IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 11187/2016P

In the matter between:

ANTHONY BRINK Applicant

and

THEMBILE MTATI N.O.
DEPUTY INFORMATION OFFICER
LEGAL AID SOUTH AFRICA Respondent

AND

Case No: 12124/2016P

In the matter between:

LEGAL AID SOUTH AFRICA Applicant

and

ANTHONY ROBIN BRINK Respondent

REASONS FOR ORDERS MADE

Vahed J:

[1] The two captioned matters were enrolled and argued before me on 27 October 2017. At the conclusion of the argument I made the following Orders:

a. In Case No 11187/2016P:

"1. The matter be and is hereby adjourned *sine die*.

2. The Respondent is afforded a period of 30 days from the date of this order within which to deliver his answering affidavit together with any further applications or papers he might be advised to deliver in the application.

3. The question of costs is reserved for determination by the Court finally determining the application."

b. In Case No 12124/2016P:

"1. The application is dismissed.

2. There shall be no order as to costs."

[2] I have been requested to furnish reasons for those Orders which I now proceed to do.

[3] A fairly detailed background is necessary.

[4] Anthony Brink, the applicant in Case No 11187/2016P, and Anthony Robin Brink, the respondent in Case No 12124/2016P is the same person and will hereafter be referred to as "Brink". For convenience I will refer to the other party in both matters as "LASA" although the institution, Legal Aid South Africa, is different from its deputy information officer. For all practical intents it is LASA which is the true litigant in both applications.

[5] At the opposed hearing Brink represented himself and appeared personally while LASA was represented by Mr Bokaba SC who appeared with Mr Carelse. Both sides have furnished me with expansive heads of argument which I

have found very helpful. I am grateful to them and borrow freely from those heads of argument, particularly when setting out the detailed factual background.

[6] Brink is a trained lawyer and an advocate. In times past, prior to the events relevant to the issues at hand, he practiced as such at the Bar.

[7] In August 2009, LASA, through divers advertisements, invited legal practitioners to apply to fill vacant "Senior Litigator" posts at its Pietermaritzburg and Durban Justice Centres.

[8] Brink applied and he and other candidates were interviewed and recommended by a selection panel to undergo a second round of interviews. Those interviews were not held and LASA terminated the process and did not fill the posts. It alleges that this was due to budgetary constraints. It also alleges that Brink was subsequently informed of the reasons why the positions were not filled.

[9] It is something of an understatement to record that Brink was not satisfied with his treatment and the responses he received from LASA from time to time.

[10] Between August 2010 and March 2011 Brink made numerous requests of LASA under the provisions of the Promotion of Access to Information Act, 2000 ("PAIA"). LASA suggests that there were as many as 69 records requested relating to the position of "Senior Litigator" but it is unnecessary for me to make any specific finding thereon. It suffices to say that there were many.

[11] On 18 October 2010 LASA's chief executive officer wrote to Brink refusing his requests in terms of PAIA and it is suggested that as part of that refusal Brink was provided with a detailed explanation for the recruitment process being discontinued.

[12] Between September 2010 and February 2011 Brink addressed many letters to divers persons including senior executives within LASA, the Chairman of the Board of LASA (Mlambo JP), members of the Board, the South African Human Rights Commission ("SAHRC"), both the Minister and Deputy Minister of Justice and Constitutional Development (as they were then designated). The numerous letters were prolix and sometimes repetitive and often extremely strongly worded in their characterisation of the many individuals who interacted with Brink over the relevant period. LASA contends that many were defamatory of those persons and were also frequently referred to or addressed in derogatory language.

[13] During July 2011 Brink commenced action in the Labour Court against LASA. He challenged his non-appointment saying that he had been discriminated against on the grounds of conscience, belief or political opinion. All of this arose, so contended Brink, out of his well-known held views as an "Aids denialist". LASA is of the view that during the course of the proceedings in the Labour Court Brink imputed improper conduct on the part of many connected with LASA, particularly, Mlambo JP and LASA's chief executive officer.

[14] After evidence had been led during the Labour Court proceedings Brink made numerous further requests of LASA under PAIA.

[15] During April 2014 Brink launched 3 separate applications (in terms of PAIA) out of the Eshowe Magistrates' Court against LASA seeking to compel the production of records.

