

**IN THE HIGH COURT OF SOUTH AFRICA**  
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

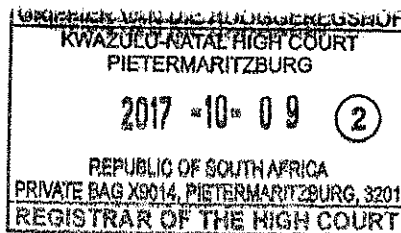
**Case No. 12124/16 P**

In the matter between:

**LEGAL AID SOUTH AFRICA**

and

**ANTHONY ROBIN BRINK**



Applicant

Respondent

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**APPLICANT'S PRACTICE NOTE**

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**COUNSEL FOR THE PARTIES:**

1 For Applicant: TJB BOKABA SC

C CARELSE

2 For Respondent: A R BRINK

**ISSUES THAT WILL BE ARGUED**

3 That this Court must order Respondent is a vexatious litigant in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956.

3.1 Brink's case falls squarely within the requirements of section 2(1)(b), and his conduct is analogous to various other cases where litigants were declared to be vexatious *a la Cohen v Cohen; Absa Bank Limited v Dlamini; and De Wet v Law Society of the Northern Provinces.*

4 That this Court must declare that the Respondent's conduct is vexatious and frivolous.

4.1 The Constitutional Court recently restated when proceedings will be vexatious in *Lawyers for Human Rights v Minister in the Presidency*. Brink's case meets the requirements enunciated both in that case and in other leading decisions (*Fisheries Development Corporation of SA Ltd v Jorgensen; Heugh v Gubb; Western Cape Housing Board v Parker*).

5 That this Court must stay all pending proceedings already brought by Brink against Legal Aid SA until Brink has paid all previous cost orders granted against him, alternatively, upon payment of security for Legal Aid SA's costs.

5.1 A court will order security if it is "*satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse*"; and the party against whom security is sought would be unable to satisfy an adverse costs order (*Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd*). We submit that, on the facts of this case, both requirements have indeed been met.

6 That this Court must strike out the Respondent's answering and supplementary affidavits in terms of Rule 6(15).

6.1 Brink's answering affidavit is replete with scandalous, vexatious, irrelevant, and hearsay matter that prejudices Legal Aid SA. His supplementary affidavit is not accompanied by an application in terms of Rule 6(5)(e). In terms of Rule 6(15), this Court is permitted to strike out such matter, which we submit is warranted in the circumstances.

**PORTIONS OF THE RECORD THAT ARE NECESSARY TO DETERMINE THE MATTER**


- 7 The portions of the record referred to the Applicant's heads of argument.
- 8 The Court will note that the Applicant seeks an order that the Respondent's entire answering affidavit should be struck out, *alternatively*, that those paragraphs identified in Annexure "RA1" to the replying affidavit and those identified in the footnotes in the heads of argument, should be struck out for the reasons advanced.

**ESTIMATED DURATION OF THE HEARING**

- 9 3 hours

**AUTHORITIES PARTICULARLY RELEVANT**

- 10 *Cohen v Cohen* 2003 (1) SA 103 (C).
- 11 *Absa Bank Limited v Dlamini* 2008 (2) SA 262 (T) (paras 121-7).
- 12 *De Wet v Law Society of the Northern Provinces, In Re: Law Society of the Northern Provinces v De Wet* [2014] ZAGPPHC 799 (para 15).
- 13 *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) (paras 19-21).

  
TJB BOKABA SC  
C CARELSE  
T SCOTT (PUPIL)

Counsel for Legal Aid SA  
Chambers, Sandton  
06 October 2017

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**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Case No. 12124/16 P**

In the matter between:

**LEGAL AID SOUTH AFRICA**

and

**ANTHONY ROBIN BRINK**



Applicant

Respondent

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**APPLICANT'S CONCISE HEADS OF ARGUMENT**

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**OVERVIEW**

- 1 In August 2009, the Respondent ("**Brink**") was interviewed and shortlisted as a candidate for the Senior Litigator post at the Durban and Pietermaritzburg offices of the Applicant ("**Legal Aid SA**").<sup>1</sup> But, Legal Aid SA subsequently aborted the filling of the remaining vacant Senior Litigator posts due to budgetary constraints.<sup>2</sup>
- 2 Brink unsuccessfully challenged Legal Aid SA's decision to not fill the post in the Labour Court, Durban.<sup>3</sup> His application to that Court, and subsequent petition to the Labour Appeal Court ("**LAC**"), for leave to appeal were also dismissed.<sup>4</sup>
- 3 Brink has since launched a number of legal proceedings against Legal Aid SA, many of which are replete with arrogant and defamatory attacks against Legal Aid SA and the judiciary, particularly the chairperson of Legal Aid SA, Mlambo JP.

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<sup>1</sup> FA p 14 para 8.

<sup>2</sup> FA p 14 para 9.

<sup>3</sup> FA pp 15-6 paras 10.2-10.5.

<sup>4</sup> FA p 16 para 10.6.

- 4 Brink has also made a series of requests to Legal Aid in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA"). To date he has requested a total of 249 records from Legal Aid SA relating to the Senior Litigator position and sought to compel their production in the Eshowe Magistrates' Court.
- 5 As a result, Legal Aid SA seeks various orders that will effectively prevent Brink from persistently and without reasonable ground bringing vexatious and defamatory proceedings against Legal Aid SA.

### VEXATIOUS PROCEEDINGS

- 6 Section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 ("the Act") provides that this Court may, if it is satisfied that a person "has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court".

- 7 To obtain relief under section 2(1)(b) an applicant must show that the respondent has "*persistently*" instituted legal proceedings; and that such proceedings have been instituted "*without reasonable ground*".<sup>5</sup>

- 8 In determining whether Brink has "*persistently*" instituted legal proceedings this Court will consider: the number of proceedings that Brink instituted, including extra-judicial legal processes; the period of time over which these proceedings were instituted; the degree of similarity between the proceedings; whether Legal Aid SA constantly remained under threat of proceedings; and whether the proceedings sought to re-litigate issues that had already been judicially determined.

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<sup>5</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 17.

- 9 In determining whether such proceedings are “*without reasonable ground*” this Court will consider whether: the overall pattern of previous litigation between Legal Aid SA and Brink shows Brink to be consistently unsuccessful; Brink conducted previous litigation in an untoward manner, including instituting proceedings while related proceedings were pending and adopting contradictory versions; Brink has demonstrated numerous examples of obstructive behaviour; Brink abused court process as a scheme and stratagem; Brink disregarded adverse costs orders with impunity; Brink used judicial mechanisms like subpoenas to draw in persons not directly involved in the litigation; the Court, its processes and officials are merely being used to effect a vendetta.
- 10 In determining whether Brink’s conduct is vexatious and frivolous, this Court will regard proceedings brought by Brink as:
- 10.1 vexatious, if they are instituted, and continued, without sufficient ground, and in bad faith solely to annoy or embarrass Legal Aid SA. Where the costs of earlier proceedings between substantially the same parties and in respect of substantially the same issues have not been paid before fresh proceedings have been instituted, such conduct is considered as *prima facie* vexatious;
- 10.2 frivolous, if they concern a complaint with no serious purpose or value;
- 10.3 an abuse of process, if, in the circumstances, they amount to a ‘mis-use’, an improper use, a *mala fide* use, or a use for an ulterior purpose of the machinery for the administration of justice.

