) your request for information goes beyond your individual circumstances and extends to information on third parties, (ii) the information on third parties does not fall within the section 46 category above.

And:<sup>164</sup>

Your request ... is declined as it is not relevant to you exercising any right you may have in law.

99. On 28 April 2011, again seeking the Commission’s assistance to access LASA’s records, Brink filed a second memorandum demonstrating the legal irrelevance and unlawfulness of Nair’s reasons for refusing his first, second and third record requests.<sup>165</sup>

100. On 22 June 2011, Mlambo JP at last responded<sup>166</sup> to the Portfolio Committee chairperson’s enquiry instituted three months earlier, by providing an ‘updated’<sup>167</sup>

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<sup>161</sup> Bundle 1, 213–16.

<sup>162</sup> Bundle 1, 217, first paragraph.

<sup>163</sup> Bundle 1, 102–3, paragraph 6.

<sup>164</sup> Bundle 1, 104, paragraph 8.

<sup>165</sup> Bundle 1, 401.

<sup>166</sup> Bundle 1, 505.

copy of the report given the Minister in March. The ‘updated’ report repeated all the lies about the handling of Brink’s PAIA requests told to the Minister (enumerated and refuted above) and contained several new allegations, inter alia pertaining to Brink’s complaints that Vedalankar had illegally refused his August and December 2010 PAIA requests. These are dealt with below.

101. The chairperson of the Portfolio Committee had specifically required ‘a formal response to these allegations’ from Mlambo JP, from the Board, and from Vedalankar.<sup>168</sup> Disobeying his clear instruction to obtain it, however, Mlambo JP did not seek the Board’s response to Brink’s fundamental rights violation complaints repeated in his three petitions; and the likely reason he did not do so is that he did not want the Board discussing the grave illegality and constitutional rights violations<sup>169</sup> in which he was personally complicit.

102. Concerning PAIA,<sup>170</sup> the report contained the fresh allegation: ‘We have responded to all Adv Brink’s requests for information in terms of PAIA within the timeframe stipulated in the Act.’<sup>171</sup> In truth and in fact, and contrary to this criminal lie,<sup>172</sup> told along with many others<sup>173</sup> to misinform and mislead the Portfolio Committee:

- Brink’s main PAIA request, his first one, had been ignored in the 30 calendar days allowed by section 25 to respond to it, a deemed refusal under section 27; then expressly refused for unlawful reasons three weeks outside ‘the timeframe stipulated in the Act’; then refused again three months later for different unlawful reasons;<sup>174</sup> and then refused again for more unlawful reasons three months after that.<sup>175</sup>

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<sup>167</sup> Bundle 1, 507, postscript.

<sup>168</sup> Bundle 1, 503.

<sup>169</sup> Besides the violation of his fundamental right to information, Brink complained also of the violation of his fundamental right to equal employment opportunity and to due process in recruitment procedure.

<sup>170</sup> Other new false information in the updated report, contradicted and exposed by LASA’s and other records, is not material to canvass here; see in this regard Brink’s founding affidavit in his application for leave to subpoena Mlambo JP.

<sup>171</sup> Bundle 1, 506, first paragraph.

<sup>172</sup> Per section 17(2) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, quoted below.

<sup>173</sup> The other lies regarding LASA’s alleged compliance with PAIA, also told to the Minister, to falsely discredit Brink’s complaint that Vedalankar had illegally refused his first and second PAIA requests, are enumerated in paragraph ... above.

<sup>174</sup> Bundle 1, 217–22.

<sup>175</sup> Bundle 1, 363–5.



- Brink's second PAIA request had been timeously but also unlawfully refused in toto – on the false basis that it was a mere repetition of the first request.<sup>176</sup>
- Brink's third PAIA request was indeed responded to within the prescribed timeframe, as alleged, but was unlawfully substantially refused.<sup>177</sup>

103. Again, like the false report to the Minister, the 'updated' report to the chairperson of the Portfolio Committee contained no indication that LASA was persistently and repeatedly illegally denying Brink access to LASA's business records that he had duly requested. To the contrary, to falsely imply that Brink's PAIA requests had been duly complied with, the report to the Portfolio Committee concerning PAIA concluded with the meretricious new statement, true on its face but false in substance: 'We copied these responses to the SA Human Rights Commission to confirm our compliance with PAIA.'<sup>178</sup>

104. Quite the opposite, four days later on 26 June 2011 the Commission disconfirmed LASA's falsely alleged 'compliance with PAIA'. Referring to Brink's second memorandum<sup>179</sup> exposing the factual and legal vacancy of Nair's reasons for continuing to suppress records Brink has duly requested, the Commission noted in a letter to him: 'A cogent opinion demonstrating the unlawfulness of the action of the deputy information officer is made in your memorandum.'<sup>180</sup>

105. And as appears below, LASA itself conceded to the Commission a couple of months later that its refusals of (Brink's) PAIA requests had been unlawful, and undertook to review them.<sup>181</sup>

106. Through LASA's counsel at the trial of Brink's labour claim, Nair initially dishonestly disputed having ghost-written the lying report to the Minister,<sup>182</sup> in other words lied about having written it, but eventually, cornered by the evidence of the electronic document's 'Author' properties, 'Briann'<sup>183</sup> i.e. Brian Nair, he admitted having done so.<sup>184</sup>

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<sup>176</sup> Bundle 1, 217: 'Records Required ... repeated in your letter dated 15 December 2010'.

<sup>177</sup> Bundle 1, 363–5.

<sup>178</sup> Bundle 1, 506, first paragraph, final sentence.

<sup>179</sup> Bundle 1, 401ff.

<sup>180</sup> Bundle 1, 499.

<sup>181</sup> Most of the illegally refused documents being withheld from Brink were eventually clawed out of LASA through several round of document discovery procedure determinedly pursued before trial in his labour case; see below.

<sup>182</sup> Bundle 3, {trial transcript}

<sup>183</sup> Bundle 2, 1015.

<sup>184</sup> Bundle 3, {trial transcript}

107. But Nair denied having ‘updated’ the report to the Minister by adding the said new allegations before its submission to the chairperson of the Portfolio Committee, and he testified that Mlambo JP<sup>185</sup> or Vedalankar<sup>186</sup> must have done so.

108. That is, under oath Nair accused Mlambo JP or Vedalankar of having told these new lies<sup>187</sup> added to the original report.

109. Prejudiced by Mlambo JP’s defamatory covering letter,<sup>188</sup> and successfully defrauded by the false information contained in the report which Mlambo JP had signed and submitted, well knowing from Brink’s three petitions to him and the Board that it was false, the chairperson of the Portfolio Committee understandably wrote to Brink on 29 June 2011:<sup>189</sup>

In light of the facts set out in Justice Mlambo’s response, I now regard the matter as closed.

110. The reason the chairperson of the Portfolio Committee took this decision to close his enquiry is that it was unimaginable to him that ‘the facts set out in Justice Mlambo’s response’ were actually lies<sup>190</sup> told to mislead him, so as to pervert his Portfolio Committee’s enquiry and to defeat its constitutional oversight function over LASA, in manifold criminal contraventions of section 17(2) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, which provides:

A person who –

...

(d) with intent to deceive a House or committee, produces to the House or committee any false, untrue, fabricated or falsified document; or

(e) ... wilfully furnishes a House or committee with information ... which is false or misleading,

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

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<sup>185</sup> Bundle 3, {transcript}

<sup>186</sup> Bundle 3, {transcript}

<sup>187</sup> Besides those regarding PAIA identified herein, the several other new lies added to the report to the chairperson of the Portfolio Committee fall outside the scope of this report on LASA’s non-compliance with PAIA.

<sup>188</sup> Bundle 1, 504.

<sup>189</sup> Bundle 1, 502.

<sup>190</sup> As said, after Brink had exposed it as such, one of these major lies was retracted as ‘an error ... a palpable error’ by Mtati and Nair on affidavit.



111. On 18 July 2011, the Commission finally decided not to make a formal determination of Brink’s fundamental rights violation complaint lodged in April, for the ultimate reason given – following an appeal against different reasons given for the refusal of its (inexpert) Gauteng office to do so (and not its expert PAIA Unit) – that Brink’s labour claim was headed for court. Without all the documents he had requested under PAIA, which he needed to fully plead his case and present at trial, Brink instituted action a few days later.<sup>191</sup>

112. On 10 August 2011, Brink filed a formal complaint to the Public Protector about LASA’s false section 32 report for 2010/11 and its illegal refusal of his PAIA requests,<sup>192</sup> which complaint he amended on 9 November 2011 by updating it with newly surfaced information.<sup>193</sup> The complaint was acknowledged<sup>194</sup> but not addressed.

113. On 25 October 2011, on the advice of his same junior counsel Machaba,<sup>195</sup> Mtati totally refused Brink’s request for 37 documents made in his agenda for the prescribed pre-trial conference after the close of pleadings, many of which documents Brink had tried obtaining via PAIA before the case, but which had been illegally refused.

114. Mtati justified his refusal with the following lies, false denials and false assertions in regard to PAIA and LASA’s illegal refusals of Brink’s PAIA requests:

- ‘The CEO’s reliance on that case law was not spurious.’<sup>196</sup> In truth and in fact, Vedalankar relied only on the name of the Teachers Union case in refusing Brink’s August 2010 PAIA request, falsely, because the judgment itself held precisely the opposite of what she falsely contended it did. In truth and in fact, her reliance on her forged, false quotation from the judgment, uttered in her letter of 18 October 2010, was indeed ‘spurious’.
- Mtati ‘denied’<sup>197</sup> (i) that ‘the test’ Vedalankar claimed ‘the court ... laid down’ in the said case for the decision of a public body record request was ‘absolutely false’; and that “‘the court’ held precisely to the contrary: “Unlike access to information from another person, access to information from the state is manifestly not constrained by the requirement that information should be for the

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<sup>191</sup> Bundle 1, 543.

<sup>192</sup> Bundle 1, 555.

<sup>193</sup> Bundle 1, 725.

<sup>194</sup> Bundle 3,

<sup>195</sup> Bundle 2, 980: Per the ‘Author’ properties of the PDF of the response emailed to Brink.

<sup>196</sup> Bundle 3, {LASA’s response to ptc agenda, paragraph 59.}

<sup>197</sup> Bundle 3, {LASA’s response to ptc agenda, paragraph 60.}



exercise or protection of any rights.”<sup>198</sup> A glance at Pillay J’s judgment exposes Mtati’s untruthfully false denial in the pleading.

- Mtati ‘disagree[d]’<sup>199</sup> that Vedalankar ‘rejected [Brink’s] records request on a fraudulent basis’.<sup>200</sup> In truth and in fact, by manufacturing fake dicta alleged to have been written by a judge in a reported judgment, Vedalankar had incontestably done so.
- ‘Documents numbered 8; 9; 12; 16; 17; 25; and 26<sup>[201]</sup> is [sic] the same as that which [Brink] has lodged a complaint with the Public Protector and which information was lawfully refused in terms of the Promotion of Access to Information Act, 2000 (“PAIA”) a decision which the SAHRC has not reversed or queried.’<sup>202</sup> In truth and in fact, the Commission had declined to formally rule on Brink’s information right violation complaint in view of his impending labour case, but it had observed the ‘unlawfulness’<sup>203</sup> of Nair’s refusal of Brink’s third PAIA request and final refusal of his first two – shown in Brink’s second memorandum to the Commission.<sup>204</sup>
- ‘Documents 19; 21; 27 – 34; 37 are refused on the basis that such documents relate to the internal operations of the Respondent’s business and that the provisions of PAIA, should it be applicable herein, authorizes the respondent to refuse with the production thereof.’<sup>205</sup> The fact that ‘documents relate to the internal operations of the Respondent’s business’ are no ground under PAIA for refusing access to such public body records.
- ‘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.’<sup>206</sup> An abject lie to the judge.

115. All this brazen dissimulation by attorney Mtati, in his response to Brink’s agenda for the pre-trial conference in his labour case, that LASA had duly complied

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<sup>198</sup> Bundle 3, {ptc agenda, para 69}

<sup>199</sup> Bundle 3, {LASA’s response to ptc agenda, paragraph 71.}

<sup>200</sup> Bundle 3 {ptc agenda, para 71}

<sup>201</sup> Bundle 3 {ptc agenda, pages 29–31}

<sup>202</sup> Bundle 3, {ptc 65, para 87.3}

<sup>203</sup> Bundle 1, 499, paragraph 2.

<sup>204</sup> Bundle 1, 401ff.

<sup>205</sup> Bundle 3, {ptc 66, para 87.5}

<sup>206</sup> Bundle 3, {ptc 66, para 87.8}



with Brink's PAIA requests, was professionally unethical false pleading to deceive the judge.<sup>207</sup>

116. At the pre-trial conference, however, LASA's senior counsel Madlanga SC, now a Constitutional Court judge, openly and very correctly told Mtati and Machaba present that the requested documents were indeed discoverable and should be surrendered, which is to say LASA's (Mtati's and Machaba's) justifications based on PAIA for refusing the requested records were wrong and legally indefensible.

