

IN THE MAGISTRATE COURT FOR THE DISTRICT OF ESHOWE
HELD AT ESHOWE

B21

CASE NOS: 257/14

258/14

259/14

1005/15

1432/15

In the matters between:

ANTHONY ROBIN BRINK

APPLICANT

and

HOPE BAMBISO N.O AND OTHERS

RESPONDENTS

ANSWERING AFFIDAVIT

I, the undersigned

THEMBILE VUYO MTATI


do hereby make an oath and state as follows:-

1. I am a duly admitted male attorney and employed as a Legal Executive by Legal Aid South Africa, a public entity established in terms of section 2 of Legal Aid

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South Africa Act 39 of 2014 with its national office situated at 29 De Beer Street, Legal Aid House, Braamfontein, Johannesburg, and I am duly authorised to depose to this affidavit.

2. The facts contained herein are within my personal knowledge and are both true and correct except where it is specifically stated to the contrary. Where I make legal submissions, such submissions are made on the advice of my legal representatives.
3. I have read the Notice of Application, Amended Draft Order, Table of Witnesses and the Supporting Affidavit of **ANTHONY ROBIN BRINK**. The Notice of Application referred to above is dated 21 July 2016.
4. The above Honourable Court already ruled on 28 July 2016, that the Notice of Set Down, presumably with its accompanying documents, served on 11 July 2016, is removed from the roll.
5. The above Honourable Court further ruled that the Applicant's application will be construed to be an application in terms of clause 5 of the settlement agreement entered into between the parties on 11 February 2016, which agreement is part of the Court record, by agreement between the parties and therefore not attached hereto

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6. Clause 5 of the settlement agreement referred to above reads:

"In the event that Legal Aid SA fails to deliver any requested document and the Applicant is not satisfied with Legal Aid SA's evidence on affidavit under section 23 the Applicant would be entitled to apply to the Court to compel the production of such documents within 180 days after delivery of the section 23 affidavit."


7. Before I specifically answer to the Applicant's Supporting Affidavit I wish to start by raising certain points *in limine*.

8. In his notice of motion, and in particular in his amended draft order, the Applicant seeks the following orders, which I will attempt to paraphrase hereunder for ease of reference:-

- 8.1. Under rule 55(1)(k) that:

8.1.1 the five applications be referred to oral evidence for the determination of the disputes enumerated in the schedule to the draft order;

8.1.2 the five deponents to the answering and confirmatory affidavits in the five applications be directed to appear before this Honourable Court for cross examination by

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the Applicant with regard to the requested records on his consolidated lists, 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"),

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8.1.3 the Applicant be granted leave to subpoena 8 officials of Legal Aid SA to appear before the Court to be cross-examined by him,

8.2. That I be declared to have unlawfully failed to comply with PAIA by not granting the Applicant access to records or furnishing him with an affidavit under section 23 of PAIA ("section 23 affidavit") in relation to the records itemised as B16, B17, B18, B31 and H32 of the consolidated list and thereby have violated his fundamental right to information and furthermore that I be directed to respond to the said records within 20 days by either furnishing the records or deposing to a section 23 affidavit,

8.3. That I be declared to have unlawfully failed to comply with the PAIA by not granting the Applicant full access to records (by furnishing wrong or incomplete records) or furnish him with a section 23 affidavit in relation to the records itemised as H12, A1, G2, H31,

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H48, E18, H32, K1-4, H35 of the consolidated lists and thereby have violated his fundamental right to information and furthermore that I be directed to respond to the said records where applicable within 20 days by either furnishing the records or deposing to a section 23 affidavit.

- 8.4. That the section 23 affidavits deposed to by me be declared non-compliant with the provisions of section 23 of the PAIA and that I be directed to furnish a new affidavit in terms of section 23 regarding any of the record not furnished within 20 days.

POINTS IN LIMINE

NO FACTUAL FOUNDATION OR CAUSE OF ACTION

9. On the Applicant's own version as it appears from the supporting affidavit, the application is without factual foundation and without cause of action, for the following self-evident reasons.
10. The 5 PAIA applications became settled when the parties entered into the settlement agreement and any further recourse the Applicant might seek must thus be found in the settlement agreement.