- 11 In our submission, Brink's case falls squarely within the ambit of these principles, and his conduct eerily echoes the cases where litigants were declared to be vexatious *a la Cohen v Cohen*;<sup>6</sup> *Absa Bank Limited v Dlamini*;<sup>7</sup> and *De Wet v Law Society of the Northern Provinces*.<sup>8</sup>
- 12 By parity of reasoning, if this Court accepts that Brink is a vexatious litigant who has conducted these proceedings frivolously and vexatiously, then, in our submission, this Court must declare that Legal Aid SA is excused from having to respond to Brink's PAIA requests in terms of section 45 of PAIA.<sup>9</sup>
- 13 It is clear that Brink's request for some 249 records from Legal Aid SA is merely an attempt to impermissibly re-litigate his labour claim, which has been determined finally by the LC and LAC. In our submission it is appropriate for this Court to declare that Legal Aid SA is excused from having to respond to Brink's requests.

#### **PAYMENT OF COSTS ORDERS**

- 14 At the time of this application Brink has already launched a number of proceedings against Legal Aid SA. These proceedings are currently pending. Legal Aid SA asks this Court to stay these pending proceedings until Brink has paid all previous cost orders granted against him, alternatively, upon payment of security for Legal Aid SA's costs.

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6 2003 (1) SA 103 (C)

7 2008 (2) SA 262 (T)

8 [2014] ZAGPPHC 799.

9 Section 45 of PAIA provides that:

*"The information officer of a public body may refuse a request for access to a record of the body if-*


*(a) the request is manifestly frivolous or vexatious; or*

*(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."*

15 A court will order security if it is “*satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse*”; and the party against whom security is sought would be unable to satisfy an adverse costs order.<sup>10</sup> We submit that, on the facts of this case, both requirements have indeed been met.

### STRIKING OUT

16 Brink’s answering affidavit is replete with scandalous, vexatious, irrelevant, and hearsay matter that prejudices Legal Aid SA. His supplementary affidavit is not accompanied by an application in terms of Rule 6(5)(e). In terms of Rule 6(15), this Court is permitted to strike out such matter. We submit that if Brink’s answering affidavit were to be accepted, this Court would in effect condone his high-handed and, frankly, malicious manner of litigating. We request that the entire answering and supplementary affidavit should be struck out, *alternatively*, that those paragraphs identified in Annexure “**RA1**” to the replying affidavit and those identified in the footnotes in the heads of argument, should be struck out for the reasons advanced.

  
pp. **TJB BOKABA SC**  
**C CARELSE**  
**T SCOTT (PUPIL)**

Counsel for Legal Aid SA  
Chambers, Sandton  
06 October 2017

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<sup>10</sup> *Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA).*

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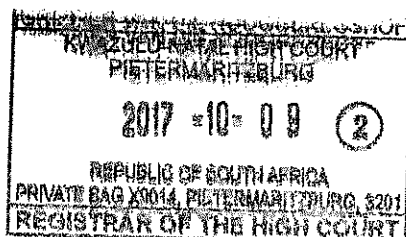
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**APPLICANT'S HEADS OF ARGUMENT**

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**TABLE OF CONTENTS**

<b>OVERVIEW .....</b>	<b>1</b>
<b>FACTUAL BACKGROUND.....</b>	<b>4</b>
<b>THE LAW .....</b>	<b>12</b>
<b>Vexatious Proceedings Act.....</b>	<b>12</b>
<b>Vexatious Proceedings .....</b>	<b>16</b>
<b>Applying the Principles .....</b>	<b>18</b>
<b>PAYMENT OF COSTS ORDERS .....</b>	<b>23</b>
<b>STRIKING OUT.....</b>	<b>25</b>
<b>CONCLUSION.....</b>	<b>29</b>

## OVERVIEW

- 1 In August 2009, the Respondent ("**Brink**") was interviewed and shortlisted as a candidate for the Senior Litigator post at the Durban and Pietermaritzburg offices of the Applicant ("**Legal Aid SA**").<sup>1</sup> But, Legal Aid SA subsequently aborted the filling of remaining vacant Senior Litigator posts due to budgetary constraints.<sup>2</sup>
- 2 Brink unsuccessfully challenged Legal Aid SA's decision to not fill the post in the Labour Court, Durban.<sup>3</sup> His application to that Court, and subsequent petition to the Labour Appeal Court ("**LAC**"), for leave to appeal were also dismissed.<sup>4</sup>
- 3 Brink's vitriolic attitude and cumulative conduct towards Legal Aid SA in the years subsequent to Legal Aid SA declining to hire him has necessitated this application.
- 4 The arrogant and defamatory nature of Brink's claims against Legal Aid SA and the judiciary, particularly the chairperson of Legal Aid SA, Mlambo JP, is illustrated most clearly by the following statement in his answering affidavit:

*"The lying defamatory Memorandum was certainly not written by Waglay JP, Davis JA or Sutherland JA, all of whose judgments are written in fine, flawless, plain and unpretentious English, in contradistinction to the haughtily magisterial, aggressive tone of the document in second language English with its grammatical imperfections – such as I noticed listening on my car radio to Mlambo JP's disposal of the costs question after President Zuma dropped his application to interdict the Public Protector's state of capture report. (I don't mean to be rude; I wish my Zulu were as strong as his English.)"*<sup>5</sup>

- 5 Brink's answering affidavit before this Court is replete with such assertions. To illustrate the point, we merely highlight selected excerpts that are characteristic of Brink's affidavit as a whole.

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<sup>1</sup> FA p 14 para 8.

<sup>2</sup> FA p 14 para 9.

<sup>3</sup> FA pp 15-6 paras 10.2-10.5.

<sup>4</sup> FA p 16 para 10.6.

<sup>5</sup> AA pp 663-4 para 821.

- 5.1 *"[O]ne of LASA's top officers... pervert[ed] my petition to the JP of the LAC for leave to appeal the dismissal of my labour claim, by slipping him a note under the counter... so as to improperly influence him to dismiss the petition, prematurely before all the papers were in."*<sup>6</sup>
- 5.2 Mlambo JP was *"improperly influenced"* and engaged in *"misconduct"*.<sup>7</sup>
- 5.3 *"[T]he JSC appears practically unable to prosecute and finalise complaints against judges"*.<sup>8</sup>
- 5.4 *"[A] top-ranking LASA officer was carrying on an adulterous affair with a certain female JCE... this adulterous top-ranking officer appears to have been instrumental in the appointment of his said mistress in February 2013 to a tribunal convened by the JSC to try a well-known complaint against a senior judge."*<sup>9</sup>
- 5.5 Mlambo JP's conduct left Brink *"with 'little regard for' him as the chairperson of the Board of a major public entity"* and that, as Legal Aid SA's chairperson, Mlambo JP was responsible for *"extraordinarily serious wilful dereliction and capital misconduct"*.<sup>10</sup>
- 5.6 That Legal Aid SA's National Operations Executive *"got his law degree by mail"*.<sup>11</sup>
- 6 Even more disconcerting is that Brink knows what he is doing and believes that he is justified in behaving this way. He states:

*"I'm keenly alive to the difference between truth and lies, facts and allegations, facts and surmises, and lies and mistakes. I mention all this*

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<sup>6</sup> AA p 456 para 74.

<sup>7</sup> AA p 466 para 104.

<sup>8</sup> AA p 474 para 133.

<sup>9</sup> AA p 652 para 769.