[16] In September 2014 the Labour Court dismissed Brink's action and awarded costs against him.

[17] During November 2014 Brink delivered to LASA further requests for records under PAIA.

[18] In December 2014 the Labour Court dismissed Brink's application for leave to appeal and in March 2015 the Labour Appeal Court dismissed his petition for leave to appeal.

[19] In March 2015 Brink made a further PAIA request of LASA.

[20] By November 2015 Brink had instituted (under PAIA) a further two applications to compel out of the Eshowe Magistrates' Court. That brought to 5 the total number of applications to compel production of records pending in the Eshowe Magistrates' Court.

[21] In October 2015 Brink instituted urgent interdict proceedings in this Court, seeking to prevent LASA from proceeding to taxation with the bill of costs due in the Labour Court proceedings. The urgent application was dismissed on 7 October 2015 with a punitive costs award against Brink. In dismissing the

application D Pillay J, who heard the application, recorded that it was "...dismissed for want of urgency...".

[22] LASA alleges that the costs due to it by Brink in the Labour Court proceedings are in the amount of R1 493 729.62 and in the amount of R154 085.03 in the interdict proceedings.

[23] Attempts at execution for the costs in the Labour Court matter have produced a sheriff's return of *nulla bona*.

[24] In seeking the intervention of the SAHRC Brink also sought their assistance with managing an alternative dispute resolution process between him and LASA. On 11 November 2015 SAHRC advised Brink that they were not prepared to proceed with that process.

[25] A pre-trial conference in the 5 applications in the Eshowe Magistrates' Court was scheduled for 11 February 2016. At that conference the 5 applications were settled and the written settlement agreement was made an Order of Court. The terms of this settlement are pertinent to the resolution of the present disputes and I therefore set out its terms in full:

> "1. The applications are to be adjourned sine die with no order as to costs.
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> 2. By 12 February 2016, the applicant will email CSE Mtati a consolidated list of all requested documents that are the subject of the above applications. The consolidated list is to comprise (i) an assembly of the several annexures to the PAIA requests in question,

extracted from the applicant's Form A PAIA requests, and (ii) the applicant's amendments to certain of his requests made by letter; and these several documents are to be assembled into a single document (the applicant's several lists will not be redrawn).

3. By 15 February 2016, CSE Mtati will furnish the applicant by email by (sic) with a copy of his written delegation as deputy information officer by LASA information officer Vidhu Vedalankar. In the event that such written delegation is not furnished as agreed, the obligation to perform under this agreement shall fall upon information officer Vedalankar.

4. By 15 April 2016, LASA Corporate Services Executive Thembile Mtati will deliver to the applicant all documents requested in his requests for such that are the subject of the above cases. In the event that any requested documents do not exist or cannot be found, Mtati will furnish the applicant with an affidavit in this regard made under section 23 of PAIA. The affidavit will contain all the detailed information prescribed by that section.

5. In the event that the respondents, through CSE Mtati, fail to deliver any requested document(s) and the applicant is not satisfied with Mtati's evidence on affidavit under section 23 that it/they does/do not exist or cannot be found, the applicant shall be entitled to apply to this court to compel the production of such document(s) within 180 days of the delivery of the said affidavit.

6. This agreement is made without any admission of wrongdoing by the respondents.

7. Upon delivery of the documents requested, and the section 23 affidavit, the applicant shall have one further opportunity to request records in regard to the Senior Litigator posts, and records his waiver of his rights to make further requests in relation to the said posts, and shall do so within 60 days.

8. Insofar as it relates to compliance with this agreement, the applicant undertakes not to engage the interventions of the following institutions including but not limited to the Minister of Justice and Correctional Services, the Portfolio Committee for the same department, the Public Protector and the SAHRC, but limit his recourse to an application directly to court as contemplated above.

9. Where the information belongs to a third party, the parties agree that CSE Mtati shall demonstrate to the applicant that he has sought consent from such third party and the said third party's reaction thereto."

[26] Mr Tembile Mtati ("Mtati"), LASA's Corporate Services Executive and Deputy Information Officer (who incidentally styled himself as LASA's attorney) represented LASA in concluding the settlement agreement and appended his signature thereto.