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11. This application, as the Court already accepted, is brought in terms of clause 5 of the settlement agreement, which is quoted above. The Applicant therefore had to demonstrate that I have failed to deliver the requested document(s) to him and that he was not satisfied with my section 23 affidavit(s) to entitle him to approach this Court to compel the production of such document(s).
12. There is however no admissible evidence contained in or annexed to or incorporated by means of reference in the supporting affidavit to sustain such findings.
13. None of the documents, in as far as the Applicant might rely on same, which the Applicant attached to his letter to the Clerk of the Court dated 26 May 2016 or the Notice of Set Down with the draft order and schedule are attached to the supporting affidavit or incorporated therein. There is thus no evidence under oath of my alleged breach of the settlement agreement.
14. I therefore do not deal in this affidavit with such documents as I am advised that they do not form part of the evidential material before this Court, but in the event that this Court should find that such documents are indeed incorporated in the supporting affidavit the Court will be requested, due to the unconventional nature this matter came before it, to grant the Respondents the opportunity to deal therewith, in as far as it may be required.
15. On this basis, the application is still-born. No admissible or any evidence exists to substantiate either the Applicant's allegations or the relief sought.

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16. Furthermore, the relief sought by the Applicant in terms of prayers 1.1, 1.2, and 1.3 of the Amended Draft Order, are:
- 16.1. not competent as it is not provided for in clause 5 of the settlement agreement,
- 16.2. not supported by any factual foundation to demonstrate that there are disputes of fact which may not be resolved on the affidavits, especially where:
- 16.2.1 the factual disputes in relation to the 5 PAIA applications have been resolved by the settlement agreement, which imposed new obligations upon the various parties, and
- 16.2.2 the Applicant does not allege any dispute on his papers. On the contrary, Applicant alleges that there is no dispute between the parties in this application.
- 16.3. prematurely sought before the Respondent's even filed their answering affidavit, and
- 16.4. frivolous and vexatious and aimed to annoy Legal Aid SA and its officials.


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17. For these reasons the relief sought in prayers 1.1, 1.2 and 1.3 should be dismissed with costs.

RES JUDICATA IN THE FORM OF "ISSUE ESTOPPEL"

18. The Applicant brought an action against Legal Aid SA under case number 529/11 at the Labour Court, Durban in June 2011 ("Labour Court"), and the action was dismissed with costs.
19. The Applicant applied for leave to appeal which was also dismissed.
20. The Applicant then petitioned the Labour Appeal Court and the petition was unanimously dismissed.
21. I pause to mention that the record in the Labour Court consists of volumes of documents running to close to 6000 pages including annexures, and I would not want to burden this Court with all the records except to state that all the documents sought by the Applicant in these five applications are interrelated to the proceedings in the Labour Court.
22. I will demonstrate below that all the requested information relates to the non-appointment of Applicant to the position of a Senior Litigator in our Pietermaritzburg office.

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23. During the pre-trial conference, the Applicant requested similar or related information which form part of the current applications. This is clearly discernable from the attached pre-trial conference agenda from indexed pages 9 to 25. I attached for the benefit of this Honourable Court, the Applicant's pre-trial agenda consisting of 88 pages which is marked **TVM1**. For the convenience of the Court, below I provide an example where similar information was requested and canvassed by Applicant during the pre-trial conference:

23.1. Page 14 of the index, paragraph 33, Applicant requested minutes of monthly meetings for the Legal Services Committee (LSTC) since 2009 until 2011;

23.2. Page 15 of the index, paragraph 35, Applicant requested minutes of the Eastern Cape regional management meetings since 2009 until 2011;

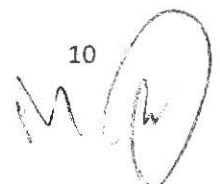
24. From the order sought by the Applicant, it is clear and as I have shown from the pre-trial agenda referred to above, that the Applicant has brought before this Honourable Court an application seeking the order relating to the same issues that were extensively deliberated on and adjudicated in the Labour Court.

25. It is my respectful submission, that it is trite law that the requirements for *res iudicata* are threefold, namely-

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- 25.1. that parties to the proceedings must be the same parties or otherwise persons who are in law identified with those who were parties to the proceedings;
- 25.2. the cause of action is the same substantively with the cause of action in the initial proceedings, and in this instance the Labour Court;
- 25.3. the relief sought relates or is interrelated to the same relief that was adjudicated in the initial proceedings.
26. I pause to mention that our courts have come to realise that rigid adherence to the requirements referred to above may result in defeating the whole purpose of *res iudicata*. That purpose, so I respectfully submit, is to prevent the repetition of law suits between the same parties, the harassment of the Respondents by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issues,
27. The Applicant had an opportunity to use available discovery processes in the Labour Court to source any and all relevant documents for his case.
28. It is also worth mentioning that Applicant also served a number of subpoenas to, amongst others, the CEO, the HRE, the Corporate Legal Manager, Judge



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President Mlambo and myself, to come and testify on his case. The Applicant however abandoned his subpoenas at the Labour Court and did not call any of us to testify.