<sup>10</sup> AA p 657 para 792.

<sup>11</sup> AA p 520 para 280.

*because many of my allegations in this affidavit are extremely serious, more especially where they bear on the integrity of the judiciary. So I don't make them lightly, and never without supporting documents. In other words, I wouldn't fire unless sure of my mark, because I well appreciate that if I miss my shot the personal and professional repercussions for me will likely be calamitous."*<sup>12</sup>

7 Regrettably Brink has done far more than just "miss [his] shot". And, by his own invitation, Legal Aid SA asks this Court to bring about the "repercussions" that Brink so willingly seeks. Legal Aid SA asks this Court to remedy the situation by:

- 7.1 declaring that Brink's conduct towards Legal Aid is vexatious and frivolous;
- 7.2 staying various applications instituted by Brink pending payment of all previous cost orders granted against him in favour of Legal Aid SA; alternatively, requiring Brink to provide security for costs;
- 7.3 interdicting Brink from instituting further proceedings against Legal Aid SA relating to his non-appointment to a Senior Litigator post without first obtaining leave from the relevant High Court or lower court; alternatively, upon providing security for costs;
- 7.4 interdicting Brink from requesting any further records from Legal Aid SA under the Promotion of Access to Information Act 2 of 2000 ("PAIA"), which relate to his non-appointment to a Senior Litigator post;
- 7.5 declaring Brink's non-appointment as a Senior Litigator with Legal Aid SA was fully and finally determined by the Labour Court and Labour Appeal Court under cases number D529/11 and DA21/14, respectively;
- 7.6 excusing Legal Aid SA from responding to any pending PAIA requests that Brink may have directed;

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<sup>12</sup> AA p 446 para 46.

- 7.7 interdicting and restraining Brink from in any way harassing and interfering with the duties and functions of Legal Aid SA, its officials and Board members by making frivolous requests for information or threats;
- 7.8 interdicting and restraining Brink from publishing false and derogatory remarks and allegations against Legal Aid SA, its officials or Board members and any judicial officer; and
- 7.9 costs of suit.
- 8 The structure of these heads of argument is as follows:
- 8.1 First, we briefly describe the factual background.
- 8.2 Secondly, we set out and apply the relevant legal principles.
- 8.3 Finally, we address the issue of striking out.

## **FACTUAL BACKGROUND**

- 9 In **August 2009**, Legal Aid SA, through newspaper and media advertisements, invited legal practitioners to apply for its vacant Senior Litigator posts at its Pietermaritzburg and Durban Justice Centres.<sup>13</sup>
- 10 Brink and other candidates were interviewed and recommended by a selection panel for second round interviews, but Legal Aid SA subsequently did not fill the vacant posts due to budgetary constraints.<sup>14</sup> Brink was subsequently informed of the reasons why the Senior Litigator position was not filled.<sup>15</sup>

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<sup>13</sup> FA p 14 para 8.

<sup>14</sup> FA p 15 para 9; p 18 para 18.

<sup>15</sup> FA p 18 para 14.

- 11 Between **August 2010 and March 2011**, Brink requested some 69 records under PAIA relating to the Senior Litigator position from Legal Aid SA.<sup>16</sup>
- 12 On **1 September 2010**, Brink wrote to the COO of Legal Aid SA seeking intervention and intimidating officials, including Mlambo JP, by threatening to report them for illegally suppressing records and aborting the recruitment process for the Senior Litigator position.<sup>17</sup>
- 13 On **18 October 2010**, the CEO of Legal Aid SA refused Brink's PAIA request and provided a detailed explanation for the recruitment process being discontinued.<sup>18</sup>
- 14 On **30 November 2010**, Brink addressed a 59 page letter to Mlambo JP, the Board of Legal Aid SA and the South African Human Rights Commission ("**SAHRC**") challenging the decision to reject his PAIA request and requesting them to intervene in alleged gross illegal breaches by Legal Aid SA's management.<sup>19</sup> In the letter Brink made serious and malicious allegations that the executive of Legal Aid SA misrepresented information, concocted unlawful excuses and that they were not honest and had acted illegally.<sup>20</sup>
- 15 As early as **24 January 2011**, Legal Aid SA through its chairperson, Mlambo JP, advised Brink that his "*conduct is unbecoming to say the least and borders on harassment*" and called upon him "*to desist from communicating with Board members in this regard*".<sup>21</sup>

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<sup>16</sup> FA p 15 para 10.1; AA p 571 para 445.

<sup>17</sup> FA p 19 para 16.

<sup>18</sup> FA p 19 para 17.

<sup>19</sup> FA p 19 para 18.

<sup>20</sup> FA p 20 para 19.

<sup>21</sup> FA p 21 para 23.

- 16 On **25 February 2011**, and in total disregard of Mlambo JP's letter, Brink wrote a further letter to Legal Aid SA taking issue with the appointment, this time copying the Minister and Deputy Minister of Justice and Constitutional Development.<sup>22</sup>
- 17 In **July 2011**, Brink instituted a Labour Court action against Legal Aid SA claiming that by not appointing him, Legal Aid SA had unfairly discriminated against him as a so-called 'Aids denialist' on the ground of conscience, belief or political opinion.<sup>23</sup>
- 18 Brink's statement of claim made various unfounded, defamatory and demeaning statements towards Mlambo JP and Legal Aid SA's CEO, including:
- 18.1 Claims that they were "*motivated by unlawful political (alternatively racial) prejudice*" in aborting his appointment and "*attempted to camouflage their direct discrimination against the applicant on prohibited grounds by concocting and advancing a false cover story for it based on a fake financial justification*".<sup>24</sup>
- 18.2 That "*Mlambo lied to the Minister*" in a confidential report "*which lies Mlambo repeated to the Chairperson of the Portfolio Committee*"<sup>25</sup> and used the "*cover of a lying alibi*" to abort Brink's appointment.<sup>26</sup> And, that Mlambo JP authored a "*false and misleading statement of the law*",<sup>27</sup> told the Minister "*a blatant lie*".<sup>28</sup>
- 18.3 Making racial slurs against Mlambo JP.<sup>29</sup>

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<sup>22</sup> FA p 22 para 25.

<sup>23</sup> FA p 15 para 10.2; AA p 571 para 446.

<sup>24</sup> FA p 28 para 41.1.

<sup>25</sup> FA p 28 para 41.2.

<sup>26</sup> FA p 29 para 41.3.

<sup>27</sup> FA p 32 para 41.11.

<sup>28</sup> FA p 32 para 41.12.

<sup>29</sup> FA p 29 para 41.4.

- 18.4 Claims that they had adopted strategies to “conceal from the applicant their unfair discrimination against him”<sup>30</sup> and created a “scheme to covertly discriminate against the applicant”.<sup>31</sup>
- 18.5 That they had “fabricate[d] a factual foundation” to not appoint Brink.<sup>32</sup>
- 18.6 That Mlambo JP demonstrated “appalling, brazen dishonesty in his dissimulations to the applicant”.<sup>33</sup>
- 19 Brink purportedly forwarded his statement of claim to, *inter alia*, the Minister and Deputy Minister of, and the Chairperson of the Portfolio Committee on, Justice and Constitutional Development, as well as the Chairperson of the Judicial Services Commission.<sup>34</sup>
- 20 However, under cross-examination in the Labour Court trial, Brink exonerated Mlambo JP and Legal Aid SA’s CEO.<sup>35</sup> Brink’s change of tack is epitomised in the following exchange:

*Mr Du Toit:*            *Well, just to save us the agony of going through the rest, can we assume that for the rest you have assume I think exonerated Judge Mlambo and Mrs Vedalankar from any accusation of dishonesty and discrimination?*

*Mr Brink:*                *Yes.*<sup>36</sup>

- 21 The transcript of Labour Court proceedings makes clear that Brink had no factual basis to impute discriminatory conduct on Mlambo JP and Legal Aid SA’s CEO, but did so nonetheless on pure speculation and with reckless disregard for their rights and reputation. To aggravate the situation, Brink distributed his statement of

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<sup>30</sup> FA p 30 para 41.7.