117. LASA's undertaking given Brink at the conference to surrender the documents was then substantially dishonoured, and it took an interlocutory application to compel, converted into a pre-trial conference at court under judicial supervision, and then a further such conference when LASA failed to honour its undertaking to surrender requested documents, to disgorge most of the records Brink needed for his case.<sup>208</sup>

118. Subsequent to the launch of Brink's labour claim for his appointment, one of LASA's officers told a member of the Commission's PAIA Unit<sup>209</sup> a slew of cunning lies about Brink's case (mixed in with a couple of truths), contradicted by LASA's records, and captured in an undated telephone note kept in the Commission's file on Brink's PAIA complaints:<sup>210</sup>

He applied to LASA (Legal Aid) for snr advisory position.<sup>[211]</sup> 2 were available.<sup>[212]</sup> One candidate got the Durban post,<sup>[213]</sup> and somehow he [Brink] was of the impression he had gotten the Pietermaritzburg post.<sup>[214]</sup> The 2 other candidates received regret letters.<sup>[215]</sup> Adv Brink received a letter not

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<sup>207</sup> A party's response to a pre-trial agenda forms part of the pleadings for the true information of the judge.

<sup>208</sup> See case file: LC D529/11.

<sup>209</sup> Neither the LASA officer nor the SAHRC officer who wrote the note is identified on it.

<sup>210</sup> Bundle 1, 868.

<sup>211</sup> True: for the Pietermaritzburg Senior Litigator post (Bundle 2, 827).

<sup>212</sup> True: the Pietermaritzburg and Durban Senior Litigator posts were simultaneously advertised (Bundle 1, 45) and the interviews for both posts were held on the same day (Bundle 1, 244–8).

<sup>213</sup> True: it was LASA attorney Bongani Mngadi (Bundle 1, 247, paragraph 6).

<sup>214</sup> False: the deeply deceptive implication to the Commission was that unlike Mngadi selected for the Durban post, Brink had not been selected for the Pietermaritzburg post. In truth and in fact, the recommendation report vouches that Brink was indeed selected for it (Bundle 1, 246; and 247, paragraph 6).

<sup>215</sup> False: first, there were three other candidates, not two, and the statement conceals the highly significant fact that Mlambo JP's former judicial colleague Ngcamu, rejected and eliminated by the selection panel, was not sent a regret letter claiming the recruitment had been aborted (Bundle 1, 383, paragraph 26; Bundle 1, 20; Bundle 2, 829 and 831).



explaining why he was rejected.<sup>[216]</sup> He req [Note incomplete.] Regret letters sent two other candidates.<sup>[217]</sup>

119. These several lies told to the Commission by a LASA officer were intended to deceive the Commission and to defraud it into believing that Brink's pursuit of:

- his appointment to the professional post at the apex of LASA's legal professional establishment, for which he had duly been recommended; and,
- his access to LASA's business records in his interrogation of the various stories told him about why his appointment had been irregularly and unlawfully aborted off the record,

were a misguided and misinformed waste of everybody's time.

120. On 6 October 2011, in collaboration with the Open Democracy Advice Centre,<sup>218</sup> the Commission conducted a special PAIA training workshop for LASA's national office 'key personnel'<sup>219</sup> on how to implement the Act,<sup>220</sup> at which the capital importance of access to information as a fundamental right was emphasized,<sup>221</sup> as well as accurate section 32 reporting to the Commission on its handling of PAIA requests.<sup>222</sup>

121. The Commission's PAIA training workshop for LASA was occasioned directly by LASA's illegal refusals of Brink's request for access to its records, which he had sought for the declared purpose of gathering evidence for his intended action against LASA for an order instating him to the top legal professional post for which he had been unanimously selected:<sup>223</sup>

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<sup>216</sup> False: Brink was not rejected by the selection panel; it recommended him in glowing terms. Nor was he rejected by Nair and Vedalankar – LASA's executing authorities under the Approval Framework, jointly responsible for approving recommendations for such high level professional appointments. No such rejection is recorded, let alone with reasons noted as required. But Brink did receive a bland regret letter, eight months after his interview and after he had begun agitating for his appointment, claiming that the Senior Litigator posts were not going to be filled (Bundle 1, 19). It is common cause that no record exists to vouch that any such decision was duly taken.

<sup>217</sup> False: contrary to this repeated lie, three regret letters were sent: to Brink, to Mngadi, and to van Wyk, but not to Mlambo JP's former judicial colleague Ngcamu – even though the selection panel rejected and eliminated him for not meeting a basic qualifying criterion for the post, in that he lacked right of appearance in the High Court.

<sup>218</sup> Bundle 2, 915.

<sup>219</sup> Ibid.

<sup>220</sup> Bundle 2, 915.

<sup>221</sup> Bundle 2, 917 top line.

<sup>222</sup> Bundle 2, 919, section i.

<sup>223</sup> Bundle 2, 915, Introduction, alluding to Brink's stated intention to 'litigate on the basis of PAIA', i.e. a requester who should be 'responded to on the same basis as other applicants [sic: requesters]'.

The rationale for the training [was] to ensure that personnel of the board [sic: LASA, formerly the Legal Aid Board] had an awareness of the legislation to increase their resource base, the quality of service and advice provided to their stakeholders. It has also been deemed important on the basis of the Commission's monitoring of LASA institutional compliance with PAIA and the need to ensure that clients [sic: record requesters] who are wishing to litigate on the basis of PAIA are responded to on the same basis as other applicants with recognised rights. ... The status and contestation with some of these requests prompted the need for training to its key personnel.

122. The workshop was attended by sixteen LASA staff members comprising the 'head of the legal department, internal audit, national operations, call centre as well as corporate services',<sup>224</sup> of which three were from Mtati's Corporate Services and seven from Nair's National Operations departments.<sup>225</sup> LASA Corporate Legal Manager Solly Sekgota, 'head of the legal department' was also present.<sup>226</sup>

123. Notwithstanding their history of non-compliance with PAIA and their demonstrated ignorance of its provisions and how to apply it – the precise reason the special PAIA training workshop was held – neither information officer Vedalankar nor deputy information officer Nair attended it to be taught how to implement the Act, and consequently both remained ignorant.

124. Although the open entry<sup>227</sup> in the attendance register reflects that he had been expected to present himself for training in how to deal with PAIA requests, Mtati did not do so either – even though he has stated on affidavit,<sup>228</sup> confirmed by Nair,<sup>229</sup> that:

I generally deal with all requests for information in Legal Aid SA, save where same is specifically directed to one of the other Deputy Information Officers.

125. Compounding this, besides having no training in how to implement PAIA, it later emerged that Mtati was not delegated as a deputy information officer until

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<sup>224</sup> Bundle 2, 915, Introduction.

<sup>225</sup> Bundle 2, 922–4.

<sup>226</sup> Bundle 2, 923.

<sup>227</sup> Bundle 2, 923, entry 6.

<sup>228</sup> Bundle 3, {VV2 answer para 9}

<sup>229</sup> Bundle 3, {VV2 Nair's con affi para 6}



16 January 2016,<sup>230</sup> which means he acted without authority, ultra vires and unlawfully in refusing Brink's PAIA requests before this.

126. Evidently, in bunking the Commission's PAIA training workshop, Vedalankar, Nair and Mtati believed they did not need any instruction from the Commission as to how to implement PAIA.

127. It is relevant to mention here that the Legislature is so acutely concerned that PAIA be applied correctly in the courts – inter alia to give effect to the object stated in the Preamble: to 'foster a culture of transparency and accountability in public ... bodies by giving effect to the right of access to information' after the 'secretive and unresponsive culture' that characterised the apartheid era, 'which often led to an abuse of power and human rights violations' – that section 91A of the Act permits only specially trained, listed and designated magistrates to deal with PAIA applications.

128. At LASA, on the other hand, PAIA requests involving fundamental rights guaranteed by the Constitution are 'generally deal[t] with' by Mtati, an untrained and unqualified legal ignoramus in the field of constitutional information transparency law, who Mlambo JP introduced to the Portfolio Committee on 8 May 2012 as:<sup>231</sup>

our Corporate [Services] Executive. He looks after our legal health in terms of people who want to sue us. He protects us.

(Which Mtati effectively achieves by persistently citing manifestly inapplicable and irrelevant provisions of PAIA to suppress duly requested records, in order to conceal evidence of high level corruption.)

129. At the Commission's PAIA training workshop, LASA's national office 'key personnel' very frankly and honestly:

- conceded repeatedly their 'lack of application based knowledge'<sup>232</sup> and 'challenges complying with PAIA'.<sup>233</sup> 'Most participants had no prior knowledge of PAIA'<sup>234</sup>

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<sup>230</sup> Bundle 3, {TM's delegation}

<sup>231</sup> Bundle 2, 1016.

<sup>232</sup> Bundle 1, 916.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.



and ‘were a little overwhelmed by the requirements of the legislation’,<sup>235</sup> which ‘led to inconsistent application in the organisation’;<sup>236</sup>

- admitted that ‘they had previously been misapplying the provisions of PAIA in certain instances’<sup>237</sup> (i.e. to Brink’s PAIA requests, the only requests refused) and ‘were able to identify the provisions in the formal context to identify and relate to access decisions impacting on practical delivery’;<sup>238</sup>
- ‘identified’ this ‘misinterpretation and misapplication ... as of high risk to LASA’;<sup>239</sup>
- ‘reacted to the reporting of LASA as non-compliant to Parliament with concern’;<sup>240</sup>
- said they ‘were able to gain value from the training. They [i.e. ‘personnel from the Legal Department’] have as a result undertaken to review decisions which may not have had justification in terms of PAIA’,<sup>241</sup> namely the illegal refusals of Brink’s PAIA requests;
- ‘identified the need to have a clear budget dedicated for PAIA compliance and implementation’<sup>242</sup> for the reason that ‘PAIA application was time consuming and compliance required dedicated personnel’;<sup>243</sup> and,
- acknowledged that ‘a review of the organisational response to PAIA was necessary to improve compliance and efficacy.’<sup>244</sup>

130. The upshot was that LASA’s head office staff present admitted that the legal advice given to Vedalankar and Nair to refuse Brink’s PAIA requests had been wrong, including the wrong advice for which junior advocate Machaba had charged LASA hundreds of thousands of rands. With which wrong advice Mtati, an equally uneducated person in PAIA matters, just went along.

131. In breach of their undertaking to the Commission, LASA’s ‘personnel from the Legal Department’ headed by CLM Sekgota did not review the refusals of Brink’s PAIA requests and did not reverse them by at least allowing Brink access to the records he had duly requested.

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Bundle 1, 919.

<sup>239</sup> Bundle 1, 916.

<sup>240</sup> Bundle 1, 913.

<sup>241</sup> Bundle 1, 920.

<sup>242</sup> Bundle 1, 920.

<sup>243</sup> Bundle 1, 916.

<sup>244</sup> Bundle 1, 917.



132. Quite the contrary, a few months later on 13 February 2012, even after LASA's minuted repeated concessions at the PAIA training workshop that Brink's PAIA requests had unlawfully been refused, attorney Mtati perjuringly alleged on affidavit in Brink's labour case for the misinformation of and to defraud the judge:<sup>245</sup>

the documents he required under the PAIA ... were lawfully refused under the provisions of that Act.

133. With same corrupt object, Mtati perjured himself again on 16 January 2013 in another affidavit in Brink's labour case:<sup>246</sup>

I can confirm that the CEO responded to all the Applicant's [Brink's] requests for access to information in terms of PAIA even if such response did not please him.

134. These two perjuries were repetitions of Mtati's false pleading<sup>247</sup> on 25 October 2011 in the said case, also to misinform and mislead the judge, a fortnight before the PAIA training workshop, but after the Commission had already remarked in June on the 'unlawfulness' of Nair's refusals of Brink's PAIA in April:

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.

135. Nor did LASA 'review ...the organisational response to PAIA ... necessary to improve compliance and efficacy', much less did it create any dedicated PAIA request handling capacity, given that 'PAIA application was time consuming and compliance required dedicated personnel', and not just 'ad hoc PAIA functionaries in their legal department.'<sup>248</sup>

136. In breach of its implicit undertakings to the Commission to see to this, it was never even put to the Board for discussion and resolution.<sup>249</sup>

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<sup>245</sup> Bundle 3, {application to compel discovery, Mtati's answering affidavit, page 6, paragraph 21}

<sup>246</sup> Bundle 3, {application to subpoena Mlambo JP, Mtati's answering affidavit, page 103, paragraph 78.3}

<sup>247</sup> Bundle 3, {pre-trial conference Bundle 1, answer to agenda, page 66, paragraph 87.8}

<sup>248</sup> Bundle 2, 916, second paragraph.