29. Whilst Applicant argues that he is not required to furnish reasons for requests made in terms of the PAIA, it will be shown that his sole intention is to rehearse his Labour Court case by alleging perjury on Legal Aid SA's main and only witness, Advocate Brian Nair.
30. The Applicant further alleges fraud on the part of sitting Judges of the Labour Appeal Court hoping that his petition will be reversed and his case to start *de novo*.
31. It is my respectful submission that the conduct of the Applicant amounts to an abuse of the Court process, his application is vexatious, intended to resuscitate the issues which were extensively ventilated in the Labour Court , divert state resources and this conduct should be frowned upon by the Honourable Court.
32. Wherefore the Respondents pray that this application brought by the Applicant be dismissed with costs.

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DEFECTIVE NOTICE OF APPLICATION

33. The Applicant's Notice of Application does not comply with the rules of the Court.

33.1. Rule 55(1)(d) reads "A notice of motion in every application other than one brought ex parte shall be similar to Form 1A of Annexure 1....."

33.2. It is my respectful submission that Form 1A requires that the Applicant must state succinctly which orders are sought supported by the affidavit. The Applicant's notice of motion fails to meet this requirement but rather introduces argument and irrelevant material thereby making it difficult to the prejudice of the Respondent's to fully comprehend the orders sought.

34. Wherefore the Respondents pray that this application brought by the Applicant be dismissed with costs.

APPLICANT'S SUPPORTING AFFIDAVIT

Ad paragraph 1

35. Save to record that:

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- 35.1. the acronym used to identify Legal Aid South Africa is "Legal Aid SA", and
- 35.2. the 5 PAIA applications have been settled,

I note the contents of this paragraph.

Ad paragraph 2

36. I deny that Applicant's claims were conceded before the proceedings began and state that:
- 36.1. before the commencement of proceedings, a discussion took place between Applicant and Respondents' representatives in pursuance of resolving the matter;
- 36.2. Respondents' representatives advised that it would be prudent to relook at all the requests made by Applicant since all the Labour Court applications including the petition have been dispensed with, and the Applicant might start with new request for records under PAIA even if his applications were unsuccessful;

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36.3. the Respondents' sought a mechanism to stop the incessant request for records under PAIA from the Applicant, hence the inclusion of clause 7 in the settlement agreement,

36.4. it was on those basis that a settlement agreement was reached.

37. Save as aforesaid the rest of the allegations in this paragraph are denied and are in any case irrelevant.

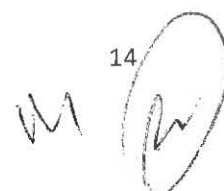
Ad paragraphs 3 and 4

38. Save to admit the contents of these paragraphs in as far as it correctly records the relevant provisions of the settlement agreement the rest of the averments are denied and are in any case argumentative and irrelevant.

39. I specifically deny that the inclusion of a provision to obtain consent of third parties' related information came as an afterthought or that Legal Aid SA in any manner acted illegally.

Ad paragraph 5

40. I deal with all the issues suggested to be outstanding under the heading Applicant's "Amended Draft Order" hereunder and same are repeated therein.

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41. I deny that I did not comply with my obligations under the settlement agreement.

42. I furthermore note that the Applicant has failed to affirm the contents of the letter to the Clerk of the Court, neither did he incorporate it in his affidavit by way of reference or attach same to his affidavit. Legal argument on the effect hereof will be advanced at the hearing of the application.

Ad paragraphs 6 to 16

43. I note the contents of these paragraphs and state that:

43.1. Applicant was informed that all the records he requested were provided to him in reply to the consolidated list in my letter dated 15 April 2016. Below I deal with specific records that Applicant alleges were not supplied.