<sup>31</sup> FA p 31 para 41.9.

<sup>32</sup> FA p 32 para 41.10.

<sup>33</sup> FA p 33 para 41.13.

<sup>34</sup> FA p 26 para 39.

<sup>35</sup> FA pp 33-9 paras 42-4.

<sup>36</sup> FA p 38.

claim far and wide, yet there is no indication that he informed these parties that he had retracted the offending statements under cross-examination, nor has Brink apologised to Mlambo JP or Legal Aid SA's CEO.

- 22 During **October 2013**, after evidence was led in the Labour Court, Brink requested a further 53 records under PAIA from three different Deputy Information Officers of Legal Aid SA to test the veracity of the evidence adduced during the Labour Court trial.<sup>37</sup>
- 23 In **April 2014**, before the Labour Court delivered its judgment, Brink launched three applications to compel the production of records in the Eshowe Magistrates' Court, against the said Deputy Information Officers.<sup>38</sup>
- 24 In **September 2014**, the Labour Court dismissed Brink's action with costs.<sup>39</sup> In dismissing Brink's claim, the Court found that Legal Aid SA—

*"could not possibly have aborted the recruitment of the applicant by discriminating him on the basis of the applicant being an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. It must follow that the applicant has not shown that he was meted with any different treatment than was given to the recommended candidates for Durban and Mthatha."*<sup>40</sup>

- 25 In **November 2014**, after the Labour Court dismissed his action and while his application for leave to appeal was pending, Brink made four more PAIA requests to Legal Aid SA for 97 further records relating to the Senior Litigator posts to test the veracity of the evidence adduced during the Labour Court trial.<sup>41</sup>
- 26 In **March 2015**, after the Labour Court dismissed his application for leave to appeal in December 2014 and the LAC dismissed his petition in February 2015,

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<sup>37</sup> FA p 15 para 10.3; AA p 572 para 448.

<sup>38</sup> FA p 16 para 10.4; AA p 573 para 452.

<sup>39</sup> *Brink v Legal Aid South Africa* (2015) 36 ILJ 1020 (LC).

<sup>40</sup> *Brink v Legal Aid South Africa* (2015) 36 ILJ 1020 (LC) para 72.

<sup>41</sup> FA p 16 para 10.5; AA p 573 para 454.

Brink made a further PAIA request.<sup>42</sup> Despite conceding no wrongdoing on the part of Mlambo JP under cross-examination, Brink's petition to the LAC persisted with his allegations framing the case as concerning "*the personal and professional integrity of a sitting judge president*".<sup>43</sup>

- 27 Brink also lashed out at the judge that presided over and decided his Labour Court action, claiming he authored a "*deplorably inattentive, glib, crude and perfunctory judgement*", performed "*gravely prejudicial misconduct*" and made "*basic errors, too many to recite*".<sup>44</sup> And, that "*the judge hadn't troubled himself to read our heads, and was hearing our oral argument without having prepared for it ten months after the evidence, and relying only on his fading and defective memory*".<sup>45</sup>
- 28 Between **August 2015 and November 2015**, Brink launched two further applications to compel the production of records in the Eshowe Magistrates' Court.<sup>46</sup>
- 29 In **October 2015**, Brink brought an urgent interdict in this Court to prevent Legal Aid SA from taxing its bill of costs relating to the Labour Court action, which was dismissed with costs on an attorney client scale.<sup>47</sup> In his application, Brink attacked the integrity of Waglay JP, one of the LAC judges that dismissed his petition for leave to appeal claiming *inter alia* that Waglay JP had "*issue[d] a counterfeit order*" and had "*intentionally violated [Brink's] fundamental right to due process*".<sup>48</sup>
- 30 Legal Aid SA's costs in the Labour Court matter and the urgent application were taxed in the amounts of R1,493,729.62 and R154,085.03, respectively.<sup>49</sup> Legal Aid

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<sup>42</sup> FA p 16 para 10.6; AA p 574 para 460.

<sup>43</sup> FA p 46 para 63.

<sup>44</sup> FA pp 46-7 para 63.

<sup>45</sup> FA p 52 para 63.

<sup>46</sup> FA p 16 para 10.7; AA p 575 para 461.

<sup>47</sup> FA p 17 para 10.8; AA p 575 para 462.

<sup>48</sup> FA pp 57-8 para 75.

<sup>49</sup> FA p 59 para 78.

SA issued a writ of execution for the taxed costs of the Labour Court matter but received a *nulla bona return* of service from the sheriff.<sup>50</sup>

- 31 On **11 November 2015**, the SAHRC advised Brink that they would not proceed with alternative dispute resolution in his matter and closed their file.<sup>51</sup> In response, Brink wrote the SAHRC a scolding letter.<sup>52</sup>
- 32 On **11 February 2016**, Legal Aid SA sought to settle the matter in the hope of somehow stopping Brink's constant requests for records, which diverted the time and resources of its officials away from their core functions.<sup>53</sup>
- 33 The purpose of Brink's numerous requests is to enable Brink to impermissibly re-litigate his labour claim. He states the reason for the requests in his answering affidavit before this Court as "*to present them to the LC in an application to re-open [Brink's] claim to [his] appointment on the strength of the material evidence obtained from LASA via PAIA requested made after the trial*".<sup>54</sup>
- 34 On **20 May 2016**, Brink addressed another letter to Legal Aid SA's CEO. The letter accused Legal Aid SA's CEO of filing a "*dishonestly false annual report*"; suppressing records disclosing insurance fraud; and inserting false information into the report, and makes belittling and derogatory remarks towards her.<sup>55</sup>
- 35 On **28 July 2016**, despite settling the PAIA applications in the Eshowe Magistrates' Court with Legal Aid SA, Brink set down the applications in that Court claiming that Legal Aid SA did not perform in terms of the settlement and seeking to

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<sup>50</sup> FA p 59 para 79.

<sup>51</sup> FA p 60 para 84.

<sup>52</sup> FA p 61 para 85.

<sup>53</sup> FA pp 61-2 paras 87-9.

<sup>54</sup> AA p 481 para 165.

