

B20

IN THE MAGISTRATES COURT FOR THE DISTRICT OF ESHOWE

In the matters between:

ANTHONY ROBIN BRINK

Applicant

and

The respondents in the following five applications:

Case no: 257/14

HOPE BAMBISO N.O., DEPUTY INFORMATION OFFICER, EASTERN
CAPE REGION, LEGAL AID SOUTH AFRICA

Case no: 258/14

VIDHU VEDALANKAR N.O., INFORMATION OFFICER, LEGAL AID
SOUTH AFRICA

Case no: 259/14

ZANELE MSWELI N.O., DEPUTY INFORMATION OFFICER, FREE
STATE AND NORTH WEST REGION, LEGAL AID SOUTH AFRICA

Case no: 1005/15

BRIAN NAIR N.O., DEPUTY INFORMATION OFFICER, LEGAL AID
SOUTH AFRICA

Case No: 1432/15

VIDHU VEDALANKAR N.O., INFORMATION OFFICER, LEGAL AID
SOUTH AFRICA

AMENDED DRAFT ORDER

B20

1.

Under rule 55(1)(k) of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa:

1.1. The five applications are referred to oral evidence for the determination of the disputes enumerated in the schedule annexed to this order.

1.2. The following deponents to the answering and confirmatory affidavits:

- Vidhu Vedalankar, Chief Executive Officer and information officer;
- Brian Nair, National Operations Executive and deputy information officer;
- Thembile Mtati, Corporate Services Executive and deputy information officer;
- Solly Sekgota, Corporate Legal Manager; and,
- Thenjiwe Magazi, Eastern Cape Regional Human Resources Manager,

are directed to appear before this court on a future date or dates to be allocated by the Clerk of Court, for cross-examination by the applicant in regard to requested records on his consolidated list, duly delivered to the said Mtati under clause 2 of the settlement agreement made before argument at court on 11 February 2016 and handed into court, which have neither been furnished to him nor certified to his satisfaction or at all under section 23 of the Promotion of Access to Information Act 2 of 2000 ('PAIA').

B20

1.3. The applicant is granted leave to subpoena:

- Chief Operations Officer Jerry Makokoane;
- Chief Legal Executive Patrick Hundermark;
- Human Resources Executive Amanda Clark;
- Board Secretary Langa Lethiba;
- KwaZulu-Natal Regional Operations Executive Vela Mdaka;
- KwaZulu-Natal Regional Human Resources Manager Baboo Brijlal;
- Mahikeng Senior Litigator Nzame Skibi; and,
- The IT officer/s who conducted searches for documents, to whom Mtati anonymously referred in items 2 and 4 of his first section 23 affidavit on 15 April 2016 dealing with records A4 and A5 on the applicant's consolidated list,

to appear before this court on the same date(s) as the said deponents and for the same purpose.

2.

Inasmuch as Legal Aid South Africa ('LASA') deputy information officer Thembile Mtati has entirely failed to respond to items B16, B17, B18, B31, and H32 of the consolidated list of requested records, despite the applicant's repeated demands on 29 April and 6 June 2016 that he do so –

2.1. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by not granting the applicant access to

B20

these said records or by furnishing him with an affidavit made under section 23 if they cannot be found or do not exist, and thereby to have violated his fundamental right to information held by organs of state, entrenched by section 32(1) of the Constitution.

- 2.2. Mtati is directed to respond to the said record requests within twenty days, either by furnishing the applicant with copies of these records or by certifying under section 23 of PAIA that they cannot be found or that they do not exist.

3.

Inasmuch as Mtati has partially failed to respond to item H12 of the consolidated list of requested records, i.e. the minutes of LASA's Legal Services Technical Committee ('LSTC') meetings held over the period October 2009 to February 2011, besides the minute of its March 2010 meeting which was previously supplied, by providing only the LSTC meeting minutes up to May 2010, but not the rest up to February 2011 as requested, despite the applicant's repeated demands on 29 April and 6 June 2016 that he do so –

- 3.1. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by not granting the applicant access to these outstanding records or by furnishing him with an affidavit made under section 23 if they cannot be found or do not exist, and thereby to have

B20

violated his fundamental right to information held by organs of state, entrenched by section 32(1) of the Constitution.

- 3.2. Mtati is directed to respond to the said record requests within twenty days, either by furnishing the applicant with copies of these records or by certifying under section 23 of PAIA that they cannot be found or that they do not exist.

4.

