

IN THE MAGISTRATES COURT FOR THE DISTRICT OF ESHOWE

In the matters between:

ANTHONY ROBIN BRINK

Applicant

and

The respondents in the following five applications:

Case no: 257/14

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

Case no: 258/14

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

Case no: 259/14

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

Case no: 1005/15

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

Case no: 1432/15

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

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SCHEDULE TO DRAFT ORDER

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# **SCHEDULE OF ISSUES ARISING FROM LEGAL AID SOUTH AFRICA DEPUTY INFORMATION OFFICER THEMBILE MTATI'S SWORN CLAIMS ABOUT REQUESTED DOCUMENTS NOT DELIVERED, AND THE WITNESSES TO BE EXAMINED AND CROSS-EXAMINED TO DETERMINE THESE ISSUES**

## **RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE MAGISTRATES' COURTS OF SOUTH AFRICA**

### **Rule 55(1)(k)**

- (i) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision.
- (ii) The court may in particular, but without affecting the generality of subparagraph (i) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

## **INTRODUCTION**

The issues for this court's decision arise from Legal Aid South Africa ('LASA') Corporate Services Executive and deputy information officer Thembile Mtati's defective and/or unsatisfactory performance on 15 April and 13 May 2016 under the settlement agreement concluded at court on 11 February 2016 between the applicant ('Brink') in person and Mtati on behalf of the respondents, and handed into court for the record.

Mtati's defective and/or unsatisfactory performance under the agreement is specified in Brink's letter to the Clerk of Court on 27 May 2016, and its annexures, applying for the allocation of a date for his motion that his applications to compel LASA's compliance with his PAIA requests be referred to oral evidence.

Subsequent to Brink's 'Notice of Breach of Settlement Agreement and Demand for Compliance' delivered to Mtati on 29 April (annexure 'G' to Brink's application to the Clerk of Court), which Mtati rejected (annexure 'H' to the application), Mtati delivered a supplementary affidavit under section 23 of PAIA (annexure 'J' to the application). Brink's second demand for compliance on 6 June 2016 (annexure 'A' to this schedule) was simply ignored.

Referred to herein as described in the consolidated list of requested records, e.g. A1, B7, E9 etc., are the records not supplied to Brink, either:

- not fully and properly certified in compliance with the detailed information requirements of section 23;

- not certified to Brink's satisfaction (per clause 5 of the settlement agreement); or,
- not certified at all.

In this schedule:

- Mtati's response by letter of 15 April 2016 to Brink's consolidated list of requested records is referred to as his 'Response'.
- Mtati's PAIA section 23 affidavit made on the same date is referred to as his 'First affidavit'.
- Brink's complaint and demand for full and proper compliance on 29 April is referred to as his 'Complaint'.
- Mtati's general repudiation of Brink's Complaint on 9 May is referred to as his 'Repudiation'.
- Mtati's supplementary section 23 affidavit on 12 May is referred to as his 'Second affidavit'.
- The disputes, including the adequacy of alleged searches for undelivered documents and the bona fides of Mtati's claims about them, are referred to as the 'issues'.
- The word 'examine' includes cross-examine.

Witnesses to be examined for the determination of the issues are:

- Vidhu Vedalankar, Chief Executive Officer and information officer;
- Jerry Makokoane, Chief Operations Officer;
- Patrick Hundermark, Chief Legal Executive;
- Brian Nair, National Operations Executive and deputy information officer;
- Thembile Mtati, Corporate Services Executive and deputy information officer;
- Amanda Clark, Human Resources Executive;
- Solly Sekgota, Corporate Legal Manager;
- Thenjiwe Magazi, Regional Human Resources Manager for the Eastern Cape;
- the IT officer/s who conducted searches for records A4 and A5 on the consolidated list, according to items 2 and 4 of Mtati's first section 23 affidavit on 15 April 2016;
- Board secretary Langa Lethiba;
- KZN Regional Operations Executive Vela Mdaka;
- KZN Regional Human Resources Manager Baboo Brijlal; and,
- Mahikeng Senior Litigator Nzame Skibi.