43.2. the records that were found not to exist, a section 23 affidavit was furnished to Applicant;

43.3. the records that could not be located, a section 23 affidavit was furnished to Applicant; I attach hereto copies of my section 23 affidavit dated 15 April 2016 marked "TVM2" and my

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supplementary section 23 affidavit marked "TVM3" evidencing the above,

43.4. I will once again, where reference is made to outstanding records furnish same to the Applicant by attaching it hereto.

44. I furthermore note that the Applicant has once again failed to affirm the contents of the documents he refers to in these paragraphs, neither did he incorporate it in his affidavit by way of reference or attach same to his affidavit. Legal argument on the effect hereof will be advanced at the hearing of the application.

Ad paragraph 17

45. The minutes for the August 2010 meeting were inadvertently missed out. There was no meeting in July 2010. The remainder of the minutes were furnished to Applicant with many other requested documents on 15 April 2016. They are again attached as "A1" together with the minute of August 2010.

Ad paragraphs 18 to 20

46. On 14 July 2016, Applicant had already applied for a notice of set down for his application to compel, which was defective and I did not deem it necessary to

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respond to his letter preferring to refer same for argument before this Honourable Court.

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Ad paragraph 21

47. Even though the contents of this paragraph are irrelevant to the determination of the issues before the Court, it is noted with particular emphasis on the Applicant's intention on calling a Senior State Advocate to be on watching brief for "perjury" charges.

Ad paragraphs 22 to 36

48. Much of the averments in these paragraphs are now academic due to the Court's ruling on 28 July 2016. I have however noted the averments made by Applicant, and save as stated hereunder deny the correctness thereof:

48.1. This Honourable Court already made a finding that Applicant should proceed by way of application;

48.2. The Applicant, albeit in denial, subsequently filed a notice of motion to attempt to correct the defect although again incorrectly;

48.3. I never conceded to the Applicant's applications or abandoned the grounds it was opposed. The 5 PAIA applications was put to bed due

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to a negotiated settlement between the parties, without the Respondents' admitting any wrongdoing,

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- 48.4. Any further relief sought by the applicant in relation to the settled PAIA applications must therefore be brought in terms of the settlement agreement, with due regard to the mechanism created therefore and the relief provided for in the settlement agreement itself,
- 48.5. The mere fact that documents are placed in the Court file and served on parties to litigation do not mean that it becomes admissible evidence before the Court,
- 48.6. Further arguments on these averments will be made during the hearing of this application.

Ad paragraph 37

49. Applicant seeks to persuade this Honourable Court to revive his case which has already been decided upon by the Labour Court and the Labour Appeal Court. These allegations are denied and not novel since Applicant had already made various baseless reports to, among others, the Chair of the Portfolio Committee on Justice, the Office of the Public Protector, the Ministry of Justice, South African Human Rights Commission and many other institutions, none of whom have as far as I am aware took any action against Legal Aid SA.

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Ad paragraphs 38 to 41

50. As already indicated supra, the Honourable Court has already made a finding on the nature of a proper application.

Ad paragraph 42 to 44

51. Applicant's averments in these paragraphs, which are denied, are argumentative, disrespectful and scandalous. It furthermore raises matters which are irrelevant to the determination of the issues in this application.

52. There is no basis for the suggestion that I included clauses in the settlement agreement that are without merit. If that is so, he should have advanced his argument before Court and refused the inclusion thereof.

53. I deny further any suggestion of "corruptly" driven fruitless and wasteful expenditure. *A fortiori*, Applicant is indebted to Legal Aid SA for more than R1, 600,000.00 (one million six hundred thousand) in taxed costs which could have been used for qualifying legal aid clients.

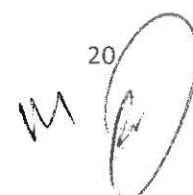
54. The Applicant is vindictive, malicious and bitter, no amount of information will satisfy him unless he gets appointed as a Senior Litigator.

Handwritten signature and the number 19.

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Ad paragraph 45 to 50

55. Applicant's averments in these paragraphs, which are denied, are argumentative, disrespectful and scandalous. It furthermore raises matters which are irrelevant to the determination of the issues in this application.
56. There is no basis laid for the allegation of corruption at the highest level of Legal Aid SA. I deny this defamatory statement.
57. Why the Applicant, who already made up his mind that perjury and corruption was committed, does not simply present his "evidence" to the relevant authorities, who are constitutionally mandated and have the relevant resources and mechanisms to investigate such matters remains a mystery.
58. I have no knowledge nor have I seen the memorandum that Applicant is referring to that seems to have formed part of his Labour Appeal Court file lest to say, Applicant is insulting sitting Judges of the Labour Appeal Court.
59. Allegations made by Applicant are again demonstrable of his intention, *id est*, to restart his Labour Court case for non-appointment as a Senior Litigator.

