

IN THE MAGISTRATES COURT FOR THE DISTRICT OF ESHOWE

In the matters between:

ANTHONY ROBIN BRINK

Applicant

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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

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SECOND AMENDED DRAFT ORDER

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1.

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

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- 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').

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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 entirely failed to respond to items B16, B17, and B18 of the consolidated list of requested records, despite the applicant's repeated demands on 29 April and 6 June 2016 that he do so, and then on 12 August 2016 furnished records marked 'B16–18' that do not fit the applicant's specification of these items –

- 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 these said records as specified 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:

- (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,

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

- 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 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.
- 3.2. 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.

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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;
- (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' –

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- 4.1. 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.
- 4.2. 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 mid-June 2015 (annexure 'F' to the applicant's replying affidavit), and which 'Fourth Account' may therefore be excluded from this set of records to be furnished to the applicant.

5.

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;

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- (b) no third party consent is required by any provision of PAIA for LASA to grant the applicant access to them;
- (c) Mtati's demonstration on 12 August 2016 (annexure 'K1' to his answering affidavit) that, under clause 9 of the Settlement Agreement, third party consent for the release of these records was sought but the third party refused it is accordingly irrelevant; and,
- (d) since sections 64, 65, 67 and 68 of PAIA govern access to private and not public body records, LASA Corporate Legal Manager Solly Sekgota's 'view' (per annexure 'K1') stated to LASA's insurer that 'In terms of sections 64, 65, 67 and 68, we require you to consider ... and grant consent' to the applicant's request for access to the records, for the reason that 'the information falls within that parameters' is wrong and irrelevant –

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

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

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6.

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.

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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,

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- (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 –

7.1. 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.’

7.2. 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.

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- 8.1. Within twenty days of this order, Legal Aid South Africa information officer Vidhu Vedalankar, deputy information officer Brian Nair, and deputy information officer Thembile Mtati are directed to file affidavits showing cause why they should not be held personally liable for all or part of Legal Aid South Africa's costs incurred in opposing the applicant's above-cited five applications and his application on 28 July 2016 to compel their full and proper compliance with their agreement on 11 February 2016 to comply with the applicant's several PAIA requests made in 2013–2015 that are the subject of his five applications, such costs to be paid on the attorney-own client scale, including the costs of Legal Aid South Africa's two counsel.
- 8.2. The determination of the final apportionment of the said officers' personal liability for payment of Legal Aid South Africa's total costs incurred in opposing the said applications on the said scale is postponed sine die and may be enrolled by applicant, by Legal Aid South Africa, or by the said officers for determination once 20 days have elapsed from the date of this order.