<sup>249</sup> Bundle 3, {'no records exist' to show that this was ever put to the Board for resolution, per LASA's response to consolidated list of records list B18–20}



137. Contrariwise, Nair later implicitly relied on LASA's lack of dedicated PAIA request handling capacity, which it had failed to create in breach of its undertaking to the Commission, by complaining dully and irrelevantly on affidavit that Brink's PAIA requests – lawfully and properly made in the exercise of his fundamental right to information, as LASA ultimately conceded in court – were a drain on LASA's resources such as to justify refusing them:<sup>250</sup>

It is obvious that in order to attend to Applicant's incessant requests for information, we must re-direct our energies and resources away from our mandate as Legal Aid SA to searching for all these information which are spread all over the country.

This is a prejudice which I submit is permissible in terms of the Act (section 45, to be precise) as a basis upon which a request for information could be refused.

138. In his evidence at the trial of Brink's labour claim in mid-2013, national office deputy information officer Nair denied having any knowledge of the Commission's PAIA training workshop in October 2011<sup>251</sup> – attended by seven staff members in his National Operations department.<sup>252</sup>

139. In truth and in fact, contrary to Nair's perjury to the judge about this, he was centrally involved in the organisation of the workshop – as proved by email records<sup>253</sup> that Brink obtained via PAIA in November 2013, a few months after Nair's perjured evidence given about this.

140. Perjuring himself in like manner, Mtati similarly falsely denied on affidavit that the Commission held such a special training workshop for LASA. In his application to compel compliance with several PAIA requests made over the period 2013–15, Brink referred to the 'special lesson' the Commission gave LASA at its PAIA training workshop on how to implement the Act and how to report its handling of PAIA requests to the Commission annually.<sup>254</sup>

141. Under oath, Mtati responded by telling the following lies:<sup>255</sup>

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<sup>250</sup> Bundle 3, {Nair's answering affidavit, paragraphs 17–18}

<sup>251</sup> Bundle 3, {transcript}

<sup>252</sup> Bundle 2, 922–4.

<sup>253</sup> Bundle 3, {the emails}

<sup>254</sup> Bundle 3, {VV2, AB founding affidavit, paragraphs 20–21}

<sup>255</sup> Bundle 3, {answering affidavit, paragraph 130.3}

There is no truth in all these paragraphs. In fact what the Applicant refers to as a ‘special lesson’ was a cordial meeting between Legal Aid SA and SAHRC to discuss and provide clarity on a method of reporting of various cases that spanned over or straddled two accounting years. I attended that meeting and there was no lesson given to Legal Aid SA’s officers.

142. In truth and in fact, and contrary to Mtati’s lies under oath about this, the attendance register of the ‘special lesson’ on PAIA ‘given to Legal Aid officers’ reflects that Mtati’s presence was expected, but that he did not attend, as three of his Corporate Services attorneys did.<sup>256</sup>

143. In his evidence at the trial of Brink’s labour claim, Nair lied similarly about a meeting with the Commission.<sup>257</sup>

144. There was no such ‘cordial meeting between Legal Aid SA and SAHRC to discuss and provide clarity on a method of reporting of various cases that spanned over or straddled two accounting years’, as Mtati falsely alleged under oath. In truth and in fact, as the Commission’s former PAIA Unit director Adeleke informed Brink by email on 5 November 2013:<sup>258</sup>

The meeting they [LASA] requested in one of their emails never took place.

145. It follows that Mtati’s claim on affidavit to have attended ‘that meeting’ was perjured. As was Nair’s evidence in court that such a meeting had been held between LASA and the Commission.

146. Referring to Brink’s affirmed statement of the incontestable facts, vouched by records to which he referred, that the Commission had reported LASA to the National Assembly for repeated non-compliant section 32 reporting; had undertaken to the National Assembly to fully audit LASA for PAIA compliance; and had delivered a PAIA training lesson to LASA’s national office staff; and that the National Assembly had repeatedly expressed its concern about LASA’s non-compliance with PAIA, Mtati’s sworn response on affidavit for the true information of court was that ‘There is no truth’ in all this.<sup>259</sup>

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<sup>256</sup> Bundle 2, 923.

<sup>257</sup> Bundle 3, {transcript}

<sup>258</sup> Bundle 3, {FA email}

<sup>259</sup> Bundle 3, {TM answering affidavit, ...}



147. Mtati's false sworn denial of these several documented facts was perjured – in contempt of the truth, in contempt of court, and in keeping with the culture of routine casual mendacity in LASA's top ranks.

148. On 11 April 2012,<sup>260</sup> LASA filed its section 32 report for 2011/12.<sup>261</sup> In wholesale breach of its reporting obligations imposed by the section, and blithely disregarding the special instruction the Commission had given LASA's head office lawyers a few months earlier on the importance of truthful, complete and accurate reporting under the section, the report was totally silent in regard to Nair's:

- response on 8 April 2011 to Brink's third PAIA request made in March 2011;
- second response to Brink's second request in December 2010, which Vedalankar had refused in January 2011; and,
- third response in April 2011 to Brink's first PAIA request in August 2010, which Vedalankar had totally refused in October 2010, and again in January 2011 for different reasons.

149. The section 32 report contained none of the information prescribed by the section, and the National Assembly was consequently not informed by the Commission in the latter's section 84 report<sup>262</sup> about LASA's persistent refusals of Brink's duly made requests for access to LASA's records and the spurious and unlawful reasons for refusing them advanced in April 2011 by newly appointed deputy information officer Nair, viz:

- The requests for access to certain records were 'irrelevant',<sup>263</sup> and 'not relevant because it is after you were informed that we are not proceeding to fill the Senior Litigator post.'<sup>264</sup> Irrelevance is not one of the 'Grounds for Refusal of Access to Records' permitted by sections 34–45 in Chapter 4 of part 2 of the Act. Unlike the case in document discovery procedure during litigation, records requested from public bodies need not be 'relevant' to anything.
- 'The Board's responsibility relates to policy issues and not to operations', therefore the requests for access to certain specified Board meeting minutes were 'refused in terms of section 44(1)(a)'.<sup>265</sup> Public body Board meetings are not secret and their minutes are not covered by the section. For her own purposes in

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<sup>260</sup> Bundle 1, 866.

<sup>261</sup> Bundle 1, 867.

<sup>262</sup> Bundle 2, 656.

<sup>263</sup> Bundle 1, 364, paragraph 2.

<sup>264</sup> Bundle 1, 365, paragraph 9.

<sup>265</sup> Bundle 1, 364, paragraph 6.



January 2011, Vedalankar had volunteered part of such a minute;<sup>266</sup> and in April 2016, LASA surrendered further Board meeting minutes.<sup>267</sup>

- ‘The communication that the position was not to be filled was conveyed to the relevant candidate by the Regional Operations Executive of the Eastern Cape [then Mtati]. The information is refused and cannot be provided as it relates to third parties as envisaged in terms of section 34(1)’. Since this business record could not conceivably contain ‘personal information about a third party’, the section had no application. Changing the excuse for not producing it, Mtati later stated before the trial of Brink’s labour claim that no such record exists.<sup>268</sup>

150. On 20 August 2012, taking up Brink’s complaint that LASA’s section 32 report for 2011/12 unlawfully failed to report Nair’s final refusals of his PAIA requests on 8 April 2011, and in other respects failed to comply with the section,<sup>269</sup> the Commission’s then PAIA Unit director Fola Adeleke emailed Mtati to demand the ‘Amendment of LASA Section 32 Report’:<sup>270</sup>

As per our earlier conversation, please find attached the scanned PAIA request from Brink to LASA and LASA’s response to the request. Please report it in your s 32 report and send back to me as a matter of urgency.

151. On 22 August 2012, Mtati rebuffed the Commission’s demand, with a welter of obfuscatory sophistry, followed by the wholly irrelevant postscript: ‘The information requested is clearly relating to the matter pending litigation.’<sup>271</sup>

152. Adeleke duly responded immediately:<sup>272</sup>

We note with concern however that reference is made in your email to a number of requests from Adv. Brink. This does not reflect in either of your reports to the Commission [for 2010/11<sup>273</sup> or 2011/12].<sup>[274]</sup> We note further that the requester’s reason for requesting particular information is being deduced. It should be noted that PAIA is quite clear that requests made to public bodies do not have to be supported or justified by a reason for the

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<sup>266</sup> Bundle 1, 251.

<sup>267</sup> Bundle 3, {the minutes}

<sup>268</sup> Bundle 1, 1020, paragraph 10.

<sup>269</sup> Bundle 3, {complaint}

<sup>270</sup> Bundle 3, {FA email}

<sup>271</sup> Bundle 3, {TM email}

<sup>272</sup> Bundle 3, {FA email}

<sup>273</sup> Bundle 1, 678–9.

<sup>274</sup> Bundle 1, 866–7.

request. Similarly, requests made prior to notification of litigation should not have to be supported by a reason or purpose for the stipulated information. We remain concerned therefore about the accuracy of your section 32 report and need to advise that we intend auditing the veracity shortly. Notice of the audit will be issued in due course.

153. Mtati ignored this communication, and did not amend LASA's false section 32 report for 2011/12.

154. As a result of this refusal to cooperate with the Commission by amending the false section 32 report, the National Assembly was not informed about LASA's illegal refusals of Brink's PAIA requests during that reporting cycle in the Commission's section 84 report.

155. In its annual report for 2011/12, LASA claimed:<sup>275</sup>

Legal Aid South Africa applies principle 8.5 of chapter eight(8) of the King III Report, which recommends organisations to consider disclosing in the integrated report, the number and reasons for refusals of requests for information that were lodged with the organisation in terms of the Promotion of Access to Information Act (PAIA), 2000.

156. And then proceeded to conceal Nair's several refusals *on different grounds* on 8 April 2011<sup>276</sup> of Brink's PAIA requests made in the previous reporting cycle, by falsely alleging under 'No. of requests refused': 'None'; and under 'Reason(s) for refusal': 'Not applicable'.<sup>277</sup>

157. In truth and in fact, Nair had refused seven of Brink's requests, variously on the basis:

- of section 44(1)(a),<sup>278</sup> irrelevantly raised to illegally refuse Brink access to Board minutes – this bad ground was abandoned with the eventually surrender of Board minutes in April 2016;<sup>279</sup>
- of section 34(1),<sup>280</sup> irrelevantly raised to illegally refuse Brink access to then Eastern Cape ROE Mtati's notification to Mahikeng Senior Litigator Nzame Skibi that the Mthatha Senior Litigator recruitment, for which post he had been

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<sup>275</sup> Bundle 2, 903.

<sup>276</sup> Bundle 1, 363–5.

<sup>277</sup> Bundle 3,

<sup>278</sup> Bundle 1, 364, paragraph 6.

<sup>279</sup> Bundle 3 {Board minutes}

<sup>280</sup> Bundle 1, 365, paragraph 9.



selected,<sup>281</sup> had been cancelled,<sup>282</sup> ‘as it relates to third parties as envisaged in terms of section 34(1)’ – the section does not ‘envisage’ this, and similar letters<sup>283</sup> were eventually surrendered during pre-trial discovery in respect of the cancellation of the KwaZulu-Natal Senior Litigator recruitment.

- that ‘it is not relevant’<sup>284</sup> to grant three other requests ‘because it is after you were informed that we are not proceeding to fill the Senior Litigator position’.<sup>285</sup> But under PAIA, relevance is not a criterion for granting or refusing a request for access to a record, so Nair’s decision ‘The information requested is refused’<sup>286</sup> was illegal.

158. By making false reports to the SAHRC under section 32 as well as in its annual report, LASA again succeeded in concealing its illegal refusals of Brink’s PAIA requests from the Portfolio Committee, defeated the National Assembly’s constitutional oversight function over LASA, and evaded being held to account for repeatedly and persistently illegally violating Brink’s constitutionally entrenched right to information.

159. On 4 September 2012, Brink filed a formal complaint about LASA’s false section 32 report for 2011/12 with the Public Protector.<sup>287</sup> Again, it was acknowledged<sup>288</sup> but not determined.

160. Upon investigating Brink’s complaints that LASA had falsely reported its unlawful refusals of his first three PAIA requests made in 2010 and 2011 in its section 32 reports for 2010/11 and 2011/12, and finding that indeed neither report complied with the detailed reporting requirement of the section and did not reflect LASA’s unlawful refusals of his requests, the Commission reported this to the National Assembly in its section 84 report for 2011/12<sup>289</sup> and stated its intention to subject LASA to a full audit for PAIA compliance accordingly:<sup>290</sup>

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<sup>281</sup> Bundle 2, 994.