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AMENDED DRAFT ORDER

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Ad prayers 1.1 to 1.3

60. As demonstrated above, the Applicant did not lay any basis for these orders requested from the Court. Applicant has still not complied with Rule 55 (1) (d).

Ad prayer 2

61. The information requested under items **B16**, **B17** and **B18** was provided to Applicant and is all contained on the attached documents marked "**B16**". This information relates to e-mail communication between our Corporate Legal Manager, Solly Sekgota with Fola Adeleke of South African Human Rights Commission (SAHRC). Also forming part of "**B16**" is a response to a questionnaire sent to SAHRC.

62. I also attach marked "**B31**" a delegation letter as requested.

63. The information relating to Counsel's fee notes on professional services rendered as contained in paragraph "**H32**" of Applicant's request was refused based on section 34 (1) of the PAIA and a section 23 affidavit was furnished to Applicant.

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B21**Ad prayer 3**

64. The minutes were sent to Applicant and they are again attached as "H12".

Ad prayer 4

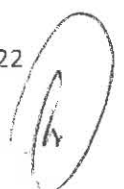
65. These records were sent to Applicant and are again attached as "A1".

Ad prayer 5

66. Document's "G2", "H31" "H48" furnished to Applicant provides a list of recommended candidates, a regret letter to Mr. Mngadi and an e-mail from Advocate Nair on backlog courts. These are the only documents I could locate and that they are different from what Applicant wants to see is a matter for argument.

Ad prayer 6

67. This information was refused based on section 63 of the PAIA as belonging to a third party. The third party was requested to provide consent to furnish this information and he refused to do so. See attached an e-mail dated 31 March 2016 marked "TVM4". Our Corporate Legal Manager spoke to the third party

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again and he now consented to the provision of his contracts and are attached marked "E18".

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Ad prayer 7

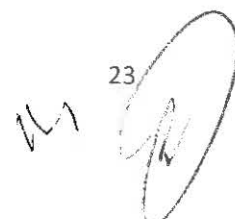
68. The information relating to Counsel's fee notes on professional services rendered as contained in paragraph "H32" of Applicant's request was refused based on section 34 (1) of the PAIA and a section 23 affidavit was furnished to Applicant. I do not agree with Applicant on the remainder of his assertions and further argument will be advance at the hearing of this application.

Ad prayer 8

69. The information requested on insurance records including a contract with Carmague was refused and section 23 affidavit was deposed to.

70. I indicated in my section 23 affidavit that the third party has not granted consent to provide this information. Attached marked "K1" is an e-mail from Carmague refusing disclosure of this information.

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Ad prayer 9

71. Applicant was informed in my section 23 affidavit that the information requested relates to a person that is deceased and protected in terms of section 34 (1).

Ad prayer 10

72. Legal Aid SA is a big organisation. It consists of 64 Justice Centres, 64 Satellite Offices, 6 Regional Offices and a National Office. As a Deputy Information Officer, I am not privy to all decisions taken at all given times at various forums.
- 72.1. When I mention in my section 23 affidavit that a record cannot be located, I shall have made all reasonable endeavours with the relevant officials at different offices, in various regions to locate the information. If I receive a response from an official that the document cannot be located, I then responded as such;
- 72.2. Where I was informed that a document does not exist, I then responded as such.
- 72.3. Officials of Legal Aid SA also change through resignations, promotions etcetera. A new official may not necessarily know if a document does not exist and this may only be established after search.
- 72.4. I did not personally travel to all relevant regions but I was communicating with the relevant officials predominantly the Human Resources Managers who are custodians of personnel related records. I also directed my team members to assist in collating the information.

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WHEREFORE the respondents pray that the Applicant's application be dismissed with costs, including the costs of the proceedings on 28 July 2016.



 DEPONENT

THUS SIGNED AND SWORN TO before me at Johannesburg on this the 12th day of August 2016 by the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on his conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.



COMMISSIONER OF OATHS

FULL NAMES: MASINDI MBINGENI

DESIGNATION: LEGAL ADMIN OFFICER

PHYSICAL ADDRESS: 16 EMPIRE ROAD, PARKTOWN