[27] On 12 February 2016 Brink provided his consolidated list.

[28] Mtati asserts that on 15 April 2016 he furnished all the records that he could find and that on the same day he deposed to an affidavit in compliance with s 23 of PAIA dealing with those records he could not find. He asserts further that on 12 May 2016 he deposed to a supplementary affidavit in compliance with s 23 of PAIA "...dealing with further records which [he] could not find or did not exist and which [he] inadvertently failed to deal with..." initially.

[29] There then followed an exchange of correspondence with Brink asserting that Mtati had not complied with the settlement agreement and Mtati contending otherwise.

[30] On 28 July 2016 Brink set down the 5 applications for hearing in the Eshowe Magistrates' Court, contending that he was entitled to do so on a fair reading of the settlement agreement generally and in terms of paragraph 5 thereof specifically. Those proceedings, in the interim, have been adjourned *sine die*, pending the final determination of the application in this Court under Case No 12124/2016P.

[31] On 1 August 2016 Brink lodged yet a further PAIA request.

[32] On 10 October 2016 Brink commenced the application in this Court under Case No 11187/2016P seeking to compel the delivery of the subject matter of that last request.

[33] On 28 October 2016 LASA commenced the application under Case No 12124/2016P seeking the following relief:

> "1. The respondent's conduct towards the applicant, its officials and board members, as set out in the founding affidavit, is declared as vexatious and frivolous,
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> 2. The applications instituted by the respondent:
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> 2.1 in the Magistrates' Court for Eshowe under case numbers 257/14 (against Bambiso NO), 258/14 (against Vedalankar NO), 259/14 (against Msweli NO), 1005/15 (against Nair NO) and 1432/15 (against Vedalankar NO), and
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> 2.2 in the Kwazulu-Natal High Court, Pietermaritzburg, against Mtati NO, under case number 11187/16
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> are stayed pending the respondent's payment of all previous costs orders granted against him in favour of the applicant, *alternatively*, payment of security for the legal costs of the respondents in the

above matters in a manner, amount and form as to be determined by the Registrar;

3. The respondent is interdicted from instituting any further legal proceedings against the applicant, its officials or Board Members, which directly or indirectly relate to his non-appointment to a senior litigator position with the applicant, in any High Court or lower court without the leave of a judge of such High Court or magistrate of such lower court, as the case might be, *alternatively* that he may only institute such legal proceedings after providing adequate security for costs, as determined by the registrar or clerk of the relevant Court;

4. The respondent is interdicted and restrained from requesting any further records from the applicant under the Promotion of Access to Information Act ("PAIA"), which directly or indirectly relate to his non-appointment to a senior litigator position with the applicant.

5. Declaring the issue relating to the respondent's non-appointment to the position of senior litigator with the applicant was fully and finally determined by the Labour Court under case number D529/11 and the Labour Appeal Court under case number DA21/14.

6. The applicant is excused from responding to any pending requests for records under PAIA which the respondent might have directed to them in the meantime;

7. The respondent is interdicted and restrained from in any way harassing and interfering with the duties and functions of the applicant, its officials and Board members by making frivolous requests for information or threats;

8. The respondent is interdicted and restrained from publishing, in whatever form, false and derogatory remarks and allegations against the applicant, its officials or Board members and any judicial officer;

9. Costs of suit,

10. Further and/or alternative relief."

[34] LASA contends in its heads of argument that the two applications have been consolidated. The Court files in each contain no such endorsement and I can find no Order to that effect. In advancing that contention LASA submits that its affidavits delivered in Case No 12124/2016P contain sufficient material for the present purposes of opposing the relief sought in case no 11187/2016P. Presumably also because success in Case No 12124/2016P sows the seeds of destruction and defeat into Case No 11187/2016P LASA contends that it need not deliver any answering affidavits therein.

[35] I shall assume that what LASA intended was that the two applications would be argued and heard together at the same hearing, which is what happened in any event.

[36] By the time the matters became ripe for hearing an interlocutory dispute developed with LASA moving for Brink's entire answering affidavit and additional supplementary affidavit in Case No 12124/2016P fell to be struck out, alternatively defined portions thereof fell be struck out, because it contended that it was prejudiced by the contents, suggesting that they were scandalous, vexatious, irrelevant and in part constituted hearsay. That was opposed by Brink.