**RECORDS ON BRINK'S CONSOLIDATED LIST THAT HAVE NOT BEEN PROVIDED TO HIM AND HAVE NOT BEEN DULY CERTIFIED UNDER SECTION 23, HAVE NOT BEEN CERTIFIED TO HIS SATISFACTION, OR HAVE NOT BEEN CERTIFIED AT ALL**

**A2.** Apropos of the aborted Mthatha Senior Litigator recruitment, the selection panel's recommendation of Mahikeng Senior Litigator Adv Nzame Skibi for appointment to the said post ('the post') on 24 May 2010, signed by all members of the panel, namely Port Elizabeth Justice Centre Executive Lynette Franklin; Eastern Cape Regional Human Resources Manager Thenjiwe Magazi; and then Eastern Cape Regional Operations Executive Thembile Mtati. (Any 'personal information' within the meaning of sections 1 and 34 of the Promotion of Access to Information Act 2 of 2000 may be blacked out.)

**Response:** 'The unsigned selection process panel's recommendation is attached as appendix A2. No signed recommendation exists.'

**Second affidavit:** 'No signed recommendation exists. This was confirmed by the Regional Human Resources Manager.'

**Issues and witnesses:** Concerning this record, Bambiso swore in paragraphs 183.2–4 of his answering affidavit in case 257/14: 'I am advised by Mr Sekgota that a file that was to be delivered to the Legal Aid SA head office in re the position of senior litigator position for Mthatha was lost in transit. I believe Ms Magazi informed Mr Sekgota telephonically last year. ... The Applicant was informed of the lost file and he still does not believe the explanation given to him.'

Magazi and Sekgota supported this 'lost in transit' story with confirmatory affidavits.

Similarly, in response to Brink's discovery request for the 'letter from the Eastern Cape RHRM, ROE, or other officer, to Nair, covering the said Motivation recommending Skibi, and proof of post if a letter was sent by post' included in his agenda for the first judicially supervised pre-trial conference at court in January 2013, for which he'd applied to disgorge persistently withheld records that he needed for the trial of his labour claim (it's item 29(b) of annexure 'A' to Bambiso's answering affidavit in case 257/2014), Mtati swore under penalty of perjury to a commissioner of oaths in Part 2 of his first discovery affidavit made on 11 March 2013: 'No such record exists. The documents were in [LASA's] possession and have

been lost in transit between Mthatha and Johannesburg.’ Mtati’s said discovery affidavit regarding these records (see document number 35(b)) is annexed to this schedule marked ‘B’.

Does Mtati mean by this that the recommendation of Skibi wasn’t signed? Or does he mean the signed recommendation once existed but has been lost and can’t be found because it was ‘lost in transit’ as he alleged on oath about the covering letter for the recommendation, and by implication about the recommendation itself that it covered? Does Mtati mean that the covering letter was mailed without the signed recommendation that it covered? Why was the ‘proof of post’ record also mailed and also ‘lost in transit’?

Mtati, Magazi, Sekgota and Nair to be examined on the different stories told about why the signed recommendation of Skibi for the Mthatha Senior Litigator post hasn’t been produced as requested. And which of the different stories told under oath is true and should be believed, and which other one also told under oath is a lie and should rightly be disbelieved because it was perjured.

Material to the court’s assessment of Mtati’s credibility in claiming on oath in his section 23 affidavits that requested documents don’t exist or can’t be found, he’ll be examined, inter alia, on a clear-cut instance of perjury committed in his said discovery affidavit, exposed by his response to item H12 below, to conceal a material document from Brink and from the Labour Court so as to mislead them and thereby defeat the ends of justice.

To the same end, Nair will be examined on the radically different stories he’s told under oath, in and out of court, about why Skibi’s appointment to the Mthatha Senior Litigator post wasn’t proceeded with. And in between telling these totally different stories under oath, more completely different stories he told LASA’s Board.

**A3.** The regret letters/emails sent to the unsuccessful candidates eliminated by the selection panel after their interviews.

**First affidavit:** ‘No such record exists. The record was checked with the specified offices which confirmed that there were no regret letters sent.’