Inasmuch as Mtati has partially failed to respond to item A1 of the consolidated list of requested records, i.e. for 'The minutes of all Eastern Cape regional management meetings held in 2010', by providing only the January, April, June and October minutes, and the first page only of the November minute, and not the August minute referred to and approved in the October minute, nor the complete November minute, nor the July minute (if such a meeting was held as will be confirmed or disconfirmed by the August minute), despite the applicant's demand for these minutes on 14 July 2016 –

- 4.1. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by not granting the applicant access to these outstanding records or by furnishing him with an affidavit made under section 23 if they cannot be found or do not exist, and thereby to have violated his fundamental right to information held by organs of state, entrenched by section 32(1) of the Constitution.

B20

- 4.2. Mtati is directed to respond to the said record requests within twenty days, either by furnishing the applicant with copies of these records or by certifying under section 23 of PAIA that they cannot be found or that they do not exist.

5.

Inasmuch as:

- (a) the document entitled 'Summary of the Scoring for Senior Litigator Positions' by Board chairperson Mlambo JP, Nair, Hundermark, Clark, and Makokoane, which Mtati furnished to the applicant in response to item G2 on his consolidated list, is wholly different from and does not fit the description of the records described and requested under item G2;
- (b) the letter sent Durban High Court Unit Manager Bongani Mngadi in August 2010, which Mtati furnished to the applicant in response to item H31 on the applicant's consolidated list, is not the email or letter sent to Mngadi in April or May 2010 as described in item H31, and the applicant specifically excluded the August letter in his Note beneath this item as not required; and,
- (c) Nair's email of 21 February 2011, conveying the decision (apparently, per the email, by the 'National Backlog task team') to reduce the number of professional assistants posted to the backlog courts at the Pietermaritzburg Magistrate's Court, which Mtati provided to the

B20

applicant in response to item H48 on the consolidated list, is not the record of the decision itself described and requested in item H48 –

- 5.1. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by not granting the applicant access to these said records or by furnishing him with an affidavit made under section 23 if they cannot be found or do not exist, and thereby to have violated his fundamental right to information held by organs of state, entrenched by section 32(1) of the Constitution.
- 5.2. Mtati is directed to respond to these said record requests within twenty days, either by furnishing the applicant with copies of these records or by certifying under section 23 of PAIA that they cannot be found or that they do not exist.

6.

As regards Mtati's refusal to allow the applicant access to 'All and any contract(s) of employment between Ngcamu and Legal Aid SA, at any Justice Centre, entered into prior to his employment as Children's Practitioner at the Durban Justice Centre', as specified in item E18 of the applicant's consolidated list, on the ground stated in his affidavit of 15 April 2016 – 'This record is refused in terms of section 63(1). The third party has refused to grant consent to provide such personal information' – inasmuch as:

B20

- (a) section 63 applies to private body records only, has no application to public body records, and consequently does not afford Mtati a lawful ground for refusing access to the said requested records;
- (b) section 34, which does provide for 'Mandatory protection of privacy of a third party who is a natural person', has no application either, in that section 34(2) provides that:

'A record may not be refused in terms of section (1) insofar as it consists of information – ...

(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to –

(i) the fact that the individual is or was an official of that public body;

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and

(iv) the name of the individual on a record prepared by the individual in the course of employment.

- (c) the records do not contain personal information that it would be unreasonable to disclose;

B20

- (d) no consent by the official is required by PAIA for the grant of access to these ordinary business records of Ngcamu's employment by LASA –

6.3. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by denying the applicant access to these said records, and thereby to have violated his fundamental right to information held by organs of state, entrenched by section 32(1) of the Constitution.

6.4. Mtati is directed to furnish the applicant with copies of these records within twenty days.

7.

As regards Mtati's refusal to allow the applicant access to LASA's counsel's fee-notes for his professional services specified in item H32 of the consolidated list, on the ground stated in his affidavit of 15 April 2016 that 'The records requested belongs to a third party in terms of section 34 and the third party has not granted consent to furnish such record', inasmuch as:

- (a) Mtati's allegation that a third party owns these financial records and the information they contain is factually wrong, and counsel's said invoices for his services presented to LASA for payment in fact belong to LASA and form part of its ordinary financial records as a public entity;

B20

- (b) third party ownership of a record is in any event not a ground contemplated by section 34 for refusing access to it;
- (c) granting the applicant access to these records cannot and will not involve the unreasonable disclosure of personal information about a third party, as contemplated by section 34 as a ground for the mandatory protection of the privacy of a third party who is a natural person;
- (d) no third party consent is required for granting access to these ordinary public body financial records; and,
- (e) Mtati has in any event failed to 'demonstrate to the applicant that he has sought consent from that third party' as provided by clause 9 of the Settlement Agreement '[w]here the information belongs to a third party ... and the said third party's reaction thereto' –

7.1. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by denying the applicant access to these said records, and thereby to have violated his fundamental right to information held by organs of state, entrenched by section 32(1) of the Constitution.