[37] I propose dealing with Case No 12124/2016P first. The papers are voluminous:

a. LASA's notice of motion, founding affidavit and the annexures thereto extend from page 1 to page 423;

b. Brink's answering affidavit and the annexures thereto extend from page 424 to page 1381;

c. LASA's replying affidavit and the annexures extend from page 1382 to page 1434;

d. A further bundle of additional affidavits and annexures extend from page 1435 to page 1492;

e. LASA's application to strike out (which puts up a further copy of the replying affidavit and annexures as its founding papers) occupies another bundle extending to 56 pages;

f. A supplementary affidavit and further documents delivered by Brink extend to 317 pages.

g. All in all the documents in the Court file in Case No 12124/2016P extend to 1865 pages (and I observe that Brink's founding papers in Case No 11187/2016P extend to 169 pages).

h. I also pause to observe that working through that morass has not been easy. Brink did not indicate what portions of the record were

to be read and LASA's Practice Note was singularly unhelpful when it suggested that what I ought to read were "[t]he portions of the record referred to [in LASA's] heads of argument." .

[38] The principal thrust of LASA's argument is that the proceedings instituted by Brink in the five Magistrates' Court applications and the application in this Court under Case No 11187/2016P qualify as proceedings deserving of the censure envisaged in the Vexatious Proceedings Act, 1956. Section 2 of that Act provides as follows:

> "**2. Powers of court to impose restrictions on the institution of vexatious legal proceedings.**—(1) (*a*) If, on an application made by the State Attorney or any person acting under his written authority, the court is satisfied that any person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing the person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that 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.
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> (*b*) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that 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.

(*c*) An order under paragraph (*a*) or (*b*) may be issued for an indefinite period or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order so issued.

(2) Any proceedings under subsection (1) shall be deemed to be civil proceedings within the meaning of paragraph (*c*) of section three of the Appellate Division Further Jurisdiction Act, 1911 (Act No. 1 of 1911).

(3) The registrar of the court in which an order under subsection (1) is made, shall cause a copy thereof to be published as soon as possible in the *Gazette*.

(4) Any person against whom an order has been made under subsection (1) who institutes any legal proceedings against any person in any court or any inferior court without the leave of that court or a judge thereof or that inferior court, shall be guilty of contempt of court and be liable upon conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding six months."

[39] The Vexatious Proceedings Act only applies to future proceedings.

[40] In *Absa Bank Ltd v Dlamini* 2008 (2) SA 262 (T) it was treated thus by Rabie J:

"[23] The purpose of the Act is to put a stop to persistent and ungrounded institution of legal proceedings. The Act does so by allowing a court to screen a "person [who] has persistently and without any reasonable ground instituted legal proceedings in any court or inferior court" (s 2(1)*(a)*). The purpose of this screening mechanism is, in the words of Mokgoro J in the *Beinash* matter (*supra* at 122G-H),

> "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".

The provisions of the Act consequently complement the common law to prevent vexatious litigation and an abuse of process.

[24] An analysis of the Act and the aforesaid authorities (and the authorities mentioned therein) seems to enforce the view that: *(a)* the court has no inherent jurisdiction at common law to prevent the future institution of vexatious proceedings; and *(b)* the provisions of the Act only aim to protect a person or persons against the institution of future vexatious proceedings in any court or inferior court and do not relate to any proceedings already instituted. Consequently the Act does not afford protection against vexatious proceedings, or an abuse of process in respect of legal proceedings, which have already been instituted. The provisions of the Act consequently do not, *inter alia*, allow for vexatious proceedings which have already been instituted, to be stayed or struck out, nor to prevent or terminate legal processes which emanated or might emanate from such proceedings.

[25] The only protection for a litigant against a vexatious proceeding or proceedings, or an abuse of a process or processes concerning a legal proceeding or proceedings which had already been instituted, has to be derived from the common law. By a "process concerning a legal proceeding" I have in mind procedures such as, *inter alia*, those permitted by the Rules of Court to facilitate the conduct of all types of litigation, including all steps relating to the execution of a judgment, and all matters ancillary to the legal process, as well as the machinery devised to generally assist with the proper administration of justice."