**Issues and witnesses:** The affidavit is insufficiently particular in that section 23 requires that an affidavit made under this section must ‘include[e] all communications with every person who conducted the search on behalf of the

information officer.’ What person ‘checked’? Since no ‘offices’ were ‘specified’ in this request, what ‘offices’ and what persons in these various ‘offices’ were ‘checked with’? Was it Magazi? If not Magazi, who? Section 1.5.1 of LASA’s ‘Policies and Procedures on Recruitment’ (the ‘Recruitment code’) requires that ‘Unsuccessful short-listed Section 23 candidates should, as far as reasonably practically [sic], be informed of the fact that they were not successful’, so these records should exist, unless Magazi irregularly failed to comply with the said preemptory requirement of the Recruitment code, despite the fact that some of the candidates had flown across the country for their interviews in Port Elizabeth, according to a record provided by Mtati on 15 April 2016 – perhaps because the Mthatha Senior Litigator selection process was a sham, with the top-level post never advertised in the press, only on LASA’s website, and only two lawyers sitting on the panel, since Skibi had been pre-selected by one of them. Just as he was pre-selected for the Mahikeng Senior Post and appointed to it, instead of the candidate recommended by the selection panel interviewing for the post, despite having been rejected by the panel – according to then Free State and Northern Provinces Regional Operations Executive Nkululeko Mayisela’s information to Brink about this. (Which is to say Senior Litigator recruitment at LASA is utterly corrupt.) Mtati and Magazi to be examined on these issues.

**A4.** If the recommendation of Adv Skibi was scanned and emailed as an attachment to the LASA national office for approval, the covering email; if sent to the national office for approval via the postal service, the covering letter and proof of registered post.

**First affidavit:** ‘No such record exists. The record was requested from the Eastern Cape Regional Office and the National Office but same cannot be located. The IT department was also not able to retrieve the record.’

**Issues and witnesses:** Who ‘requested’ these records? Who were they requested from in ‘the Eastern Cape Regional Office and the National Office’? Who in the ‘IT department’ searched for them? On whose advice were they searched for by the ‘IT department’? The fact that they allegedly ‘cannot be located’ and that an IT officer was allegedly tasked to search for them but ‘was also not able to retrieve’ them implies that such electronic records are or were believed to exist and were therefore searched for. Mtati, Magazi, Nair and the IT officer who allegedly searched for the records to be examined about this.

**A5.** All other communications between the national office and the Eastern Cape regional office and/or the Mthatha Justice Centre concerning the recommendation of Adv Skibi for transfer and appointment to the post.

**First affidavit:** ‘No such record exists. The record was requested from the Eastern Cape Regional Office and the National Office but same cannot be located. The IT department was also not able to retrieve the record.’

**Issues and witnesses:** Who ‘requested’ these records? From whom were they ‘requested’? Who searched for them and said they ‘cannot be located’? Who in the ‘IT department’ searched for but was ‘also not able to retrieve the record’? The fact that they alleged ‘cannot be located’ and that an IT officer was allegedly tasked to search for the records but ‘was also not able to retrieve’ them implies that such electronic records are or were believed to exist and were therefore searched for. Mtati, Magazi, and the IT officer who allegedly searched for the records to be examined about this.

**A6.** All communications between the national office and the Eastern Cape regional office and/or the Mthatha Justice Centre concerning:

- the approval of Adv Skibi’s appointment and transfer to the post;
- the cancellation of Adv Skibi’s appointment and transfer to the post; and,
- the reason for the cancellation of the recruitment to the post.

**Second affidavit:** ‘No such record could be found. The record was checked with the specified offices but same could not be located.’

**Issues and witnesses:** If ‘No such record could be found’, who in the ‘specified offices’ searched for them? Was an IT officer engaged to search the electronically stored records, as contemplated in paragraph 3 of the notice of application in case 257/14, given that the declaration implies the records exist? (Under oath, Vedalankar and Nair have given totally different reasons for the cancellation of Skibi’s appointment, at the time Brink was pressing for his at Pietermaritzburg.) Magazi, Mtati, Vedalankar and Nair to be examined about these records.

**A7.** Besides the above-specified records, all communications between the Eastern Cape regional office and/or the Mthatha Justice Centre and the Free State and North West regional office, and/or the Mahikeng Justice Centre, and/or Mahikeng

Senior Litigator Adv Nzame Skibi concerning the Mthatha Senior Litigator post.