7.2. Mtati is directed to furnish the applicant with copies of these records within twenty days – with the exception of LASA's counsel's 'Fourth Account' for R169 600 on 31 March 2011, a copy of which LASA provided the applicant in

B20

mid-June 2015, and which 'Fourth Account' may therefore be excluded from this set of records to be furnished to the applicant.

8.

As regards Mtati's refusal to allow the applicant access to the several requested insurance records specified in items K1–4 of his consolidated list, on the ground that 'The records requested belongs to a third party. The third party has not granted consent to the granting of the record', inasmuch as:

- (a) the assertion that the requested insurance records in LASA's possession 'belong to a third party' is factually wrong, and these records and the information they contain in fact belong to LASA and form part of its ordinary business records as a public entity;
- (b) no third party consent is required by any provision of PAIA for LASA to grant the applicant access to them; and
- (c) Mtati has in any event failed to 'demonstrate to the applicant that he has sought consent from that third party' as provided by clause 9 of the Settlement Agreement '[w]here the information belongs to a third party ... and the said third party's reaction thereto' –

8.1. Legal Aid South Africa deputy information officer Mtati is declared to have unlawfully failed to comply with PAIA by denying the applicant access to these said records, and thereby to have violated the applicant's fundamental

B20

right to information held by organs of state, entrenched by section 32(1) of the Constitution.

- 8.2. Mtati is directed to furnish the applicant with copies of these records within twenty days.

9.

As regards Mtati's refusal to allow the applicant access to item H35 on the applicant's consolidated list, namely 'Former Board Secretary Bee-Mari Schoeman's resignation or dismissal letter, and/or any other record identifying the reason she quit LASA', on the grounds that 'The employee referred to on the request is deceased. The requested record is refused in terms of section 34(1)', thereby implying that the records contain personal information that it would be unreasonable for LASA to disclose, Mtati is directed within twenty days to deliver the record(s) to the Clerk of Court in a sealed envelope marked 'Private. For attention, Senior Magistrate Gert van Rooyen c/o Chief Magistrate Leon Venter', for the purpose of a judicial examination of the record(s) under section 80(1) of PAIA and the court's determination of whether such record(s) contain(s) any personal information that it would be unreasonable for LASA to disclose, and if so, whether it might be blacked out before delivery of the thus redacted record(s) to the applicant.

B20

10.

To the extent that both of Mtati's affidavits made on 15 April and 12 May 2016, purportedly under section 23 of PAIA in relation to requested records not furnished to the applicant:

- (a) contradictorily state *both* that the requested records do not exist *and* that they cannot be found, implying they do exist, thus failing to make the critical categorical distinction contemplated by subsections 23(1)(b)(i) and (ii) between extant but untraceable records on one hand and non-existent records on the other, and the said affidavits fail to state either case unambiguously and unequivocally;
- (b) and/or the affidavits,
 - (i) fail to make clear whether Mtati personally searched for the records on the applicant's consolidated list or delegated another person or persons to search for them on his behalf;
 - (ii) fail to 'include[e] all communications with every person' consulted by Mtati or such other delegated person(s) 'to find the record in question or to determine whether the record exists' (per section 23(2));
 - (iii) fail to clearly identify such person(s) consulted, by referring only to their offices or departments, or to extrinsic documents; and,

B20

- (iv) fail to include written records of such communications with such consulted persons by annexing them or putting up confirmatory affidavits in relation to hearsay about oral communications about the records conducted 'telephonically' and at 'meetings' (per paragraph 2.3 of the first affidavit on 15 April 2016);
- (v) fail to 'give a full account of all steps taken to find the record in question or to determine whether the records exists' per section 23(2) i.e. 'all reasonable steps' taken (per section 23(1)(1)(a)), by merely claiming insufficiently that the record was 'checked with' an office, department, or unnamed official –

10.1. Legal Aid South Africa deputy information officer Mtati's affidavits made on 15 April and 13 May 2016 are declared non-compliant with section 23 of PAIA, and with clause 4 of the settlement agreement, recording his specific undertaking: 'The affidavit will contain all the detailed information prescribed by that section.'

10.2. Mtati is directed within twenty days to furnish the applicant with an affidavit regarding every requested record on the consolidated list not furnished to the applicant, which fully and properly complies with section 23 of PAIA by containing a complete, clear and unambiguous statement of all the detailed information it prescribes.