<sup>55</sup> FA pp 65- para 98.

subpoena various senior Legal Aid SA officials.<sup>56</sup> That application is currently postponed pending the outcome of this application.<sup>57</sup>

36 On **1 August 2016**, Brink wrote a letter accusing Mlambo JP of illegal involvement in the recruitment process and insinuated that he had favoured a long-time friend instead.<sup>58</sup>

37 On **8 September 2016**, Brink sent another PAIA request for 30 specific records relating to his non-appointment as a Senior Litigator.<sup>59</sup>

38 Subsequent to postponing the Eshowe Magistrates' Court application and knowing that Legal Aid SA intended to bring this application, Brink launched an application to compel in this Court under case number 1118/2016.<sup>60</sup>

39 Brink has indicated unequivocally that he wishes to re-litigate his labour claim, despite the claim having already been dismissed by both the Labour Court and the LAC and therefore being *res judicata*. In his answering affidavit, Brink states that he seeks "*the substitution of the [LAC's] dismissal order with an order for absolution from the instance, allowing [Brink] to return to court on fresh pleadings for an order reinstating [Brink] to the post, retroactive to 1 January 2010, the earliest date on which [Brink] said [he] was available to begin*".<sup>61</sup>

40 Brink incongruously adopts this stance despite stating that he is—

*"obviously not claiming any relief from this court, because [Brink's] perfectly aware that:*

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<sup>56</sup> FA p 68 para 101.

<sup>57</sup> FA p 70 para 106.

<sup>58</sup> FA p 71 para 108.

<sup>59</sup> FA p 70 para 107.

<sup>60</sup> FA p 17 para 10.10; AA p 576 para 466. Brink's application to compel has been consolidated with the present application. In view of Legal Aid SA bringing the present application, Legal Aid SA has not filed an answering affidavit in Brink's application to compel, but has filed a notice to oppose.

<sup>61</sup> AA p 462 para 92.

- (a) [Brink's] claim to [his] appointment has been finally determined against [him] by the LC (and rightly in the result, if not in the way to it); and
- (b) until such time as the dismissal of [Brink's] claim has been set aside, the dispute between [Brink] and LASA has been finally settled by a binding court judgment."<sup>62</sup>

- 41 Legal Aid SA has a Corporate Legal Division consisting of four legal practitioners and two candidate attorneys.<sup>63</sup> Its main function includes prosecuting litigation by and against Legal Aid SA, and to provide legal support to all business units of Legal Aid SA, including six regions, sixty four Justice Centres and sixty four Satellite Offices.<sup>64</sup> In 2015/16 the division handled eighty six litigation matters, reviewed 13 policies, provided 60 legal opinions and drafted 113 contracts.<sup>65</sup>
- 42 It is clear that the division has limited capacity, yet Brink's conduct forces Legal Aid SA to unnecessarily divert its already constrained resources to attend to vexatious litigation, compromising the delivery of legal services as mandated to Legal Aid SA.<sup>66</sup>

## THE LAW

### *Vexatious Proceedings Act*

- 43 Legal Aid SA asks this Court to order that Brink is interdicted from instituting any further legal proceedings against Legal Aid SA, its officials or Board Members relating to his non-appointment as a senior litigator with the applicant without judicial leave, *alternatively* that he may only do so after providing adequate security for costs.

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<sup>62</sup> AA p 483 paras 169-70.

<sup>63</sup> FA p 73 para 110.

<sup>64</sup> FA p 73 para 111.

<sup>65</sup> FA p 73 para 112.

<sup>66</sup> FA pp 73-4 paras 113-4.

44 Section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 (“the Act”) provides that this Court may, if it is satisfied that a person “*has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court*”, order that—

*“no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.”*

45 The Constitutional Court has confirmed that the section is constitutionally valid, holding that its purpose is—

*“to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.”*<sup>67</sup>

46 The Constitutional Court has also held that restricting a vexatious litigant “*serves the interests of the administration of justice itself*” in that it “*renders scarce resources available for the resolution of real disputes*”.<sup>68</sup>

47 In consequence, when a person meets the requirements of the subsection “*the court is under a constitutional duty to protect bona fide litigants, the processes of the courts and the administration of justice against vexatious proceedings*”.<sup>69</sup>

48 To obtain relief under section 2(1)(b) an applicant must meet two requirements:

48.1 first, the respondent has “*persistently*” instituted legal proceeding; and

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<sup>67</sup> *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) para 15.

<sup>68</sup> *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC) para 58.

<sup>69</sup> *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) para 17.

48.2 secondly, such proceedings have been instituted "*without reasonable ground*".<sup>70</sup>

49 In *Cohen v Cohen*,<sup>71</sup> the Cape High Court declared the respondent to be a vexatious litigant in terms of section 2(1)(b). It did so on the basis that:

49.1 The respondent was regarded as having "*persistently*" instituted legal proceeding because he had instituted nine different processes against the applicant, five of which concerned the same subject matter. At no stage was there more than a five-month clear period that had elapsed without "*the threat of some court procedure hanging over [the applicant's] head*".<sup>72</sup>

49.2 It found the proceedings to be "*without reasonable ground*" as:

49.2.1 the respondent, with the exception of one or two instances, always found himself on the losing side. The Court accepted that even though unsuccessful litigation is not in itself vexatious litigation, "*the overall pattern becomes important where there is some history of litigation between the same parties*";<sup>73</sup> and

49.2.2 the manner in which the respondent conducted the litigation was untoward: while court proceedings were pending he would launch fresh applications in different courts and adopt contradictory versions in the different proceedings,<sup>74</sup> this cast doubts on the respondent's "*bona fides and the reasonableness of the litigation instituted by him*".<sup>75</sup>

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<sup>70</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 17.

<sup>71</sup> *Cohen v Cohen* 2003 (1) SA 103 (C).

<sup>72</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 18.

<sup>73</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) paras 19 and 24.

<sup>74</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 20.

<sup>75</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 22.

49.3 Noted further considerations supported declaring the respondent to be vexatious, including that:

49.3.1 "*numerous examples of obstructive behaviour and breaches by the respondent*" had taken place over the years;<sup>76</sup>

49.3.2 litigation had been used by the respondent as a scheme and stratagem that amounted to "*abuses of the process of the courts*";<sup>77</sup>

49.3.3 the respondent's attitude of impunity towards costs;<sup>78</sup>

49.3.4 the respondent's use to subpoenas and other judicial mechanisms to pester persons not directly involved in the litigation;<sup>79</sup> and

49.3.5 having regard to the history of the matter as a whole the applicant had "*repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation*".<sup>80</sup>

50 In *Absa Bank Limited v Dlamini*,<sup>81</sup> the Pretoria High Court declared the respondent to be a vexatious litigant in terms of section 2(1)(b). It did so on the basis that the respondent "*exhibited a contemptuous disregard of the court, its officials and its orders*" and re-instituted similar proceedings, including PAIA requests, only for these to be unsuccessful and "*all without any merit whatsoever*".<sup>82</sup> The respondent was "*clearly utilising the court, its processes and its officials in his vendetta against*

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<sup>76</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 25.

<sup>77</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 27.

<sup>78</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 28.

<sup>79</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 29.

<sup>80</sup> *Cohen v Cohen* 2003 (1) SA 103 (C) para 30.

<sup>81</sup> *Absa Bank Limited v Dlamini* 2008 (2) SA 262 (T).

<sup>82</sup> *Absa Bank Limited v Dlamini* 2008 (2) SA 262 (T) para 121.

*the applicant*".<sup>83</sup> As was the case in *Cohen*, the respondent adopted an attitude of impunity towards costs.<sup>84</sup>

### ***Vexatious Proceedings***

51 Legal Aid SA asks this Court to declare that Brink's conduct towards Legal Aid SA, its officials and board members is vexatious and frivolous.

52 In *Lawyers for Human Rights*,<sup>85</sup> the Constitutional Court recently set out when proceedings will be "vexatious":

52.1 Litigation will be "vexatious" where it:<sup>86</sup>

52.1.1 is "*frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant*";

52.1.2 concerns a complaint "*with no serious purpose or value*";

52.1.3 "*is initiated without probable cause*" by a litigant "*who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent*"; or

52.1.4 "*is not likely to lead to any procedural result*".