**First affidavit:** ‘No such record exists. The record was requested from the specified offices but same cannot be located.’

**Issues and witnesses:** ‘No such record exists’ or ‘could not be located’ – which? Who requested them? Who in the specified offices searched for them? Was an IT officer engaged to search the electronically stored records, as contemplated in the notice of application in case 257/14, given that the declaration implies the records exist? Magazi, Mtati, Vedalankar, Nair and Skibi to be examined on these issues.

NOTE: The notes and the footnotes to the individual record requests in the following parts of the consolidated list are reproduced as they appeared in the original PAIA record request annexures and supplementary requests assembled into the consolidated list. All documents referenced herein (LASA has them) may be accessed at the online case document archive: [www.tig.org.za/LASA](http://www.tig.org.za/LASA)  
username: lasa      password: LASA2010.

**B1.** All and any records vouching the sworn allegation made on affidavit to the Durban Labour Court (‘court’) on Legal Aid South Africa National Operations Officer Brian Nair’s instructions<sup>1</sup> in the matter of Anthony Robin Brink (‘Brink’) v Legal Aid South Africa (‘LASA’), Case No. LC D529/11, that ‘many of the senior litigators have failed to live up to the required expectations as they, despite many years in practice, lacked the required Court experience.’<sup>2</sup>

Contradicting this allegation by Nair to court, all oral and written reports since 2009 made to the Minister of Justice and Constitutional Development (LASA’s ‘Executive Authority’)<sup>3</sup> and to the Portfolio Committee in the National Assembly (which exercises ‘oversight’<sup>4</sup> over LASA) have consistently assured the Minister and Parliament that LASA’s lawyers are performing well. These numerous reports are extensively quoted in Brink’s heads of argument.<sup>5</sup> In court, Nair retracted his false allegation made to court before the trial, on oath, in which he wantonly disparaged the professional competence of LASA’s Senior Litigators; see below.

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<sup>1</sup> Application to quash the applicant’s subpoenas, Corporate Services Executive Thembile Mtati’s supporting affidavit, page 4, paragraph 20. Nair confirmed under cross-examination that he instructed Mtati on the contents of the pleadings and affidavits that he (Mtati) signed in the case.

<sup>2</sup> Application to subpoena Mlambo JP, Mtati’s answering affidavit, page 107, paragraph 81.12; Nair’s confirmatory affidavit, pages 122–3.

<sup>3</sup> Bundle, pages 428, 447, and 452; and bundle addendum, pages 1058 and 1060.

<sup>4</sup> Bundle, page 426, third last line; and bundle addendum, page 895, ‘Discussion’, first paragraph.

<sup>5</sup> Brink’s heads of argument, pages 68–70, paragraphs 214–15.

**First affidavit:** ‘No such record exists. The official specified was consulted and he has no recollection of the existence of such record.’

**Issues and witnesses:** Mtati to be examined on who ‘consulted’ who, and whether he is the ‘official specified’ or Nair is. Is it intended to allege that no such record exists? If so, section 23 requires that this be stated positively without an unambiguous rider. If the said sworn allegation was true, and was not perjury, a record ought to exist to support it. Vedalankar, Nair, Hundermark and Clark to be examined on whether any record exists to support this sworn allegation of Senior Litigator professional incompetence, made by Mtati on Nair’s instructions and supported by Nair on oath (or whether the sworn allegation was pure invention, unsupported by any record, and a totally unfounded, criminal lie told to mislead and defraud the judge, which is to say was perjured to pervert his determination of the true facts of the case and thereby defeat the ends of justice).

**B2.** All and any records vouching the allegation made to court in the pleadings on Nair’s instructions that ‘most of the senior practitioners who were recruited without having undergone a second interview were lacking experience in vital areas like High Court litigation skills’.<sup>6</sup>

Contradicting this allegation made to court before trial on his instructions, Nair testified on oath at trial that *all* Senior Litigators underwent a second interview. The same contradictory allegation is made on Nair’s instructions in the pleadings.<sup>7</sup> As said, in court Nair retracted his slur on LASA’s Senior Litigators (‘lacking experience in vital areas like High Court litigation skills’) and told a different story under oath, contradicted by his statements to the Board (see below).