<sup>282</sup> Totally different reasons for this were given by Vedalankar to Brink, which she, Nair and HRE Clark repeated on oath, and by Nair in his evidence given two years later in the Labour Court. (Bundle.....).

<sup>283</sup> Bundle 2, 829 and 831.

<sup>284</sup> Bundle 1, 365, 9.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Bundle 3, {PP complaint}

<sup>288</sup> Bundle 3, {acknowledgement}

<sup>289</sup> Bundle 2, 925ff.

<sup>290</sup> Bundle 1, 927, fourth paragraph.



A case in point [of false section 32 reporting by public bodies is] where a complainant [Brink] 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. ... The Commission engaged with LASA and remains concerned about the accuracy<sup>[291]</sup> of section 32 reporting by LASA.

And duly concluded:<sup>292</sup>

The Commission intends auditing LASA fully in the course of the 2012/13 financial year.

161. In October 2012, at the presentation of LASA's annual report for 2011/12, the Portfolio Committee repeatedly expressed its concern about LASA's non-compliance with PAIA. (Copied to him, the chairperson of the Portfolio Committee had read Brink's third petition to the Board in February 2011 about LASA's substantive non-compliance with record requests under the Act, going beyond its false reporting to conceal it.)

162. Board member Jan Maree presented LASA's annual report to the Portfolio Committee.<sup>293</sup> In full knowledge of the true contrary facts, having received and acknowledged<sup>294</sup> Brink's first petition protesting and substantiating precisely the opposite, attorney Maree falsely alleged:<sup>295</sup>

100% ... compliance with the Promotion of Access to Information Act

and that:<sup>296</sup>

LASA operated within a strong governance framework which included an effective and functioning governing board.

In reality, the Board had shown itself to be so weak as to be entirely ineffective and dysfunctional in ensuring statutory and constitutional compliance by LASA's management executives, despite Brink's repeated petitions to it calling its attention

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<sup>291</sup> In in fact the 'veracity' of its reporting (Bundle 3, {FA email}).

<sup>292</sup> Bundle 2, 928, second paragraph.

<sup>293</sup> On Mlambo JP's behalf, since he was unavailable (Bundle 2, 894).

<sup>294</sup> Bundle 1, 958.

<sup>295</sup> Bundle 2, 894, Presentation by Legal Aid South Africa (LASA).

<sup>296</sup> Ibid.



to the illegal refusals of his constitutional right of access to LASA's business records duly requested under PAIA.

163. After Vedalankar outlined LASA's general performance during the year,<sup>297</sup> veteran Portfolio Committee member Hon Jeffery (now Justice Deputy Minister) cut straight to the Commission's PAIA report:<sup>298</sup>

Mr Jeffrey (ANC) said ... it was the Committee's job to make sure they did oversight. He was curious about a Promotion of Access to Information Act (PAIA) report that was released that stated the South African Human Right Commission was unhappy with LASA and their cooperation in terms of PAIA.

164. Committee chairperson Hon Landers also raised the adverse PAIA report – the only matter of concern to him that he raised during the presentation:<sup>299</sup>

The Chairperson told the [LASA] delegation that they would arrange for Legal Aid to view the PAIA report.

165. When Vedalankar tried to silently avoid addressing the negative report that both Hon Jeffery and Hon Landers and had pertinently raised, the latter called her to account:<sup>300</sup>

The Chairperson said that he wanted to know about the PAIA report.

166. With the corrupt intention of discrediting the Commission's PAIA report against LASA, with the ultimate purpose of concealing her and Nair's repeated and persistent illegal refusals of Brink's PAIA requests to hamper his investigation and refutation of the false budgetary insufficiency excuse she'd repeatedly given him, including under oath,<sup>301</sup> about why his appointment had been aborted, Vedalankar responded with a series of lies,<sup>302</sup> in repeated criminal contravention of section

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<sup>297</sup> Bundle 2, 894, penultimate paragraph.

<sup>298</sup> Bundle 2, 895, Discussion.

<sup>299</sup> Bundle 2, 895.

<sup>300</sup> Bundle 2, 896.

<sup>301</sup> Bundle 1, 380, paragraph 13; and 390–1.

<sup>302</sup> Bundle 2, 896, sixth paragraph.



17(2)(e) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act:<sup>303</sup>

Ms Vedalankar said she was very unhappy with the PAIA report because it was untrue. Legally one could not use PAIA when one was in court and there was going to be an official judgment about this.

167. In truth and in fact, and contrary to Vedalankar's several criminal lies to the Committee:

- The Commission's report was perfectly true. LASA had indeed repeatedly failed to comply with its reporting obligations prescribed by section 32; and its false and defective, non-compliant reporting of its unlawful refusals of Brink's PAIA requests about which Brink had complained is plainly apparent on the face of LASA's section 32 reports for 2010/11<sup>304</sup> and 2011/12<sup>305</sup> having regard to the specific information required by the section. The Commission's report did not deal with LASA's substantive non-compliance with PAIA, namely Vedalankar's and Nair's illegal refusals of Brink's PAIA requests, only its false and misleading reporting afterwards to conceal this. Consequently, Vedalankar's obfuscatory effusion, 'Legally one could not use PAIA when one was in court' was, apart from being false on multiple scores mentioned below, also irrelevant and no answer to the Commission's reported findings that LASA had repeatedly failed to comply with its reporting obligations under section 32, thus frustrating and defeating the National Assembly's constitutional oversight function – in that had LASA duly reported to the Commission under section 32 in 2010/11 and 2011/12, the Portfolio Committee would have been alerted, via the Commission's section 84 reports for those years, to Vedalankar's and Nair's illegal refusals of Brink's PAIA requests in 2010 and 2011 and to their repeated violation of his fundamental right to information in determinedly suppressing the documentary evidence of LASA's business records that he wished to examine in his investigation of the circumstances in which his appointment had been aborted and the true reason for it.
- Vedalankar's answer, 'Legally one could not use PAIA when one was in court', was false and contrived to mislead the Committee on two scores.

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<sup>303</sup> Section 17(2): 'A person who – ... (e) ... wilfully furnishes a House or committee with information ... which is false or misleading, commits an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.'

<sup>304</sup> Bundle 2, 678.

<sup>305</sup> Bundle 2, 866.

- First: when Brink filed his first three PAIA requests in August and December 2010 and March 2011, he was not yet ‘in court’, and only went to court in July 2011<sup>306</sup> when he sued for his reinstatement to the top legal professional post for which he had been recommended.
- And second: even had Brink been ‘in court’ when he made his PAIA requests, any documents thus obtained would have been admissible with the leave of the judge under section 7(2) of PAIA. That is, a requester being ‘in court’ is no justification under PAIA for refusing access to a requested record.
- Vedalankar’s claim that ‘there was going to be an official judgment about this’ (‘this’ being her claim that ‘one could not use PAIA when one was in court’) was pure invention to mislead the Committee. The law on the use of documents obtained via PAIA in legal proceedings after they have commenced is clearly set out by section 7 of PAIA. No such issue was before court for decision, as falsely alleged by Vedalankar to the Committee, neither in Brink’s labour case nor in any other. It was a crowning lie to the Committee contrived to put it off taxing her any further about LASA’s repeated non-compliance with the Act. And the minute of LASA’s presentation shows that Vedalankar’s final lie achieved this.<sup>307</sup>

168. In January 2013, the Commission conducted a preliminary audit of LASA by way of a general questionnaire on its PAIA handling capacity. It did not at that stage audit LASA’s responses to Brink’s PAIA requests and its reporting of them afterwards.

169. LASA’s replies to the Commission’s questionnaire did not point up any problems in this regard, but as will appear below, LASA continued unlawfully obstructing and denying Brink access to its records and continued failing to report these unlawful refusals properly and truthfully under section 32, thus evading accountability for this gross illegality and stultifying the National Assembly’s oversight function imposed by section 55(2)(b)(ii) of the Constitution, by preventing the Commission from informing the National Assembly about these further illegal denials of access in its section 84 reports, with the result that the National Assembly remained unaware about LASA’s ongoing, repeated and persistent unlawful wilful failures to comply with Brink’s PAIA requests and its repeated and

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<sup>306</sup> Bundle 3, {first and last pages of statement of claim; and Mtati’s email to Adeleke re date of institution of action}

<sup>307</sup> Vedalankar’s free-flowing, casually told lies to the Committee about PAIA were not the only lies she told; the minute of her presentation to the Committee shows that she repeatedly misinformed it about other matters, and that Hon Jeffery repeatedly found her unconvincing and did not accept the false information and false explanations she gave (Bundle 2, 894–6, and 907).



persistent violation of his fundamental right to information, and the Justice Portfolio Committee in the National Assembly was thus prevented from taking remedial action.

170. Disregarding the special lesson that the Commission had given it in October 2011 on ‘public bodies as repositories of information’ and ‘transparency and public participation’ as a ‘fundamental cornerstone of sound democracies’<sup>308</sup> and the ‘primacy of the legislation’<sup>309</sup> and ‘the status of PAIA as a fundamental right [enforcement mechanism] ... reiterated and emphasized at different points of the training’,<sup>310</sup> LASA persisted in violating Brink’s fundamental right to information by illegally refusing his further PAIA requests made in 2013, 2014 and 2015, on grounds inter alia that the Commission had specifically and repeatedly instructed it were legally incompetent. This is discussed below.

171. In December 2012, February 2013 and March 2013, Brink made three PAIA requests addressed to Vela Mdaka, LASA’s deputy information officer for KwaZulu-Natal, in relation to a temporary Professional Assistant post at Pietermaritzburg, which requests were satisfactorily responded to and duly reported under section 32 in or about April 2013 for the 2012/13 reporting cycle.

172. In October 2013, after the trial of Brink’s labour claim but before judgment, Brink made three more PAIA requests, addressed to information officer Vedalankar and to two regional deputy information officers,<sup>311</sup> in which he:

- interrogated the circumstances in which another Senior Litigator appointment had been aborted, about which Nair had told one story on affidavit before trial, and another totally different one in his oral evidence, and, in between telling these different stories under oath, told the Board two other completely different stories;<sup>312</sup> and,
- tested the veracity of Nair’s inherently implausible<sup>313</sup> evidence given at trial that as deputy information officer in LASA’s national office he had no knowledge of

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<sup>308</sup> Bundle 2, 917.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Bundle 3, {the three 2013 requests}

<sup>312</sup> Bundle 3, {‘All the Different Stories’}

<sup>313</sup> In his subsequently delivered judgment (paragraph 57), the trial judge referred found that Brink had shown Nair to be ‘not generous with the truth’ on ‘a number’ of scores; which is to say, he repeatedly concealed the true facts within his knowledge and thereby lied in court. The judgment is accessible online at <http://goo.gl/WAuLK6>.



the Commission's PAIA training workshop for LASA's national office staff and its preliminary audit of LASA for PAIA compliance.

173. Besides granting Brink access to LASA's records pertaining to the Commission's PAIA workshop and PAIA audit<sup>314</sup> (which categorically exposed Nair's perjuries about them at the trial of Brink's labour claim), all other requested records were refused the following month.<sup>315</sup>

174. The unlawful reasons given for denying Brink access to the records he requested, all later abandoned, were that:

- he had previously requested (some of) them during pre-trial document discovery procedure in his labour case (but unable to disgorge them in time for trial, had now requested them again, under PAIA, after trial);
- 'all the request relates to legal proceedings before court'; and,
- 'your request falls within the prescripts of section 7(1) read with section 45 of the Act'.<sup>316</sup>

175. However:

- the fact that a record has been previously requested during past or pending litigation, and/or the fact that it 'relates to' such litigation, is not a ground contemplated and permitted by any of sections 34–45 in Chapter 4 of Part 2 of PAIA, 'Grounds for Refusal of Access to Records' of a public body;
- section 7 is not among these 'Grounds for Refusal of Access to Records', and cannot be relied on to refuse access to a record requested under the Act; and,
- since Brink's PAIA requests were made for a serious stated purpose, inter alia for Nair's prosecution for perjury,<sup>317</sup> plainly they were not 'manifestly frivolous or vexatious' within the meaning of section 45. Indeed Mtati subsequently acknowledged this and advanced it as a reason for seeking an extension of time to respond:<sup>318</sup>

your requests ... incorporate allegations that have far reaching implications on the officials of Legal Aid South Africa.

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<sup>314</sup> Among these, email records show that Nair knew full well about both the workshop and audit and that he perjured himself in court in denying his knowledge of them. Bundle 1, ...

<sup>315</sup> Seemingly the only reason LASA gave up its PAIA workshop and audit records is that Brink had indicated his intention to seek the same records from the Commission in order to verify the completeness of the workshop and audit records. Bundle 3, {covering letter}

<sup>316</sup> Bundle 3, {refusals}

<sup>317</sup> Bundle 3, {footnote 1 to PAIA request annexure addressed to VV}

<sup>318</sup> Bundle 3, {extension request}



176. As will appear below, all these factually and legally spurious grounds advanced to Brink for refusing his requests were eventually abandoned at court well over two years later, after he had sued to compel compliance with them.