[41] I did not understand Mr Bokaka, who relied on *Dlamini*, to contend that it was wrongly decided.

[42] I am in respectful agreement with Rabie J and additionally can find no reason to extend the effect of the Vexatious Proceedings Act so as to make it

applicable to pending proceedings. The Act clearly only applies to future proceedings. I will revert to this aspect.

[43] The next string in Mr Bokaba's bow urged me to find that in applying the Court's inherent jurisdiction I ought to stay the pending litigation, both in this Court and in the Eshowe Magistrates' Court. I must do this, so I was urged, both because the proceedings are vexatious and also, alternatively, because of the unpaid costs, I ought to stay the various proceedings until appropriate security has be found by Brink.

[44] Here again *Dlamini* is particularly instructive:

> [19] The Constitutional Court in *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC) (1999 (2) BCLR 125) [per] the honourable Mokgoro J found the aforesaid provision of the Act to be constitutional. In the course of her judgment Mokgoro J, paras 10 – 11 at 121C-G, referred to the judgment of *In re Anastassiades* 1955 (2) SA 220 (W), where the Honourable Ramsbottom J (as he then was) had occasion to deal with the conduct of an unrehabilitated insolvent, Anastassiades, who "harassed" parties by instituting a plethora of actions against them, most whereof simply had no prospect of success. After considering the matter and despite having been urged to grant an order restraining Anastassiades from such conduct, Ramsbottom J held, after consideration of the relevant authorities and in the absence of statutory power, that the South African courts do not possess the inherent power to impose such a general prohibition. The South African common law merely affords the court the inherent power to stop frivolous and vexatious proceedings, for they amount to an abuse of its process. See in this regard *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 518 where the Honourable Innes CJ added the following:
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> > "Now these orders were made, not under statutory authority, but under the inherent powers of the Courts. And I am satisfied that the same jurisdiction is inherent in our Courts. Where there has been repeated and persistent litigation between the same parties

> on the same cause of action, and in respect of the same subject matter, a defendant should not be driven to file repeated pleas of *res judicata*, or to make a succession of applications to stay proceedings where prior costs have not been paid. I think he is entitled to more effectual protection against long-continued unsuccessful onslaughts in respect of the same dispute. Such protection could only take the form of a general order curtailing in some respects the plaintiff's ordinary right of litigation in that matter. Such an order I think the Cape Provincial Division had the jurisdiction to make."

[20] Consequently, the inherent jurisdiction of South African courts only extend to the prevention of abuse of its own process without being concerned with the process of other courts; only protects the parties to the litigation with which the court is dealing and is not concerned with other parties who are not before it; and does not extend beyond the immediate requirements of the particular case before it.

. . .

[26] In *Cohen v Cohen and another* 2003 (1) SA 103 (C) the honourable Griesel J, with reference to the *Beinash* matter, held at para 14 at 108D-E that at common law the courts enjoyed an inherent power to strike out claims that were vexatious, holding that that meant claims that were "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant". The findings in the *Cohen* matter find application after such proceedings had been instituted.

[27] In *Bissett and others v Boland Bank Ltd and others* 1991 (4) SA 603 (D) the honourable Booysen J also found that the court has the inherent discretion to strike out or stay existing proceedings that are vexatious. In this regard the following was said at 608D–G:

> "The Court has an inherent power to strike out claims which are vexatious. (*Western Assurance Co v Caldwall's Trustee* 1918 AD 262 at 271; *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D.)

Vexatious in this context means 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. (*Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and others* 1979 (3) SA 1331 (W)).

This power to strike out is one which must be exercised with very great caution, and only in a clear case. The reason is that the courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action. (*Western Assurance Co* case *supra* at 273; *Fisheries Development* case *supra* at 1338G).

Whilst an action which is obviously unsustainable is vexatious, this must appear as a certainty and not merely on a preponderance of probability. (*Ravden v Beeten* 1935 CPD 269 at 276; *Burnham v Fakheer* 1938 NPD 63; *African Farms* case *supra* at 565D–E)."