**First affidavit:** ‘No such record exists. The official specified was consulted and he has no recollection of the existence of such record.’

**Issues and witnesses:** Mtati to be examined on who consulted who, and whether Nair is the ‘official specified’, or he is, being the signatory of the pleading? Is it intended to allege that no such records exist? If so, section 23 requires that this be stated unambiguously. Vedalankar, Nair, Hundermark and Clark to be examined on whether any record exists to support this allegation of Senior Litigator

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<sup>6</sup> Pleadings bundle, original response, page 143, paragraph 8.

<sup>7</sup> Pleadings bundle, original response, page 143, paragraph 10.

professional incompetence, made by Mtati on Nair's instructions (and if not whether this allegation was pure invention, unsupported by any record, and a totally unfounded lie told to mislead and defraud the judge, to pervert his determination of the true facts of the case and thereby defeat the ends of justice).

**B3.** All and any records vouching the allegation made to court on affidavit on Nair's instructions, and supported by Nair on affidavit,<sup>8</sup> that LASA had 'conducted a quality assurance in respect of the existing senior litigators and it was out of concern from the results of such exercise that the concerns around these officials were noted.'<sup>9</sup> More particularly, the documents required are the record of the decision allegedly taken to 'conduct a quality assurance' audit of LASA's Senior Litigators' professional performance; the record of the audit; and the record where 'concerns around' their performance were 'noted'.

**First affidavit:** 'No such record exists. The official specified was consulted and he has no recollection of the existence of such record.'

**Issues and witnesses:** Mtati to be examined on who consulted who, and whether he's the 'official specified' being the author of the affidavit, or Nair is, who instructed him on its contents and who put up a confirmatory affidavit. Is it intended to allege that no such record exists? If so, section 23 requires that this be stated unambiguously. If the said sworn allegation was true, and was not perjury, the requested records ought to exist to support it. Vedalankar, Nair, Hundermark and Clark to be examined on whether any record exists to support this sworn allegation made by Mtati on Nair's instructions and supported by Nair on oath that Senior Litigator performance was audited and found unsatisfactory (and if not, whether this evidence was pure invention, unsupported by any record, and a totally unfounded, criminal lie told to mislead and defraud the judge, which is to say was perjured to pervert his determination of the true facts of the case and thereby defeat the ends of justice).

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<sup>8</sup> Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122–3.

<sup>9</sup> Application to subpoena Mlambo JP, Mtati's answering affidavit, page 81, paragraph 10.

**B4.** All and any records identifying which of the ‘many of the senior litigators’,<sup>10</sup> namely Pieter Nel at Bloemfontein; Herman Alberts at Pretoria; Mornay Calitz at Cape Town; William Karam at Johannesburg; Nzame Skibi at Mahikeng; and Elizabeth Crouse at Port Elizabeth<sup>11</sup> (described by Nair to the Board as ‘some of our most senior and experienced lawyers’),<sup>12</sup> ‘have failed to live up to the required expectations as they, despite many years in practice, lacked the required Court experience’<sup>13</sup> and are ‘lacking experience in vital areas like High Court litigation skills’.<sup>14</sup>

**First affidavit:** ‘No such record exists. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Was he told it exists but can’t be found, or that it doesn’t exist? Vedalankar, Nair, Hundermark and Clark to be examined on whether any record exists to support this sworn allegation made by Mtati on Nair’s instructions and supported by Nair on oath that many of LASA’s Senior Litigators have been found to be professionally incompetent (or whether the pleaded and sworn allegation was pure invention, unsupported by any record, and a totally unfounded criminal lie told to mislead and defraud the judge, which is to say was perjured to pervert his determination of the true facts of the case and thereby defeat the ends of justice).

**B5.** All and any communications between LASA executive management and the said allegedly inexperienced and unskilled Senior Litigators concerning their alleged inadequate professional ability to do their jobs properly, as alleged by Nair in the pleadings and interlocutory affidavits before trial for the true information of court.

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<sup>10</sup> Application to subpoena Mlambo JP, Mtati’s answering affidavit, page 107, paragraph 81.12; Nair’s confirmatory affidavit, pages 122–3.