52.2 An application will be "*manifestly inappropriate*" where it is "*so unreasonable or out of line that it constitutes an abuse of the process of court*". An abuse of process:<sup>87</sup>

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<sup>83</sup> *Absa Bank Limited v Dlamini* 2008 (2) SA 262 (T) para 126.

<sup>84</sup> *Absa Bank Limited v Dlamini* 2008 (2) SA 262 (T) para 127.

<sup>85</sup> *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC).

<sup>86</sup> *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para 19.

<sup>87</sup> *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para 20.

52.2.1 “takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”;

52.2.2 arises when “machinery used for the better administration of justice” is “use[d] for [an] ulterior purpose”;

52.2.3 is ultimately determined by the circumstances of each case.

52.3 “Ultimately, the inquiry on the appropriateness of the proceedings requires a close and careful examination of all the circumstances.”<sup>88</sup>

52.4 The Court concluded by noting that: “The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed.”<sup>89</sup>

53 Vexatious proceedings have also been identified as including:

53.1 “[P]roceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; ‘abuse’ connotes a misuse, an improper use, a use mala fide, a use for an ulterior motive.”<sup>90</sup>

53.2 Where, like the present matter, the costs of earlier proceedings between substantially the same parties and in respect of substantially the same issues have not been paid before fresh proceedings have been instituted, such conduct is considered as *prima facie* vexatious.<sup>91</sup>

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<sup>88</sup> *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para 21.

<sup>89</sup> *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) para 17.

<sup>90</sup> *Fisheries Development Corporation of SA Ltd v Jorgensen* 1979 (3) SA 1331 (W) 1339E-F.

<sup>91</sup> *Heugh v Gubb* 1980 (1) SA 699 (C) 702-3; *Western Cape Housing Board v Parker* 2005 (1) SA 462 (C).

### *Applying the Principles*

54 In summary, the following principles apply in determining Legal Aid SA's complaint under section 2(1)(b) of the Act:

54.1 Section 2(1)(b) of the Act empowers this Court to declare Brink a vexatious litigant in relation to *future* proceedings.

54.2 Declaring Brink as a vexatious litigant serves two interests. It protects Legal Aid SA which has repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and serves the public interest that the functioning of the courts and the administration of justice should proceed unimpeded by the clog of groundless proceedings.

54.3 This Court must first determine whether Brink has "*persistently*" instituted legal proceedings. It will consider:

54.3.1 the number of proceedings that Brink instituted, including extra-judicial legal processes;

54.3.2 the period of time over which these proceedings were instituted;

54.3.3 the degree of similarity between the proceedings;

54.3.4 whether Legal Aid SA constantly remained under threat of proceedings;

54.3.5 whether the proceedings sought to re-litigate issues that had already been judicially determined.

54.4 Thereafter, this Court must determine whether such proceedings are "*without reasonable ground*". It will consider whether:

54.4.1 the overall pattern of previous litigation between Legal Aid SA and Brink shows Brink to be consistently unsuccessful;

- 54.4.2 Brink conducted previous litigation in an untoward manner, including instituting proceedings while related proceedings were pending and adopting contradictory versions;
- 54.4.3 Brink has demonstrated numerous examples of obstructive behaviour;
- 54.4.4 Brink abused court process as a scheme and stratagem;
- 54.4.5 Brink disregarded adverse costs orders with impunity;
- 54.4.6 Brink used judicial mechanisms like subpoenas to draw in persons not directly involved in the litigation;
- 54.4.7 the Court, its processes and officials are merely being used to effect a vendetta.

55 The following principles apply in declaring Brink's conduct as vexatious and frivolous. Proceedings brought by Brink will be regarded as:

- 55.1 vexatious, if they are instituted, and continued, without sufficient ground, and in bad faith solely to annoy or embarrass Legal Aid SA. Where the costs of earlier proceedings between substantially the same parties and in respect of substantially the same issues have not been paid before fresh proceedings have been instituted, such conduct is considered as *prima facie* vexatious;
- 55.2 frivolous, if they concern a complaint with no serious purpose or value;
- 55.3 an abuse of process, if, in the circumstances, they amount to a 'mis-use', an improper use, a *mala fide* use, or a use for an ulterior purpose of the machinery for the administration of justice.

56 In our submission, this case falls squarely within ambit of these principles. Brink's cumulative conduct may be summarised as follows, he:

56.1 unsuccessfully challenged Legal Aid SA's decision not to appoint him in a Senior Litigator position in the Labour Court and the LAC;

56.2 is persistently flooding Legal Aid SA with PAIA requests that: are substantially similar in scope; and related to the dispute around his appointment to the Senior Litigator position while the subject matter was either still before the Labour Court and/or LAC and/or had been finally determined by the Labour Court and the LAC, such that his behaviour amounts to an abuse of the provisions of PAIA;

56.3 launched five applications under PAIA in the Eshowe Magistrates' Court to compel Legal Aid SA to provide records, which applications were settled, but which Brink now seeks to resuscitate by claiming that Legal Aid SA did not comply with the settlement agreement and seeking to subpoena various officials of Legal Aid SA;

56.4 consistently used sarcastic, demeaning, defamatory and degrading language in his court papers and correspondence towards Legal Aid SA's officials and even sitting Judges, and disseminates these documents widely including through a website he created specifically to report on his battles with Legal Aid SA;

56.5 continually threatens to lay criminal charges of perjury against Legal Aid SA's executive, but fails to formally lay a charge with the SAPS to enable them to investigate these charges in line with their mandate;

56.6 continually threatens to lay complaints against Legal Aid SA and its officials with the Public Protector, the Auditor General, Judicial Services Commission, the Law Society of the Northern Provinces, and General Council of the Bar, without actually laying such complaints to enable Legal Aid SA and its officials to actually formally respond and deal with them;

- 56.7 where Brink has laid complaints, as is the case with Mlambo JP and Wagley JP, these complaints are spurious and defamatory;
- 56.8 is impecunious and unable to satisfy two cost orders amounting to about R1.6 million but seems intent to proceed with further litigation against Legal Aid SA. Brink himself states he is “*only ‘factually insolvent’ to the extent that [he] can’t pay LASA’s legal bills, the big one obtained by fraud on the court*”;<sup>92</sup>
- 56.9 litigates in a heavy-handed manner and his pleadings and related PAIA requests are replete with defamatory language against prominent individuals and institutions;
- 56.10 uses the Court, its processes and officials merely to effect his vendetta against Legal Aid SA;
- 56.11 under the guise and in an abuse of the remedies afforded by PAIA, attempts to re-open and re-try his Labour Court action in the Labour Court or any other court and/or the “*court of public opinion*” when there should be finality in litigation over the same subject matter; and
- 56.12 is forcing Legal Aid SA to divert much needed resources to attend to Brink’s vexatious litigation, correspondence and PAIA requests, which compromise Legal Aid SA’s ability to discharge its statutory mandate.
- 57 Indeed, Brink’s conduct echoes the conduct of the applicant in *De Wet v Law Society of the Northern Provinces*,<sup>93</sup> whom the Pretoria High Court declared to be a vexatious litigant in terms of the Act. In granting its order, the High Court summarized the applicant’s conduct as follows:

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<sup>92</sup> AA p 677 para 894.