177. In or about April 2014, LASA filed its section 32 report for the 2013/14 reporting cycle: 1 April 2013 to 31 March 2014. Crucially, it failed to report ‘the number of times each provision of this Act was relied on to refuse access in full or partial[ly]’, as prescribed by section 32(d).

178. It did not report, as required by the section, that it had relied on sections 7 and 45 to refuse Brink’s three PAIA requests made in 2013 (each request seeking access to numerous records). The sections were not mentioned at all.

179. In an apparent allusion to section 7, which prohibits the use of documents in litigation obtained via PAIA after the litigation has started, unless the judge allows them, LASA reported that the reasons it refused two of Brink’s requests totally, and one partially (almost completely), were that his requests ‘relate to issues before court under case D529\_2011’ and in an equally irrelevant garble:

This relates to the matter already before court and the requester was referred to part of the records already placed before court in the pleadings and where applicable it was stated that such records were found not available.

180. Chapter 4 in Part 2 of PAIA, ‘Grounds for Refusal of Access to Records’ does not permit the refusal of requests for access to a public body records on any of these reported grounds.

181. LASA did not even allude to section 45 by reporting that it had rejected Brink’s requests as a frivolous waste of LASA’s time, much less did it cite this section relied on, as required by section 32(d). It was completely silent about this.

182. Had LASA complied with section 32(d) by duly reporting ‘the number of times each provision of this Act was relied on to refuse access’, the incompetence and legal irrelevance of these justifications, which is to say the unlawfulness of LASA’s refusals of Brink’s requests, would have been immediately apparent to the Commission and to the National Assembly in turn on sight of the Commission’s section 84 report conveying LASA’s section 32 information.

183. The allegation in the report that ‘where applicable, it was stated that such records were found not available’ was a lie to the Commission for the ultimate



misinformation of the National Assembly. In truth and in fact, requested records not furnished were refused outright. None were alleged to Brink to be ‘not available’. Such a claim, even had it been made, would not have complied with the finely detailed information requirements of section 23(1) in regard to the certification of any record that ‘cannot be found’ or ‘does not exist’.

184. LASA’s section 32 report also failed to report, as required, on what section of the Act LASA relied to refuse the PAIA request of another requester mentioned in the report, one Leston Simpson. And it shows that, based on the misinformation contained in LASA’s PAIA manual, and misled by it, Simpson appealed against the refusal of his PAIA request; and that LASA Chief Legal Executive Hundermark refused his appeal. As will be discussed below, and as the Commission has repeatedly tried teaching LASA, there is no internal appeal against the refusal of PAIA requests by information officers of category-(b) public entities<sup>319</sup> (per the definition of same in section 1), and LASA has no ‘relevant authority’ (per the definition in section 1) to decide such appeals. In short, Hundermark acted ultra vires and unlawfully.

185. On 29 April 2014, Brink launched three applications to court against Vedalankar and two regional deputy information officers for orders compelling their delivery of records that he had requested but which they had illegally refused.<sup>320</sup>

186. Opposing his applications to court, they responded (LASA’s junior counsel Machaba writing for them)<sup>321</sup> in their answering affidavits with a flood of factually and legally idle defences, all later abandoned. These were (in Machaba’s awkward, professionally immature, aggressive-defensive language quoted here) that section 7 of PAIA justified the refusal of Brink’s requests for access to its records; section 45 did likewise; Brink had not first appealed to the CEO and/or to the Board before suing; his time to appeal had lapsed; he wished to usurp the function of the Legislature; the court did not have jurisdiction; service of his applications was defective; the court was biased; the matter was too convoluted to decide on the papers; Brink’s claims brought in his local court were intended to deliberately disadvantage the respondents; he had placed the court in a trap to rule differently from the Labour Court; there was a deep-seated dispute of fact requiring oral

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<sup>319</sup> At the October 2011 PAIA training workshop, the Commission had pertinently reminded LASA’s head office staff that ‘LASA falls under the type “B” category of public bodies in terms of LASA’ (Bundle 2, 916).

<sup>320</sup> Bundle 4,

<sup>321</sup> Bundle 3, {PDF Author properties}



evidence or a trial to determine; CSE Mtati is indeed a duly delegated deputy information officer; the matters were sub judice; the applications offended against the precedence rule and created unnecessary confusion; Brink had waived his right to request the documents he had requested under PAIA; he had delayed in requesting the documents; he had not joined other parties; he had previously requested certain of the records for trial in his labour case; the requested documents related to his labour case; the requested documents had been improperly requested for the purposes of future criminal, civil, and disciplinary proceedings; Brink's claims were an abuse of court; he was not ordinarily resident in the court's area of jurisdiction; he ought to have made one and not three PAIA requests; the court lacked the power to grant the orders he had sought; the orders were too vague, too convoluted and too incoherent to be granted; Brink should have sought the documents requested via a different mechanism, and not PAIA; it is an abuse to collect evidence for this or that litigation; his allegations were scandalous, irrelevant and a gross abuse of court and of his power as a magistrate; he is not entitled to apply for an order making provision for returning to court on amplified papers for a further order; the orders were insufficiently precise; the court needs sight of the thousands of pages of papers in his labour case to decide his claims; the court does not have the power to find the CEO in contempt; his behaviour is strange and unethical; his provision of copies of the papers to the persons mentioned in his notices of motion are calculated to generate friction and discord amongst LASA's staff and undermine the operation of LASA; sections 7 and 45 of PAIA complement each other; some of his evidence should be struck out; he is guilty of gross misconduct; his conduct is deplorable and deserves the dimmest view a court can give a person; he has failed to comply with the Act; his claims are scandalous, vexatious and a flagrant disregard of the law and the processes of court; the Minister's Notice concerning jurisdiction has no force and effect; other persons not cited need to give oral evidence; and because of the aggravating, defamatory, unethical facts before court, Brink's applications should be dismissed with punitive costs.

187. As said, all of these false allegations and vacant defences were abruptly abandoned at court before argument on the day Brink's applications finally reached trial.



188. In November 2014, after the dismissal of his labour claim on the strength of Nair's oral evidence,<sup>322</sup> Brink sought further records under PAIA in relation to various aspects of the case<sup>323</sup> and to test, several novel, manifestly untruthful claims Nair made on oath at trial,<sup>324</sup> and expose them as lies.

189. Brink addressed his record requests variously to Hundermark,<sup>325</sup> Chief Operations Officer Jerry Makokoane,<sup>326</sup> and Nair<sup>327</sup> – all alleged by LASA's PAIA manual to be deputy information officers.<sup>328</sup>

190. Among the records Brink sought was Hundermark's written delegation under section 17.<sup>329</sup> To date, despite repeated demands for it,<sup>330</sup> none has been produced.<sup>331</sup> Which means that contrary to the false information in the PAIA manual, Hundermark is not a deputy information officer, and that in handling Brink's PAIA requests he acted ultra vires and unlawfully.

191. On 31 December 2014, Brink requested LASA Board Secretary Langa Lethiba to inform the Board about the illegal refusal of his PAIA requests in November 2013 and that he had now sued to compel compliance with them.<sup>332</sup>

192. Lethiba declined to do so, on the basis that the matter was now in court,<sup>333</sup> thus allowing the continuing haemorrhaging of LASA's budget on wastefully

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<sup>322</sup> The judgment, delivered well more than a year after trial, was riddled with the most basic legal and factual mistakes, including the judge's radical fatal error in misallocating the onus of proof; see application for leave to appeal, and later petition for the same, at the case archive (post-judgment) online at <http://goo.gl/WAuLK6>. The judge totally accepted and relied on Nair's oral evidence to dismiss Brink's claim, despite finding him 'not generous with the truth' on 'a number' of scores, and despite the radical destructive contradictions between his evidence and (i) the documentary record, (ii) his affidavit before trial in April 2011, (iii) the interlocutory affidavits by him and Mtati, (iv) his report to the Board in November 2011, and (v) LASA's own pleadings in the case – none of which radical contradictions, canvassed in Brink's heads of argument (at: <http://goo.gl/WAuLK6>), featured in the judgment.

<sup>323</sup> A number of Brink's requests were referenced to the transcript of Nair's evidence, a copy of which he had now obtained from the registrar of the Durban Labour Court.

<sup>324</sup> See penultimate footnote above.

<sup>325</sup> Bundle 4,

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Bundle 4, {PH request, item 23}

<sup>330</sup> Bundle 4, {demand for full and proper compliance, 29 April 2016. Re item E23, the delegation: 'This item has neither been supplied nor certified.'}

<sup>331</sup> Bundle 3, {second s23 affidavit in May: No. 12: 'The record did exist but could not be found after search.' (Both s23 affidavits in April and May 2016 are replete with other obviously false statements – such as that Board minutes and KZN regional management meeting minutes cannot be found.)}

<sup>332</sup> Bundle 3, {letter to Lethiba}



incurred legal costs, in indefensibly opposing Brink's unanswerable claims to vindicate his fundamental right to information.

193. On 13 February 2015, having sought an extension of time within which to respond under section 26,<sup>334</sup> Nair totally refused<sup>335</sup> Brink's request on various spurious and unlawful grounds, all of which were ultimately abandoned at court when Brink sued him to compel his delivery of the requested documents.<sup>336</sup>

194. On 3 and 25 February 2015 respectively,<sup>337</sup> after also seeking extensions under section 26,<sup>338</sup> Hundermark and Makokoane responded to Brink's requests, not by notifying their grant or refusal of them, as required of them, but by unlawfully demanding payment of thousands of rands variously for time spent on background reading, on reading the requests, and on being briefed about them.<sup>339</sup>

195. Besides prescribing a nominal request fee, section 22 of PAIA does not allow such reading and briefing fees, only search fees – and search fees only in respect of records to which access has been granted.

196. At its PAIA training workshop in October 2011, the Commission had specifically instructed LASA on the 'types of fees'<sup>340</sup> that PAIA requesters may be charged, but the lesson evidently failed.

197. In view of Vedalankar's ultimate 'direction and control' responsibility under section 17(2) of PAIA for compliance with the Act by deputy information officers she has delegated, and in view of her power reserved by section 17(6)(b) to take over from them any PAIA request they are handling, on 19 March 2015 Brink protested Hundermark's and Makokoane's unlawful money demands, and asked her to see to their and Nair's compliance with his PAIA requests.<sup>341</sup> Brink annexed a further PAIA request addressed to her for a few more records.<sup>342</sup>

198. On 2 April 2015, Brink complained to the Public Protector about Nair's unlawful total refusal of his PAIA request to him, and about Hundermark's and

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<sup>333</sup> Bundle 3, {Lethiba's response}

<sup>334</sup> Bundle 4,

<sup>335</sup> Bundle 4,

<sup>336</sup> Bundle 4,

<sup>337</sup> Bundle 4,

<sup>338</sup> Bundle 4,

<sup>339</sup> Bundle 4,

<sup>340</sup> Bundle 2, 917.

<sup>341</sup> Bundle 4,

<sup>342</sup> Bundle 4,



Makokoane's unlawful money demands and failure to respond to his PAIA requests in the prescribed manner by either granting or refusing them.<sup>343</sup> Nair's several reasons for refusing Brink's request (all later abandoned) were tabulated and refuted in an appendix to the complaint.<sup>344</sup>

199. KwaZulu-Natal office investigator Siphon Cishe declined to intervene.<sup>345</sup> Brink replied by identifying his several basic factual misconceptions that misdirected him, and copied his letter to the Public Protector's national office.<sup>346</sup> The latter undertook to review the decision,<sup>347</sup> but LASA's total capitulation at court on 11 February 2016 overtook the pending review and rendered it moot.

200. In or about April 2015, LASA filed its section 32 report for the 2014/15 reporting cycle ending 31 March 2015.<sup>348</sup> Again it was grossly non-compliant and contained false and misleading information – comprehensively detailed in Brink's later complaint to the Commission about it.<sup>349</sup>

201. In sum, and most importantly, the reason reported by LASA for refusing Brink's requests was that 'they relate to the litigation proceedings that were pending before the Courts' – a legally spurious reason, not permitted for refusing a record request, and indeed later abandoned.

202. The report failed to state 'the number of times each provision of this Act was relied on to refuse access in full' as required by section 32(d). Had it done so, the irrelevance and unlawfulness of this spurious ground ('they relate to the litigation proceedings that were pending before the Courts'), and of the other irrelevant and unlawful grounds for refusal also advanced to Brink, but not even mentioned in the report as required, would have been apparent.

203. Regarding 'the number of requests for access refused', LASA failed to inform the Commission that fourteen records requested by Brink were refused (by Nair).