<sup>11</sup> Pre-trial conference bundle, reply to the applicant’s pre-trial issues, page 102. The reply drawn on NOE Brian Nair’s instructions: Application to quash the applicant’s subpoenas, supporting affidavit, page 4, paragraph 20; and Nair admitted in court that he instructed Mtati on the contents of the pleadings and affidavits he (Mtati) signed in the matter.

<sup>12</sup> Bundle addendum, page 870, paragraph 4.

<sup>13</sup> Application to subpoena Mlambo JP, Mtati’s answering affidavit, page 107, paragraph 81.12; Nair’s confirmatory affidavit, pages 122–3.

<sup>14</sup> Pleadings bundle, original response, page 143, paragraph 8.

**First affidavit:** ‘No such record exists. The officials specified was consulted and he has no recollection of the existence of such record.’

**Issues and witnesses:** Mtati to be examined on who the ‘officials’ are (or is). Vedalankar, Nair, Hundermark and Clark to be examined on whether any record exists to support the allegation in the pleadings and interlocutory affidavits in Brink’s labour case that many of LASA’s Senior Litigators are professionally incompetent, as alleged by Mtati and Nair (or whether the pleaded and sworn allegation was pure invention, unsupported by any record, and a totally unfounded criminal lie told to mislead and defraud the judge, which is to say was perjured to pervert his determination of the true facts of the case and thereby defeat the ends of justice).

**B6.** All and any records vouching Nair’s allegation to the Board in his ‘Report to Board’ of 26 November 2011<sup>15</sup> under the heading ‘Quality reviews of senior litigators’ that ‘It has therefore been agreed that a national quality review panel will be established that will include a few senior legal executives, as well as someone external to the organization, possibly a retired Judge, who would conduct these reviews. The terms of reference for these review panels will include: • an examination of the type of cases handled to determine if it complies with our requirements • an examination of the level of preparedness for their cases • a review of the appropriateness of the legal strategy adopted in their cases • a determination of whether the most appropriate outcome of the case was achieved. The review panel will be established during the third quarter of this financial year [i.e. by the end of December 2011]. All senior litigators will be reviewed by this panel before the end of this financial year<sup>16</sup> [i.e. before 31 March 2012]. More particularly, the record required is of the decision, which Nair alleged to the Board had been ‘agreed’, that ‘a national quality review panel will be established’ to audit the performance of LASA’s allegedly underperforming Senior Litigators.

**First affidavit:** ‘No such record exists. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

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<sup>15</sup> Bundle addendum, pages 869–70. At trial, Nair admitted having written it.

<sup>16</sup> Bundle addendum, page 870, paragraph 4.

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Was he told it exists but can’t be found, or that it doesn’t exist? Vedalankar, Nair, Clark and Hundermark to be examined on whether any record exists to support Nair’s allegation to the Board that it had been ‘agreed’ that ‘a national quality review panel will be established’ to audit the performance of LASA’s allegedly underperforming Senior Litigators (or whether the allegation was pure invention, unsupported by any record, and a totally unfounded lie told to mislead the Board to falsely justify his unlawful failure, without Board authority, and for an ulterior corrupt purpose, to deviate from LASA’s Strategic Plan in employing nine Senior Litigators, for which LASA had applied and continues every year to apply for and receive millions of rands in salary budget).

**B7.** All and any records vouching that LASA is concerned about the type of work Senior Litigators are performing, as differently alleged by Nair under oath in the witness stand at trial.

Under cross-examination, Nair radically changed his story which he had previously told the Board in his ‘Report to Board’ of 26 November 2011<sup>17</sup> and court in the pleadings and interlocutory affidavits drawn on his instructions, and confirmed by him on oath, and claimed that there was no question over the Senior Litigators’ professional performance and service delivery, but with the type of work they do. In court, Nair alleged that Senior Litigators are appointed mainly to argue criminal appeals (for which reason he contended Brink was unsuitably over-qualified as an experienced civil lawyer). His false evidence in court about this is contradicted by his truthful claim to the Board in his ‘Report to Board’ in November 2011 that Senior Litigators, ‘our most senior and experienced lawyers’,<sup>18</sup> are appointed to handle ‘very complex matters ... in specialist and higher courts such as the SCA and CC’;<sup>19</sup> ‘impact litigation matters’ and ‘High profile matters which could negatively affect our reputation if not handled properly.’ This accords with the advertised job description, stipulating that the professional function of Senior Litigators is ‘to render legal services, primarily litigation services in complex criminal and civil matters ... specialised, complex or impact litigation matters ... Provide written legal opinions ... Assist with in-house training ... mentoring and coaching to legal staff’<sup>20</sup> – consistent with the purpose originally advanced to the Board for which the post was created: to employ ‘professional staff that are senior enough to take on ... cases of a highly complex nature ... build up such

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<sup>17</sup> Bundle addendum, pages 869–70.