[28] In *Western Assurance Co v Caldwall's Trustee* 1918 AD 262 at 271 the honourable Innes CJ stated the following:

"Every Court has an inherent right to prevent an abuse of its process in the form of frivolous or vexatious litigation. (*Reichel v Magrath*, 14 AC 665)."

[29] In *Beinash v Wixley* 1997 (3) SA 721 (SCA) ([1997] 2 All SA 241) the court did not concern itself with the provisions of the Act, as the issue to be decided related to legal proceedings which had already been instituted. In that matter the appellant caused a subpoena to be issued in the court *a quo* requiring the respondent to produce certain documents which were said to be relevant in a certain proceedings then pending between the appellant and certain other parties. The respondent was not cited as a party to those proceedings. The respondent applied for the subpoena to be set aside on the basis that it constituted an abuse of the process of the court.

[30] At 734F-G, the honourable Mahomed CJ stated that there could not be an all-encompassing definition of the concept of "abuse of process" but that it could be said in general terms "that an abuse of process takes place where

the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective".

[31] In regard to the inherent power of the court in this regard, the honourable Mahomed CJ said the following at 734D:

> "There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and another* 1927 AD 259 at 268:
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> > 'When . . . the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse.'
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> What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process 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. (*Standard Credit Corporation Ltd v Bester and others* 1987 (1) SA 812 (W) at 820A–B; Taitz *The Inherent Jurisdiction of the Supreme Court* (1985) at 16.) A subpoena *duces tecum* must have a legitimate purpose. (The unreported judgment of Marais J in the WLD *Wachsberger v Wachsberger* on 8 May 1990 in case No 8963/90 and the unreported judgment of Plewman J in the WLD on 6 October 1993 in the case of *Lincoln v Lappeman Diamond Cutting Works (Pty) Ltd* 17411/93.)
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> Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law. The

process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason the Court must be cautious in exercising its power to set aside a subpoena on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the subpoena in issue in any particular matter constitutes an abuse of the process, the Court will not hesitate to say so and to protect both the Court and the parties affected thereby from such abuse. (*Sher and others v Sadowitz* 1970 (1) SA 193 (C); *S v Matisonn* 1981 (3) SA 302 (A))"

[45] I am of the respectful view that, again, Rabie J is correct in his analysis and reasoning.

[46] Drawing on that it is quite plain that this Court's inherent jurisdiction extends only to matters of its own process. The inherent jurisdiction does not, and could never, extend to the power to control the process of other courts. Consequently, I have no power to stay the pending proceedings in the Eshowe Magistrates' Court.

[47] It is also quite plain that I am only empowered *in very exceptional circumstances* to close the doors on Brink. Can I say that Brink's litigation in this Court serves no real or serious purpose and serves *solely as an annoyance* to LASA?

[48] It is true that Brink employs very strong language at times. It is also true that he has held a very dim view of LASA's senior officials and executives and its Board members. He has expressed that view frequently, repeatedly and with very

liberal sprinklings of sometimes every adjective within his command of the language. True too is the fact that he, for a considerable period of time, has been a very painful thorn in LASA's side; causing them annoyance.

[49] But is that enough to silence him *now*? I think not.

[50] The five applications in the Eshowe Magistrates' Court will have to take their course there. There is nothing that I can do about that. If, when those matters come to fruition, and if the LASA can make out a case for security for costs and/or for matters or allegations to be struck out, LASA must do so. The merits or otherwise of their contentions will ultimately come to pass.

[51] Am I then at liberty to stay the single case pending in this Court (Case No 11187/2016P), labelling it vexatious by drawing parallels with what Brink has done in the Labour Court and the Eshowe Magistrates' Court. To so do I must find that Brink's purpose is none other than to cause offence and annoyance, that he has no cause to pursue, and that he brings the administration of justice into disrepute.

[52] Brink has made it quite plain that he seeks access to the many named records because he contemplates applying to the Labour Court to rescind the judgment granted against him and to reopen the case because he genuinely believes that ultimately the documents will demonstrate that the Labour Court judgment was grounded on perjured evidence and perhaps also on fraud. Now, Brink may be completely misguided in that endeavour. I cannot make those

determinations now. It may well be that in the fullness of time a Court may well be entitled to muzzle Brink, but in my view, that time has not yet arrived.