204. Regarding 'the number of times each provision of this Act was relied on to refuse access', LASA failed to report section 7: ten times, and sections 37, 47 and 48:

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<sup>343</sup> Bundle 3,

<sup>344</sup> Ibid.

<sup>345</sup> Bundle 3, {Cishe's refusal}

<sup>346</sup> Bundle 3, {letter to Cishe}

<sup>347</sup> Bundle 1, {complaint to Public Protector}

<sup>348</sup> Bundle 3,

<sup>349</sup> Bundle 3,



four times each. (Which sections as justifications were also inapplicable and legally irrelevant, and were accordingly also later abandoned.)

205. The report falsely and misleadingly stated:

The requester, Mr Brink was requested to pay the search fees in terms of section 22 of the Act. He had failed and/or refused to pay the fees and accordingly the reply had not been submitted to him.

206. In truth and in fact, Brink was not ‘requested to pay the search fees in terms of section 22 of the Act’ as falsely alleged, i.e. the charge allowed by the section for searching for and copying documents to which access has been granted. This allegation was false for two reasons. First, Brink was not granted access to any documents he requested. And second, thousands of rands were demanded from him for hundreds of hours allegedly spent reading Brink’s requests, on background reading, and for time spent in briefing sessions<sup>350</sup> – and not for searching and copying. Section 22 does not allow such reading and briefing charges.

207. Mtati later confirmed that no records whatsoever exist to vouch that all this time was spent on reading and briefing as alleged.<sup>351</sup>

208. It follows that LASA’s illegal demands for compensation for this were a fraudulent attempt to extort money from Brink.

209. The illegal, fraudulent money demands were furthermore made in bad faith and without any intention of furnishing Brink with any of the records he had requested, because Mtati later refused them all.<sup>352</sup>

210. The dishonest and corrupt object of raising the illegal and fraudulent money charges against Brink was plainly to put him off pursuing his constitutional right to access to the records he had duly requested.

211. The section 32 report falsely stated ‘0’ applications to court. As it was intended to do, this lie concealed from the Commission and from the National Assembly the fact that in April 2014 Brink had launched three court applications to compel compliance with his illegally refused PAIA requests (which illegal refusals LASA later implicitly conceded at court).

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<sup>350</sup> Bundle 4,

<sup>351</sup> Bundle 4,

<sup>352</sup> Bundle 4,



212. As a result of this false section 32 reporting by LASA, it succeeded again, now for the fourth time, in misinforming the Commission, and, through it, misleading the National Assembly on its performance under PAIA in 2014/15, and concealing its persistent and wilful non-compliance with it in order to suppress documents its national office executives did not want Brink to see and pass on to the authorities.

213. On 28 April 2015 Mtati acknowledged Brink's March letter and PAIA request to Vedalankar, and requested an extension of time on her behalf within which to respond.

214. Not only was Mtati's extension request legally incompetent, it was also dishonest. The first reason he advanced for the extension, namely that information officer Vedalankar was on leave, was not a competent reason for an extension contemplated and permitted by section 26(1). It was also untrue, in that Mtati later confirmed on oath that Vedalankar 'has not read the Applicant's request and has not made any decision therein.'<sup>353</sup> Section 26(1)(c) which Mtati advanced as a further reason for the extension had no application: it allows an extension if 'consultations among divisions of the public body or with another public body is necessary or desirable to decide the requests that cannot reasonably be completed within the original period.' No such consultations were embarked on.

215. Nonetheless, Brink did not object to the extra 30-day extension, even though the reasons Mtati gave for seeking it were both legally incompetent and dishonest.

216. On 26 May 2015, claiming to have been 'delegated'<sup>354</sup> by acting CEO Nair to respond on Vedalankar's (or his) behalf in her absence, Mtati responded to Brink's letter and PAIA request addressed to Vedalankar by:

- now refusing outright all records requested of Hundermark and Makokoane;<sup>355</sup>
- persisting with the unlawful money demands about which Brink had complained;<sup>356</sup> and,
- denying Brink access to all the rest of the records requested of Vedalankar<sup>357</sup> – besides providing one record (LASA's section 32 report for 2013/14) and claiming another did not exist, without certifying this on affidavit as required by section 23.

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<sup>353</sup> Bundle 4, {VV2 paragraph 10}

<sup>354</sup> Bundle 4, {VV2, paragraph 5}

<sup>355</sup> Bundle 4,

<sup>356</sup> Ibid.

<sup>357</sup> Ibid



217. On 19 June 2015, Brink dispatched by registered post a formal fundamental rights complaint to the Commission about Nair’s and Mtati’s unlawful refusals of his PAIA requests, and the unlawful money demands.<sup>358</sup>

218. On 29 June 2015 Brink mailed<sup>359</sup> copies of his complaint to Hundermark,<sup>360</sup> Makokoane,<sup>361</sup> Audit and Risk Executive Avie Naidoo,<sup>362</sup> Board Secretary Lethiba,<sup>363</sup> and Board Audit and Risk sub-committee chairperson Nonhlanhla Mgadza,<sup>364</sup> making final appeals for their remedial intervention in Mtati’s illegal refusals of his PAIA requests. None responded.

219. On 9 July 2015, Chief Legal Executive Hundermark falsely disclaimed any interest in and responsibility for PAIA matters at LASA,<sup>365</sup> despite:

- his engagement with then PAIA Unit director Kisoona regarding Brink’s first, ignored, PAIA request made in August 2010, and the assurance he gave her that it would be responded to by 20 October 2010;<sup>366</sup>
- his central involvement in organizing staff attendance at the Commission’s PAIA training workshop in October 2011;<sup>367</sup>
- his specific knowledge, through his further engagement with Kisoona, of ‘the reporting of the Brink saga [to the National Assembly] (you [the Open Democracy Advice Centre] may be familiar with it – Patrick [Hundermark] is)’;<sup>368</sup>
- his rejection of Simpson’s appeal against the refusal of his PAIA request, acting as Chief Legal Executive and as such its most senior lawyer on LASA’s national management executive committee to whom LASA’s head office evidently looked for the last word on PAIA disputes.

220. In short, when Brink called Hundermark’s attention to Mtati’s extraordinarily serious, illegal refusal on completely spurious grounds of his PAIA requests directed at obtaining further evidence of corruption in the abortion of his recruitment to the

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<sup>358</sup> Bundle 3,

<sup>359</sup> Bundle 3,

<sup>360</sup> Bundle 3,

<sup>361</sup> Bundle 3,

<sup>362</sup> Bundle 3,

<sup>363</sup> Bundle 3,

<sup>364</sup> Bundle 3,

<sup>365</sup> Bundle 3,

<sup>366</sup> Bundle 3,

<sup>367</sup> Bundle 3,

<sup>368</sup> Bundle 3, {Email from then PAIA Unit director Kisoona to the Open Democracy Advice Centre on 12 July 2011, copying Hundermark in}



top professional post for which he had been recommended, LASA's Chief Legal Executive looked the other way.<sup>369</sup>

221. On learning that his fundamental right violation complaint had not been collected from the Commission's local Post Office, Brink travelled to Johannesburg to hand-deliver copies to the Gauteng office in Braamfontein and to new PAIA Unit director Kisha Candasamy in the national office there on 31 July 2015.<sup>370</sup>

222. On 6 August 2015, with his formal complaint to the Commission not yet resolved, and his 180 day time limit to apply to court under section 78(2) running low, Brink launched an application to court against Nair for an order compelling his compliance with his PAIA request that he had illegally refused.

223. On 21 September 2015, Brink called the Commission's attention to the ongoing serious problem of LASA's continuing, persistent false section 32 reporting, with reference to the most recent instance of this, its false report for 2014/15.<sup>371</sup>

224. The matter was not resolved, and the National Assembly was once again misinformed<sup>372</sup> and misled to believe that LASA had complied with PAIA during the year.

225. On 12 October 2015, the Commission offered LASA an 'alternative dispute resolution (ADR) process facilitated by the Commission in an attempt to amicably resolve this complaint'<sup>373</sup> that Brink had made about the illegal refusals of his PAIA requests and illegal money charges raised against him.

226. Yet again the Commission reminded LASA that:<sup>374</sup>

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<sup>369</sup> Winner of the Rusty Wilmot Trophy for loyalty and dependability (1982) (Bundle 3, ... {PH resumé, including his Rusty Wilmot Trophy for loyalty and dependability}, Hundermark's loyalty and dependability were rewarded a few months later by LASA chairperson Mlambo JP, Judge President of the Gauteng Division of the High Court, with an acting judgeship in his Division in November 2015 (Bundle 3, ...).

<sup>370</sup> Bundle 3,

<sup>371</sup> Bundle 3, ... At the time he wrote, Brink had not yet succeeded in obtaining LASA's section 32 report to the Commission for 2013/14, only its PAIA report included its annual report for the year. The Commission eventually furnished him a copy on 17 December 2015 (Bundle 3, ...), and as mentioned above, it proved to be misleading and non-compliant as well.)

<sup>372</sup> Bundle 3, {SAHRC s84 report}

<sup>373</sup> Bundle 3, {Candasamy to Sekgota email}

<sup>374</sup> Bundle 4, {VV1, replying affidavit, annexure D}

As LASA is a type B public body for the purposes of PAIA, no internal appeal process is available to the Complainant should he be dissatisfied with this decision.

227. As will appear below, LASA disregarded the Commission's repeated elementary advice that there is 'no internal appeal process' available at LASA, and repeatedly insisted on oath (per Nair and Mtati) that there was such an appeal process, and that Brink had wrongly failed to pursue it before coming to court.

228. Notwithstanding that 'The misinterpretation and misapplication [of PAIA] was identified as being high risk to LASA',<sup>375</sup> as the Commission recorded in its report of its PAIA training workshop in October 2011, attended by Corporate Legal Manager Sekgota,<sup>376</sup> Sekgota spurned the Commission's offer to mediate a resolution of Brink's claims out of court,<sup>377</sup> and preferred the matter drag out.

229. On 18 November 2015, Brink sued Vedalankar<sup>378</sup> to compel her compliance with his requests addressed to her, to Makokoane, and to Hundermark, which Mtati had illegally refused in May.<sup>379</sup>

230. This was now Brink's fifth suit against LASA information- and deputy information officers to compel them to respect his constitutional right to information and to open LASA's books, which they were determined to keep hidden.

231. Both applications to court against Nair and Vedalankar were opposed, and voluminous answering affidavits, drawn by LASA's junior counsel Machaba, repeated the same vacant defences raised against Brink's three previous, still pending applications – save that the internal appeal defence was dropped in Mtati's affidavit made on Vedalankar's behalf. All these empty defences were later abandoned.

232. In his answering affidavit, disputing Brink's claim that he was not, Mtati insisted under oath:<sup>380</sup>

I am without question a Deputy Information Officer.

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<sup>375</sup> Bundle 2, 916.

<sup>376</sup> Bundle 2, 923.

<sup>377</sup> Bundle 3, {Sekgota to Candasamy email}

<sup>378</sup> Bundle 4, {VV2 application}

<sup>379</sup> Brink did not accept that Mtati, Makokoane and Hundermark were deputy information officers as alleged, and indeed Mtati definitely was not and Hundermark almost certainly not: no delegation has been produced despite repeated demand for it (see immediately infra).

<sup>380</sup> Bundle 4, {VV2 answer paragraph 8}



233. Referring to himself, Hundermark and Makokoane, all alleged by the PAIA manual to be deputy information officers,<sup>381</sup> Mtati repeated again under oath.<sup>382</sup>

Deputy Information Officers have been duly appointed, alternatively duly delegated.

234. Mtati's written delegation as deputy information officer<sup>383</sup> produced in mid-February 2016<sup>384</sup> shows that contrary to his repeated lies under oath about this, in truth and in fact he had not 'been duly appointed, alternatively duly delegated' as a deputy information officer at the time he handled Brink's PAIA requests, refused them, and made answering affidavits opposing his applications to court to compel compliance with them.

235. In view of the substantial similarity of LASA's opposition to all five of his applications, Brink set them down for argument together on the same day, 11 February 2016.<sup>385</sup>

236. On 12 January 2016, Brink alerted the Commission to serious misinformation in LASA's PAIA manual and to several basic misconceptions about the operation and implementation of PAIA<sup>386</sup> disclosed by the answering affidavits in his applications against Vedalankar and Nair to compel their compliance with his illegally refused PAIA requests, namely the wrong contentions that:

- Vedalankar was entitled to withhold her decision of Brink's PAIA requests until he had paid the various reading and briefing charges demanded – but under section 22 of PAIA, only search fees may be levied, and only in respect of documents to which access has been granted;
- Brink ought to have sued Vedalankar out the court where she has her 'principal or employment address' – but under section 1 of PAIA, an aggrieved records requester may sue out of a magistrate's court in whose territorial jurisdiction he is 'ordinarily resident'; and,

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<sup>381</sup> Bundle 4, {VV2 founding affi, paragraph 5}

<sup>382</sup> Bundle 4, {VV2 answer paragraph 122}

<sup>383</sup> Bundle 3,

<sup>384</sup> Under clause 3 of the settlement agreement at court on 11 February 2016 (Bundle 4, ...).