<sup>93</sup> *De Wet v Law Society of the Northern Provinces, In Re: Law Society of the Northern Provinces v De Wet* [2014] ZAGPPHC 799.

*"The Law Society applied that Mrs. De Wet be declared a vexatious litigant. The reason for this is that Mrs. De Wet brings interlocutory applications always of a tremendous voluminous nature. This necessitates the Law Society to instruct attorneys and counsel incurring legal costs which Mrs. De Wet cannot pay. Mrs. De Wet on the other hand has stated in open court that costs orders can be made against her as she has absolutely nothing."<sup>94</sup>*

58 In our submission, Brink's conduct not only mirrors those litigants that were declared to be vexatious in the cases we have referred to, but exceeds it. This is epitomised in Brink's answering affidavit in this application, which we have replicated quotations from in these heads. Brink's conduct should be met with this Court's reproach by granting relief under the Act and its inherent jurisdiction.

59 If this Court accepts our reasoning that Brink is a vexatious litigant that has conducted these proceedings frivolously and vexatiously, and that his PAIA requests merely seek to impermissibly re-litigate his labour claim, then, in our submission, this Court must declare that Legal Aid SA is excused from having to entertain Brink's various requests.

60 This is because section 45 of PAIA provides that:

*"The information officer of a public body may refuse a request for access to a record of the body if -*

*(a) the request is manifestly frivolous or vexatious; or*

*(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."*

61 For the reasons we have advanced, Brink clearly falls into both categories. He has requested a total of 249 records from Legal Aid SA relating to the Senior Litigator position and sought to compel their production in the Eshowe Magistrates' Court. Legal Aid SA's Corporate Legal Division already has limited capacity as is, which Brink's requests and subsequent litigation place even greater strain upon. It is

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<sup>94</sup> *De Wet v Law Society of the Northern Provinces, In Re: Law Society of the Northern Provinces v De Wet* [2014] ZAGPPHC 799 para 15.

appropriate for this Court to declare that Legal Aid SA is excused from having to respond to the requests, as contemplated by section 45 of PAIA.

#### PAYMENT OF COSTS ORDERS

62 At the time of this application Brink has already launched a number of proceedings against Legal Aid. These proceedings are currently pending.

63 Legal Aid asks this Court to stay these pending proceedings until Brink has paid all previous cost orders granted against him, alternatively, upon payment of security for Legal Aid's costs.

64 Section 173 of the Constitution provides that:

*"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process..."*

65 This power is only conferred upon Superior Courts and does not extend to lower courts. By contrast, lower courts are regarded as 'creatures of statute' because their powers are confined to their empowering legislation. The powers of magistrates courts are defined by the Magistrates Court Act 32 of 1994 ("MCA").

66 The Constitutional Court has described the reason for this Court's inherent jurisdiction as follows:

*"The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome."<sup>95</sup>*

67 One way that this Court's inherent jurisdiction empowers it "to stop or prevent a vexatious action as being an abuse of the process of the Court" "is by ordering the vexatious litigant to give security for costs of the other side".<sup>96</sup> A "Court has an

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<sup>95</sup> *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC) para 42.

<sup>96</sup> *Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 15.

*inherent power to order a litigant to furnish security for the costs of its opponents, if it is satisfied that the litigation is vexatious*".<sup>97</sup>

68 The reasons that a court may do so is because -

*"the question of security is one of practice and not of substantial law.... Courts have an inherent discretion to grant or refuse an order of security and in coming to such a decision will consider all the relevant circumstances of a particular case."*<sup>98</sup>

69 A court will only order security if:

69.1 it is "*satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse*";<sup>99</sup> and

69.2 the party against whom security is sought would be unable to satisfy an adverse costs order.<sup>100</sup>

70 We submit that both of these requirements have indeed been met:

70.1 The five PAIA applications are all:

70.1.1 before the same court, the Eshowe Magistrates' Court;

70.1.2 substantially similar in scope; and

70.1.3 related to Brink's non-appointment to the Senior Litigator position, which has been finally determined.

70.2 Notwithstanding that the five PAIA applications were settled *inter partes*, Brink persists with prosecuting them. In fact, Brink set down the

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<sup>97</sup> *Nielson v Rautenbach NO 2014 (3) SA 17 (GNP) para 13.*

<sup>98</sup> *Nielson v Rautenbach NO 2014 (3) SA 17 (GNP) para 16.*

<sup>99</sup> *Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) para 16.*

<sup>100</sup> *Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) para 10.*

applications in the Eshowe Magistrates' Court in which he seeks to subpoena 13 witnesses to testify, the majority being senior managers of Legal Aid SA based at its national office.

70.3 Brink's pending application to compel in this Court was brought subsequent to postponing the proceedings in the Eshowe Magistrates' Court and with full knowledge that Legal Aid SA intended to bring the present application.

70.4 Brink's cumulative conduct to date is holistically vexatious and frivolous.

70.5 Brink is currently unemployed<sup>101</sup> and appears to be factually insolvent.<sup>102</sup>

70.6 Brink has yet to pay Legal Aid SA's taxed costs in the Labour Court matter and the urgent application to the tune of R1.6 million.

70.7 When Legal Aid SA issued a writ of execution against Brink to recover these costs it was met with a *nulla bona return* from the sheriff.

70.8 In fact, Brink brought an urgent application seeking to interdict the taxing master from taxing Legal Aid SA's costs, which application was dismissed with costs on an attorney client scale.

70.9 Legal Aid SA serves a public function. Brink's conduct has forced Legal Aid SA to unnecessarily divert its already constrained resources to attend to vexatious litigation, which compromises its ability to discharge its much needed public function.

## **STRIKING OUT**

71 Legal Aid SA will, at the hearing of this application, apply for Brink's answering affidavit to be struck out, alternatively that certain portions of the affidavit be struck out.

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<sup>101</sup> FA p 9 para 4.1.

<sup>102</sup> FA p 70 para 104.7.

72 Rule 6(15) permits this Court to strike out “*from any affidavit any matter which is scandalous, vexatious or irrelevant*” provided that “*it is satisfied that the applicant will be prejudiced if the application is not granted*”.

73 Two requirements must therefore be satisfied for a striking out application to succeed:

73.1 First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; and

73.2 Secondly, the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.<sup>103</sup>

74 The terms “*scandalous, vexatious or irrelevant*” have been defined in the context of Rule 6(15) as follows:

*“(a) Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.*

*“(b) Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.*

*“(c) Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.”<sup>104</sup>*

75 Brink’s answering affidavit is replete with unwarranted abusive personal attacks and defamatory material against various Legal Aid SA officials<sup>105</sup> and various members of the judiciary and constitutional institutions.<sup>106</sup>

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<sup>103</sup> *Beinash v Wixley* 1997 (3) SA 721 (SCA) 733B.

<sup>104</sup> *Lawyers for Human Rights v Minister of Home Affairs* 2016 (4) SA 207 (GP) para 49; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) 321C-E; *Vaats v Law Society of Namibia* 1991 (3) SA 563 (Nm) 566C-E.

<sup>105</sup> Examples of attacks against Legal Aid SA officials: AA p 429 para 5-7; p 456 paras 74-5; p 469 para 114; p 484 paras 172-4; pp 482-99 paras 177-228; p 525 para 304; p 530 para 329; p 536 para 351; p 552 para 410; pp 643-4 paras 728-9; p 661 para 800; p 663 para 812.