[53] In any event, I believe that the parties (Brink and LASA) have ring-fenced matters such that it may be argued by LASA in some future proceedings that Brink may institute that the settlement agreement struck in the Eshowe Magistrates' Court has firmly placed a cap on all future PAIA requests and future litigation arising out of such requests.

[54] I say so because on a fair reading of that settlement agreement:

a. LASA placed a low subjective threshold on the matter of Brink pursuing his remedies in the Eshowe Magistrates' Court. All he had to do was contend that he was not *satisfied.* Paragraph 5 of the settlement agreement is that clear.

b. LASA permitted Brink one more PAIA request. He has waived his right to make further requests. Again, paragraph 7 of the settlement agreement is clear. To my mind it goes without saying that that one further PAIA request was permitted, so too it must have been in the contemplation of the parties that that request could quite possibly generate further litigation. That much too is contemplated by paragraph 8 of the settlement agreement. That further litigation is plainly the pending matter in this Court.

[55] Thus the parties, to my mind, designed their own solution.

[56] Mtati says that the "...major consideration for [LASA] at the time was to somehow stop the constant requests for records received from Brink, as it was diverting the time and resources of its officials away from their core functions." He says also that "... [he] therefore, in hindsight and maybe being overly optimistic, decided that it [was] best to settle the matter on the basis [they] did.".

[57] Everything employed by LASA and called to aid in support of the relief it seeks was known to it at the time the settlement agreement was concluded. Nothing new (save for the very steps contemplated or permitted by the settlement agreement) has occurred. Yet LASA advances no reasons why it is entitled to avoid the settlement agreement and the very course of conduct it was party to designing.

[58] For that reason too I am not inclined to consider the request to strike out. Given the range and extent of the settlement agreement it may well be contended that the "vexatious proceedings" application ought not to have been brought in the first place.

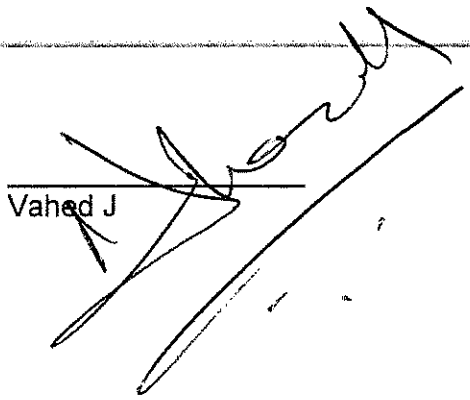
[59] I am accordingly of the view that there is absolutely no need for any "muzzling order" at this stage. What is unfolding is exactly what the parties agreed to, they also appear to have agreed that no additional litigation beyond what is presently being pursued will be undertaken.

[60] As with those matters unfolding in the Eshowe Magistrates' Court, when Case No 11187/2016P comes to be dealt with in this Court, and if the LASA can make out a case for security for costs and/or for matters or allegations to be struck out, LASA must do so. The merits or otherwise of their contentions will ultimately come to pass.

[61] Finally, a word about costs. Obviously, Case No 11187/2016P is an ongoing matter and the costs there will ultimately be determined by the Court finally determining that matter. It is perhaps advisable that I indicate now that, for all practical purposes, the entire hearing on 27 October 2017 was devoted to resolving Case No 12124/2016P.

[62] As for the costs in Case No 12124/2016P I made no Order, thus effectively leaving each party to bear its/his own costs. I did so in the exercise of my overall discretion as to costs. The papers, as I have attempted to demonstrate, were voluminous and prolix. There was avoidable duplication by both sides and, again by both sides, there was an aggressive zeal to burden the record with unnecessary annexures to the affidavits. While Brink may in some technical sense be regarded as the successful party in Case No 12124/2016P, and while I have found that his use of language and style of litigation may not, *on these papers*, extend sufficiently to, on their own, warrant an Order muzzling him; I remain sufficiently unimpressed thereby to deny him such costs that he may have incurred, due regard being paid to the fact that he did represent himself.

[63] For those reasons I made the Orders set out above.



Vahed J

Case Information

Date of Hearing:	27 October 2017
Date of Reasons:	25 June 2018
Counsel for LASA:	TJB Bokaba SC (with C Carelse)
For Mr Brink:	In Person