<sup>385</sup> Bundle 4,

<sup>386</sup> Bundle 3,

- Brink was required to make an internal appeal before applying to court to compel – per Nair’s answering affidavit in October 2015: Brink ‘ought to have lodged his appeal 60 days after my decision’.<sup>387</sup>

237. In making this latter assertion, Nair did not say to whom Brink was supposed to appeal. The answering affidavits opposing Brink’s first three applications had variously claimed:

- ‘The CEO [Vedalankar] is the head of the organisation and also the Information Officer. She is the person who ought to consider appeals against decisions for refusal of access to information by a deputy information officer’;<sup>388</sup>
- or, differently: ‘my seniors including the CEO and/or the Board are the people to whom an appeal against my decision lies’;<sup>389</sup>
- or, differently again: the ‘Information Officer or even the Board headed by a judge’;<sup>390</sup>

which is to say, either Vedalankar, or the Board, or Vedalankar and the Board sitting together, or Vedalankar and the Board sitting alternately – whatever.

238. Two months after Nair’s wrong contention about the need to appeal before approaching court, despite the Commission’s failed attempt to teach LASA’s attorneys that it is a category-(b) public body, without internal appeal machinery, Mtati finally quietly dropped this error, and didn’t repeat it in his answering affidavit in December 2015 in Brink’s second application against Vedalankar – unlike in his answering affidavit in August 2014 in Brink’s first application against Vedalankar:<sup>391</sup>

It appears clear to me that the Applicant ought to have proceeded in terms of section 74(1)(a). ... I am not sure under what basis does he come to the ... conclusion ... that no ... appeal lies in his case. ... He himself contends that: ‘... no right of internal appeal lies against the refusal of a request for access to the records of a public body such as Legal Aid SA.’ ... The Applicant could not have been more wrong in his analysis of the above section of the Act.

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<sup>387</sup> Bundle 4, {Nair answering affidavit, paragraph 10}

<sup>388</sup> Bundle 4, {Bambiso, answering affidavit, paragraph 191.5}

<sup>389</sup> Bundle 4, {Bambiso, answering affidavit, paragraph 80.5}

<sup>390</sup> Bundle 4, {Mtati answering affidavit in VV1, paragraph 65}

<sup>391</sup> Bundle 4, {VV1 Mtati answering affidavit paragraphs 59–61}



239. Mtati's and Nair's serious mistake about internal appeals, which Brink had repeatedly pointed out, was finally explicitly conceded in LASA's section 32 report for 2015/16 in April 2016:<sup>392</sup>

since Legal Aid SA is a category-(b) public body, as defined by section 1 of PAIA, it has no internal appeal procedure available to aggrieved record requesters.

240. By letter of 25 January 2016, the Commission raised with LASA these elementary misunderstandings of the Act and incompetent provisions that had been included in LASA's corrupted PAIA manual – including Brink's point that the new distinction made in the manual between 'deputy information officers' and 'designated deputy information officers' was spurious under section 17.

241. To date, however, many months later, the manifold serious errors and misinformation in LASA's PAIA manual identified by the Commission remain uncorrected. That is, LASA continues to misinform and mislead people wishing to access its records – especially those refused access, who continue to be misinformed and misled into making incompetent internal appeals instead of proceeding directly to court for relief as the Act prescribes.

242. According to Mtati on affidavit:<sup>393</sup>

I have in the past four years been responsible for the development of the Legal Aid SA's PAIA manual. The last version that was approved by the Board was adopted in 2015. This manual is easily accessible on the Legal Aid SA's website

243. Mtati was appointed Corporate Services Executive in July 2010,<sup>394</sup> and the successive changes to the original PAIA manual were made thereafter.

244. Prior to Mtati's appointment as CSE and his so-called 'development' of the PAIA manual, the original version<sup>395</sup> was in perfect shape and conformed precisely to the Act and to the stipulations of section 14, 'Manual on functions of, and index of records held by, public body'.

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<sup>392</sup> Bundle 3,

<sup>393</sup> Bundle 4, {VV2, Mtati's answering affidavit, paragraph 6}

<sup>394</sup> Bundle 2,

<sup>395</sup> Bundle 4,



245. It follows that Mtati has been ‘responsible’ for the progressive corruption of LASA’s PAIA manual. As mentioned above, Mtati failed to attend the Commission’s PAIA training workshop in October 2011, and his ignorance of the most basic provisions of PAIA as a result is evident from the manner in which he has fouled the manual up.

246. Mtati is not to blame for this alone. Before repeatedly resolving at their Board meetings to approve Mtati’s incompetent, unlawful and misleading alterations of LASA’s originally perfect PAIA manual, neither chairperson Mlambo JP, nor law professor Yusuf Vawda, nor any of the other several lawyers on the Board, including du Rand and Maree, noticed that Mtati was progressively corrupting it by making changes to it that were inconsistent with and in serious conflict with the provisions of PAIA.

247. Mtati’s claim that ‘This manual is easily accessible on the Legal Aid SA’s website’ is incorrect. On 22 March 2016, Brink called LASA Communications Executive Mpho Pashe’s attention to the problem that the hyperlink to the PAIA manual on LASA’s website attracts a dangerous malware notice.<sup>396</sup> Vedalankar and COO Makokoane were copied in.<sup>397</sup>

248. Pashe did not acknowledge Brink’s communication. Both Vedalankar<sup>398</sup> and Makokoane did;<sup>399</sup> but to date the trouble persists, and consequently LASA’s PAIA manual remains inaccessible on LASA’s website, other than to persons willing to risk the hazard that their computers may become infected with malware if they proceed to click on the PAIA manual hyperlink that they have been warned not to.

249. The PAIA-specialist senior magistrate<sup>400</sup> specially appointed to try Brink’s five applications to compel LASA’s compliance with his illegally refused PAIA requests ordered a pre-trial conference before the hearing on 11 February 2016.<sup>401</sup>

250. On 1 February 2016, ten days before the case, Brink delivered<sup>402</sup> a detailed agenda<sup>403</sup> for the conference, pointing up the factual and legal vacancy of each and every one of LASA’s defences to his applications.

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<sup>396</sup> Bundle 3,

<sup>397</sup> Bundle 3,

<sup>398</sup> Bundle 3,

<sup>399</sup> Bundle 3,

<sup>400</sup> Under section 91A of PAIA, only a designated, listed magistrate who has ‘completed a training course’ in PAIA may adjudicate applications brought under the Act.

<sup>401</sup> Bundle 3,



251. Instead of conceding Brink's clearly unanswerable case for access to all the records he had requested, Mtati briefed two junior advocates from Johannesburg to fly across the country and appear at the hearing in the Eshowe Magistrate's Court in KwaZulu-Natal, namely Machaba, who had advocated the refusal of Brink's PAIA requests from early 2011 and Christopher Carelse, a former LASA head office lawyer,<sup>404</sup> who had attended the Commission's PAIA training workshop in October 2011<sup>405</sup> and therefore had some knowledge of how PAIA works.

252. At court, a couple of minutes into the pre-trial conference, and before the applications could be argued, LASA totally capitulated to Brink's claims; abandoned all its unlawful justifications for denying him access to the records he had requested; reversed its unlawful refusals of access; abandoned its unlawful money demands; abandoned all its patently vacant defences to the five applications, and undertook to provide him with all the records he had requested or to certify on oath any that do not exist, by 15 April 2016.<sup>406</sup> Also, as an afterthought added in manuscript to the agreement typed and printed at court, to show 'the reaction' of any third party asked for consent to the release of records it owned. (None of the recorded 'information' Brink sought 'belongs' to any third party; and the word 'belongs' doesn't feature in Part 2, Chapter 4, 'Grounds for Refusal of Access to Records'.)<sup>407</sup>

253. The settlement agreement drawn and signed at court required that Mtati furnish Brink with a copy of his delegation as deputy information officer.<sup>408</sup> He did so a few days later; and, as said, it shows that he was only appointed on 16 January 2016, which gives the lie to his sworn claims in his answering affidavits on 8 August 2014 and 15 December 2015, quoted above, that he was a deputy information officer on the dates he refused Brink's PAIA requests addressed to Vedalankar, on 6 November 2013 and 26 May 2015, and those addressed to Hundermark and Makokoane, also on 26 May 2015. That is, besides refusing Brink's PAIA requests unjustifiably and illegally, Mtati indeed also acted ultra vires and illegally in responding to them without any authority under PAIA to do so, as Brink pointed

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<sup>402</sup> Bundle 3,

<sup>403</sup> Bundle 3,

<sup>404</sup> Bundle 2, 922.

<sup>405</sup> Bundle 2, 922: the first attendee listed in the attendance register.

<sup>406</sup> Bundle 3,

<sup>407</sup> Ibid.

<sup>408</sup> Per clause 3.



out;<sup>409</sup> and he later perjured himself about it in insisting that he was a deputy information officer when he was not.

254. Anticipating that LASA was likely to make another, now fifth, false report to the Commission under section 32, as it had on four previous occasions, in order to conceal from the National Assembly its illegal refusals of his PAIA requests in 2015/16, Brink drew a draft section 32 report for Vedalankar<sup>410</sup> containing all the information the section prescribed, and emailed it to her, and to other interested national executives CLE Hundermark, COO Makokoane, and IAE Mamotheti Sethopo on 24 March 2016. All acknowledged receipt.<sup>411</sup>

255. On 15 April 2016, LASA delivered to the Commission its section 32 report for 2015/16.<sup>412</sup> All the prescribed information stated in Brink's draft report was omitted. Yet again, and now for the fifth time, LASA's report was massively non-compliant with the detailed reporting requirements of the section, and again contained false information for the ultimate misinformation of the National Assembly.

256. On 20 May 2016, Brink raised all this directly with Vedalankar,<sup>413</sup> but she ignored his demand that the false and non-compliant report be remedied.

257. On 1 June 2016, Brink then indentified all the false information and many non-compliant deficiencies of LASA's 2015/16 report to the Commission.<sup>414</sup>

258. Inter alia, the report persisted in falsely claiming as a justification for obstructing/refusing Brink's access to the records he had requested that he had refused to pay 'search fees' – two months after LASA had abandoned its illegal money demands at court on 11 February 2016, thereby implicitly conceding they were not in fact 'search fees' as Brink had shown, and that they were not properly chargeable under PAIA as he had complained.

259. The report falsely alleged '0' requests 'refused in full'. In truth and in fact, on 26 May 2015 Mtati had refused Brink's requests addressed to Hundermark (two requests) and Makokoane in full – three requests refused in full, and virtually all

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<sup>409</sup> Bundle 4,

<sup>410</sup> Bundle 3, ... . Brink emailed an earlier draft to Board Secretary Langa Lethiba (Bundle 3, ...).

<sup>411</sup> Bundle 3,

<sup>412</sup> Bundle 3,

<sup>413</sup> Bundle 3,

<sup>414</sup> Bundle 3,



his request addressed to Vedalankar, but for one record supplied and one said not to exist.

260. By dint of this false reporting, LASA concealed that it had (illegally) denied Brink access to 83 duly requested records.

261. It equally untruthfully reported that ‘0’ provisions of the Act were relied on to refuse access to requested records. In truth and in fact, without having explicitly named the sections in his refusal, Mtati impliedly relied on sections 7 and 45, by claiming, irrelevantly, that the requests were ‘related and ancillary to the litigation proceedings you have brought against Legal Aid South Africa’ in Brink’s labour claim and his applications to compel compliance with his first three PAIA requests made after the claim was tried; and that the requests ‘are malicious and seek to divert the resources of Legal Aid South Africa’, an unambiguous reference to section 45. Mtati expressly relied on section 36 to refuse Brink access to the insurance records he’d requested. And he impliedly relied on section 34 to refuse access to a leave form requested on the ground that it was ‘personal information’. None of this was reported.