- 76 Brink attacks the integrity of the Judge President of the Gauteng Division throughout his answering affidavit including its annexures.<sup>107</sup>
- 77 These personal attacks do not contribute to the resolution of the dispute between the parties. Brink has characteristically inserted them purely with the intent to harass, annoy and cloud the real issues.
- 78 The answering affidavit is replete with irrelevant material, especially insofar as it relates to Brink's attempt to re-argue his labour claim.<sup>108</sup> This is legally impermissible as that claim has already been dismissed by both the Labour Court and the LAC and is therefore *res judicata*.
- 79 Brink's answering affidavit is similarly replete with inadmissible hearsay evidence.<sup>109</sup> Hearsay statements in affidavits may be struck out irrespective of whether or not there is prejudice to the opposite party as contemplated in Rule 6(15).<sup>110</sup>
- 80 The few allegations remaining in Brink's answering affidavit are so intertwined with those that have been subject to discussion that they are also prejudicial and fall to be struck out.

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<sup>106</sup> Examples of attacks against the Presiding Judge in the Labour Court: AA p 451 para 63(c); p 465 para 104; p 640 paras 713-5; pp 647-9 paras 743-54; p 656 paras 785-6.

Examples of attacks on the LAC: AA pp 456-8; paras 74-9; p 465 para 104; p 489 para 187; p 586 para 512; pp 212-3 paras 704-5; p 675 para 791; pp 663-4 paras 818-24; p 686 para 938.

Examples of attacks against the Judicial Services Commission: AA p 451 para 63(b); pp 473-4 para 133; p 652 paras 768-9.

Attacks against the Portfolio Committee on Justice: AA p 489 para 186 read with p 617 para 649.

Attacks on the SAHRC: AA p 618 para 654.

<sup>107</sup> Examples of attacks on Mlambo JP: AA p 429 para 5; p 438 para 29; pp 487-9 paras 180-3, 186, 188; p 561 para 436; p 570-1 paras 443-4; p 571 para 447; pp 584-5 paras 503-6; pp 596-7 paras 550-5; pp 598-9 paras 561-3; p 606 para 604; p 607 para 608; p 616 para 646; p 641 para 717; p 657 para 792.

<sup>108</sup> Examples of Brink's attempts to re-argue his labour claim: AA pp 500-9 para 232-43; pp 512-23 paras 257-95; pp 534-48 paras 342-97; p 553 paras 413-7; pp 558-60 paras 428-34; p 562-70 paras 439-40; pp 648-50 paras 752-6; pp 658-60 paras 797-9, 801-3.

<sup>109</sup> Examples of hearsay evidence: AA pp 502-3 paras 238 and 241; p 511 para 254; p 537 para 354; p 590 para 528; p 592 para 534; p 639 para 711; pp 652-4 paras 768-70 and 775-6; p 661 para 808; p 666 para 841; p 667 para 843.

<sup>110</sup> *Cultura 2000 v Government of the Republic of Namibia* 1993 (2) SA 12 (Nm) 27H.

- 81 Legal Aid SA is prejudiced by these scandalous, vexatious, irrelevant and hearsay allegations in that:
- 81.1 Brink's answering affidavit is worded in such an abusive and defamatory manner that it serves no other purpose but to harass and annoy Legal Aid SA, its Board, its officials and all other parties affected thereby;
  - 81.2 these allegations rendered the answering affidavit unnecessarily prolix;
  - 81.3 the answering affidavit does not in any way contribute to the determination of the issues between the parties;
  - 81.4 the answering affidavit has the potential to cause irreparable harm to the integrity and reputation of individuals and institutions, who are not parties to this application; and
  - 81.5 considerable time and resources would need to be expended to answer all of the allegations.
- 82 We submit that if Brink's affidavit were to be accepted, this Court would in effect condone his high-handed and, frankly, malicious manner of litigating. In the premises, we request that the entire answering affidavit should be struck out *alternatively* that those paragraphs identified in Annexure "RA1" to the replying affidavit and those identified in the footnotes above, insofar as they are not duplicated, should be struck out for the reasons advanced.
- 83 On 14 September 2017, Brink filed a supplementary affidavit. The purpose of Brink's supplementary affidavit was to "*report five material developments*" that had purportedly occurred since Legal Aid SA had filed its replying affidavit on 31 March 2017.
- 84 It is well established that a party may not, as of right, file a further affidavit subsequent to a replying affidavit being filed.

84.1 A litigant seeking to file a further affidavit must apply to court in terms of Rule 6(5)(e), which provides that a court may permit the filing of a further affidavit.

84.2 The applicant must satisfy the Court that the further affidavit is where necessary for "*a proper adjudication*"<sup>111</sup> of a case "*upon the full facts*".<sup>112</sup>

85 Brink has not filed a substantive application in terms of Rule 6(5)(e) seeking this Court's permission to file his supplementary affidavit. As a result, no case has been made out that the facts contained therein are necessary for a proper adjudication of this case.

86 Without a substantive application before it, this Court can only speculate as to the relevance of the facts contained in Brink's supplementary affidavit. In our submission, the indubitable conclusion is that Brink did not make out case under Rule 6(5)(e) because there is no case for him to make.

87 In the premises, this Court should similarly strike out the content of the supplementary affidavit on the basis that it is wholly irrelevant to the present dispute and renders these papers unnecessarily prolix.


## CONCLUSION

88 For the reasons set out above we submit that Legal Aid SA has made out a proper case for the relief sought in the notice of motion.

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<sup>111</sup> *Dickson v SA General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) 628.

<sup>112</sup> *North Central Local Council and South Central Local Council v Roundabout Outdoot (Pty) Ltd* 2002 (2) SA 625 (D) 630.



AP

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06 October 2017

**APPLICANT'S LIST OF AUTHORITIES**

*Absa Bank Limited v Dlamini* 2008 (2) SA 262 (T) paras 121-7

*Boost Sports South Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) paras 10, 15, 16

*Beinash v Ernst & Young* 1999 (2) SA 116 (CC) paras 15, 17

*Beinash v Wixley* 1997 (3) SA 721 (SCA) 733B

*Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) 321C-E

*Brink v Legal Aid South Africa* (2015) 36 ILJ 1020 (LC) para 72

*Cohen v Cohen* 2003 (1) SA 103 (C) paras 17-30

*Cultura 2000 v Government of the Republic of Namibia* 1993 (2) SA 12 (Nm) 27H

*De Wet v Law Society of the Northern Provinces, In Re: Law Society of the Northern Provinces v De Wet* [2014] ZAGPPHC 799 para 15

*Dickson v SA General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) 628

*Fisheries Development Corporation of SA Ltd v Jorgensen* 1979 (3) SA 1331 (W) 1339E-F

*Heugh v Gubb* 1980 (1) SA 699 (C) 702-3

*Lawyers for Human Rights v Minister of Home Affairs* 2016 (4) SA 207 (GP) para 49

*Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) paras 19-21

*Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC) para 42

*Nielson v Rautenbach NO* 2014 (3) SA 17 (GNP) paras 13, 16

*North Central Local Council and South Central Local Council v Roundabout Outdoot (Pty) Ltd* 2002 (2) SA 625 (D) 630

*Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC) para 58

*Vaats v Law Society of Namibia* 1991 (3) SA 563 (Nm) 566C-E

*Western Cape Housing Board v Parker* 2005 (1) SA 462 (C)