262. The report claimed under ‘Number of requests granted in full’: ‘2’ and ‘All the records were granted to Adv Brink in full.’ This was absolutely false. Brink’s PAIA request addressed to the Department in November 2015 for all LASA’s budget applications to the Department for the preceding five years for salaries for its nine Senior Litigator posts<sup>415</sup> was referred by the Department to LASA for a response under section 20 of the Act;<sup>416</sup> and with the Department watching, these records were duly supplied.<sup>417</sup> Besides a previous section 32 report<sup>418</sup> and another record claimed not to exist,<sup>419</sup> all the rest of Brink’s record requests addressed to LASA were refused.<sup>420</sup>

263. Under ‘Other matters as may be prescribed’, the report mentioned – amidst a mess of false and misleading information calculated to dissemble that the refusals of Brink’s PAIA requests had been legally justified – that Brink had brought five ‘review applications in the Eshowe Magistrate Court’. The report concealed the facts that at court on 11 February 2016, two months earlier, LASA had abandoned all its

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<sup>415</sup> Bundle 3,

<sup>416</sup> Bundle 3,

<sup>417</sup> Bundle 3,

<sup>418</sup> Bundle 4,

<sup>419</sup> Bundle 4,

<sup>420</sup> Bundle 4,



unlawful justifications for refusing Brink's PAIA requests; had abandoned its unlawful money demands; had abandoned all its meritless defences to his applications to court; and had totally capitulated to his claims to access to the records he had requested or to sworn certification where any did not exist.

264. In short, with its concealment of prescribed information; concealment of relevant information; provision of false information; and generation of false implications, the report created the wholly false and misleading impression that in 2015/16 LASA had duly complied with its constitutional information transparency obligations as circumscribed by PAIA.

265. To date, LASA's false and deficient section 32 report for 2015/16 remains uncorrected, and the National Assembly stands exposed to being misinformed for a fifth time and misled into wrongly believing that LASA duly complied with PAIA in 2015/16.

266. LASA's false section 32 reporting to the Commission for five years is extraordinarily serious. The reporting requirement imposed on public bodies by the section, namely that they report annually to the Commission with the fine particularity prescribed by subsections (a) to (i) on how they handled PAIA requests in the previous reporting cycle, is no trivial thing. The Preamble to PAIA notes that 'the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations'. Unlike during the apartheid era, now 'section 32(1)(a) of the Constitution provides that everyone has the right of access to any information held by the State', enabling 'everyone' to expose 'secretive' corruption, gross maladministration involving millions of rands and directly affecting service delivery, and the wholesale breakdown of the rule of law, due process and proper corporate governance in public bodies, and 'abuse of power and human rights violations' by rogue officers in their most senior ranks.

267. The detailed reporting requirements of section 32 enable the National Assembly to closely monitor public body compliance with PAIA, enacted to give effect to 'the right of access to any information held by the State'. If a public body reports falsely to the Commission, year after year, the National Assembly is misinformed and misled in turn, and its constitutional oversight function and responsibility in regard to public entities, imposed by section 55(2)(b)(ii) of the Constitution, is frustrated and stultified, thereby defeating the object of section 32 of PAIA, defeating the object of the Act to give effect to the fundamental right to



information in the democratic era, and enabling the delinquent public body to behave like an corrupt organ of the apartheid state run by lawless rogues, year after year, undetected, unaccountably, and with perfect impunity.

268. On 15 April 2016, the due date under its settlement agreement for delivery of all requested documents or sworn certification of those that do not exist, LASA reneged: Its performance was grossly defective and non-compliant with its agreement and with PAIA, in that numerous requested records were neither furnished nor certified under section 23; were claimed to have been furnished but were not; were claimed to have been certified but were not; and were refused again on legally and factually spurious grounds. Mtati's section 23 affidavit failed to include all the detailed information prescribed,<sup>421</sup> and was generally radically contradictory in claiming both that records did not exist and could not be found – the latter claim implying they did exist and had been searched for accordingly.

269. In an 18-page notice of breach and demand for compliance sent Mtati on 29 April 2016, Brink specified all these general and particular breaches of the settlement agreement and called on Mtati to remedy them.<sup>422</sup>

270. Mtati's response on 9 May 2016 was to blandly dispute that LASA was in breach:<sup>423</sup>

We deny that we are in breach of the settlement agreement at all.

And to undertake only to furnish a supplementary section 23 affidavit in regard to some uncertified records:<sup>424</sup>

I indicated to you through e-mail that I will be forwarding you a supplementary affidavit.

271. His 'supplementary affidavit' made on 13 May 2016<sup>425</sup> failed to remedy the many breaches Brink identified, and Mtati ignored a second demand to remedy.<sup>426</sup>

272. Under clause 5 of the settlement agreement,<sup>427</sup> Brink accordingly returned to court<sup>428</sup> to compel full and proper compliance with the agreement and with his PAIA

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<sup>421</sup> In court on 8 September 2016, the magistrate pointed this out.

<sup>422</sup> Bundle 4,

<sup>423</sup> Bundle 4,

<sup>424</sup> Ibid.

<sup>425</sup> Bundle 4,

<sup>426</sup> Bundle 4,

<sup>427</sup> Bundle 4,



requests that LASA had in February finally agreed to grant, as legally and constitutionally required.

273. Brink's third demand to remedy<sup>429</sup> was also ignored.

274. Set down on 28 July 2016, Brink's application to compel was postponed by court to 8 September 2016 for further affidavits.

275. LASA thereafter surrendered a few further records,<sup>430</sup> but persisted in refusing others and failed to remedy its defective and non-compliant section 23 affidavits.

276. Brink meanwhile on 1 August 2016 made two further PAIA requests:<sup>431</sup> one for all cost vouchers, including counsels' fee-notes, reflecting the total public revenue expended by LASA in refusing Brink's PAIA requests made in the period 2013–15 and opposing his applications to compel compliance with them; and the other being a final request for further records concerning LASA's Senior Litigator posts, which final request was specifically contemplated in clause 7 of the February settlement agreement.<sup>432</sup>

277. To frustrate and obstruct Brink's pursuit of these outstanding records, and of a compliant section 23 affidavit, on 29 August 2016, a few days before the hearing, LASA brought an application for security, demanding Brink pay R150 000 into court.<sup>433</sup>

278. Brink refuted LASA's case for the payment of security on several grounds advanced in his heads of argument.<sup>434</sup>

279. In court on 8 September 2016, LASA did not press its application for security. Instead, it applied for and won a postponement of Brink's claims to the requested documents LASA had undertaken to provide him, but had not, and to due certification under section 23 of any that do not exist or cannot be found, on the basis that it wished to apply to the High Court to interdict Brink from pursuing his claims to the said documents and to a compliant section 23 affidavit on the ground that he is a vexatious litigant. LASA's counsel stated that Vedalankar and

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<sup>428</sup> Bundle 4,

<sup>429</sup> Bundle 4,

<sup>430</sup> Bundle 4,

<sup>431</sup> Bundle 4,

<sup>432</sup> Bundle 3,

<sup>433</sup> Bundle 4,

<sup>434</sup> Bundle 4,



Hundermark had approved this intended litigation under LASA's Approval Framework, in view of its likely cost in the sum of an estimated R300 000.

280. That is, having ultimately failed in its endeavour to successfully obstruct Brink's access to the records he had requested:

- by illegally refusing them on spurious grounds and by raising illegal money charges, all later abandoned;
- by engaging in protracted filibustering opposition of his applications to compel compliance with his PAIA requests on wholly baseless and indefensible grounds, all later abandoned;
- by reneging on its undertaking at court to fully and properly comply at last with his PAIA requests, after many years of obstruction, and continuing to refuse records it had undertaken to provide, for new manifestly insupportable reasons;
- by opposing his application under the default clause of the settlement agreement for orders directed at compelling compliance with its agreement to respond fully and properly to his PAIA requests; and,
- by trying to knock him out with a baseless last-minute application for the payment into court of massive security for costs, brought out of time under the rules of court<sup>435</sup> and on the dishonestly false ground that Brink's claim to enforce the settlement agreement and hold LASA to its promise to comply with his PAIA requests was vexatious,

LASA moved to obstruct and smother Brink's investigation of criminal and other corruption in LASA's top ranks by blocking his access to the records he had requested for this stated purpose, or due certification of any that do not exist or cannot be found, which records and certification LASA had undertaken on the court record in February 2016 to provide.

281. On 26 September 2016, Mtati refused both of Brink's August PAIA request in toto, on the basis alleged that they were frivolous and vexatious and an unreasonable demand on LASA's time and resources, and therefore barred by section 45 of PAIA.<sup>436</sup>

282. On 10 October 2016, Brink sued out of the High Court at Pietermaritzburg to compel compliance with both his August PAIA requests.<sup>437</sup>

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<sup>435</sup> Rule 62(1) requires that a demand for security be made 'as soon as reasonably practicable after the commencement of proceedings'. The demand was served on 28 July 2016, at the end of them.

<sup>436</sup> Bundle 3,

<sup>437</sup> Bundle 4,



283. Shortly after this in October, LASA published its annual report for 2015/16 online. It falsely stated for the misinformation of the Minister, the Portfolio Committee and the public, that two PAIA requests were made in the reporting period, and that both had been granted:<sup>438</sup>

The King III report, in Principle 8.5, sub-paragraph 36, recommends that companies should consider disclosing in its Integrated Report the number and reasons for refusals of requests for information that were lodged with the company in terms of the PAIA. We report that during the 2015-2016 financial year, Legal Aid SA received two requests for information in terms of the PAIA. The two requests were granted in full.

284. The section 32 report also claims two requests were made, both by Brink.<sup>439</sup>

285. In truth and in fact, mentioned above, only one request was made by Brink in the reporting cycle: addressed to the Department, it was referred to LASA to respond to under section 20 and granted. Brink addressed no PAIA requests to LASA in the 2015/16 reporting cycle: his then most recent having been in March 2015 in the previous cycle. But on 26 May 2015 it was mostly refused, and Brink's three 2014 requests addressed to Hundermark and Makokoane, initially obstructed with illegal money demands, were finally refused on 26 May 2015 outright. This highly pertinent information was concealed by LASA in its annual report.

286. On

287. As defined in LASA's 'Business Plan 2011–2012', the 'Quality' that Mtati and his 'Corporate Service Dept' is expected to deliver is 'Settlements negotiated ... that are in the best interests of Legal Aid South Africa'.<sup>440</sup> Instead of negotiating a settlement of Brink's PAIA applications, as required of him – having implicitly conceded at court on 11 February 2016 that LASA cannot lawfully justify continuing to withhold the records Brink has duly requested, and that its defences (set up by junior counsel, since replaced) to his applications to compel are meritless and unsustainable – Mtati, on behalf of LASA's information- and deputy information officers, directly implicated in capital misconduct as management executives, continues opposing Brink's constitutionally supported claims to the public records he requested, so as to avoid handing them over, as he undertook to

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<sup>438</sup> Bundle 3, {annual report page 65

<sup>439</sup> Bundle 3,

<sup>440</sup> Bundle 2, 876.



do, or, in the case of any that do not exist, to avoid certifying this properly under section 23. Consequently the litigation needlessly drags on and multiplies, at massive wasted expense and cost in public revenue, for the essential purpose of preventing Brink from exercising his fundamental civil right to access LASA's records, and ultimately to suppress (further) evidence of criminal corruption in LASA's top ranks.

288. Mtati's continuing opposition to Brink's applications is manifestly not 'in the best interests of Legal Aid South Africa'. Rather, his persistent frustration of Brink's access to the records he has requested is in the personal interest only of those top-echelon officers in LASA whom Brink has stated he intends taking to law for their corruption, maladministration and crimes. And it is to protect them personally ('he protects us', per Mlambo JP),<sup>441</sup> not LASA as a public entity, that Mtati is squandering enormous sums of public revenue to violate Brink's constitutional right to information.

289. In their persistent, determined obstruction of Brink's access to LASA's business records, with the corrupt object of suppressing and concealing documentary evidence of pervasive corruption in its top ranks, including further evidence of such crimes as perjury, defeating the ends of justice, and lying to the Portfolio Committee, as well as of gross maladministration involving millions of rands and directly affecting service delivery; of the wholesale breakdown of proper corporate governance, of the rule of law, and of due process at LASA, involving, inter alia, the routine illegal flouting of LASA's internal regulations by Board chairperson Mlambo JP and national management executives; and of pervasive systemic corruption in the conduct of LASA's recruitment operations, information officer Vedalankar, deputy information officer Nair and in-house attorney Mtati have since 2010 to date run up legal costs to LASA of R..... million.<sup>442</sup>

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<sup>441</sup> Bundle 2, 1016.

<sup>442</sup> Bundle 3, {Put up all counsel's invoices, LASA's attorney bills, and their travel vouchers, when delivered under court order – requested under PAIA in November 2014 and on 1 August 2016.} As regards counsel's fee-notes, Mtati's latest spurious reason for refusing them, given on 15 April 2016, is that they 'belong to a third party in terms of section 34 and the third party has not granted consent to furnish such record.' (Bundle 3, ...) In fact and in law, (i) these invoices for professional services rendered LASA and presented for payment belong to LASA; (ii) third party ownership is not a ground contemplated in section 34; (iii) such ordinary commercial records cannot conceivably contain personal information that it would be unreasonable to disclose (per the section); (iv) other such fee-notes from counsel have been supplied; (v) no refusal has been shown; (vi) no third party consent is anyway required to release them.