<sup>18</sup> Ibid.

<sup>19</sup> Bundle addendum, page 869.

<sup>20</sup> Bundle, pages 43 and 45.

capacity at each province linked to a high court unit. Such senior litigators would be able to undertake more complex work as well as support and mentor our other High Court staff,<sup>21</sup> and summarised in LASA's amended response to Brink's amended statement of claim: 'to create a pool of specialist professionals whose role would be to attend to complex matters at various courts'.<sup>22</sup> A public statement on 5 March 2012 stated consistently again: 'In very complex matters [involving 'the rights of women and children'], our Senior Litigators provide support and advice to practitioners that need it.'<sup>23</sup> The whole thrust of the Strategic Plan 2009–12 was to scale up LASA's civil legal services delivery capacity; this is canvassed, with references, in Brink's heads of argument.<sup>24</sup>

**Second affidavit:** 'No such record could be found. The record was checked with the specified official who confirmed its non-existence.'

**Issues and witnesses:** Mtati to be examined on whether Nair is the 'specified official' who 'confirmed' that no record whatsoever exists to support his oral evidence in the Labour Court that LASA is concerned about the type of work its Senior Litigators are performing. Vedalankar, Nair, Clark and Hundermark to be examined on whether such record exists of any such concern raised at any of LASA's management meetings (and if not, whether Nair's evidence given under oath in the Labour Court in this regard was pure invention, newly improvised and fabricated on the go in court, unsupported by any record, and a totally unfounded, criminal lie told to mislead and defraud the judge, which is to say was perjury to pervert his determination of the true facts of the case and thereby defeat the ends of justice).

**B8.** All and any records vouching that as at 11 March 2013,<sup>25</sup> 'The ['national quality review'] panel [for Senior Litigators] has not been constituted and terms of reference are still under consideration.'<sup>26</sup> More particularly, records are required vouching that the 'terms of reference are still under consideration'.

In truth and in fact, Nair fully stated the alleged 'terms of reference' in his 'Report to Board' of 26 November 2011.<sup>27</sup> More to the point, Nair's dissimulation to the Board and to court that the professional ability of LASA's Senior Litigators is deficient was revealed as false by his retraction of this allegation in court, and his replacement of this lie with another,

<sup>21</sup> Bundle addendum, pages 990–1, paragraph 2.7.

<sup>22</sup> Pleadings bundle, amended response, page 20, paragraph 2.2.

<sup>23</sup> Bundle addendum, pages 825–6.

<sup>24</sup> Brink's heads of argument, pages 28–30, paragraphs 84–5.

<sup>25</sup> Bundle addendum, page 986.

<sup>26</sup> Bundle addendum, page 988, 'Other new documents required', items 48–50.

<sup>27</sup> Bundle addendum, page 870, paragraph 4.

namely that he is concerned about the type of work they do – then proceeding to contradict himself, the pleadings, and the record regarding the type of work they should be doing.

**Second affidavit:** ‘No such record exists. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same does not exist.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. In his first discovery affidavit filed in Brink’s labour case (annexure ‘B’ hereto), Mtati himself swore to a commissioner of oaths under penalty of perjury on 11 March 2013 that ‘The [‘national quality review’] panel [for Senior Litigators] has not been constituted and terms of reference are still under consideration.’ Vedalankar, Nair, Clark and Hundermark to be examined on whether any record exists showing that the ‘terms of reference [for the ‘national quality review’] panel [for Senior Litigators] are still under consideration’ (or whether Mtati perjured himself in manufacturing and uttering this false allegation in his discovery affidavit to mislead, deceive and defraud Brink and the trial judge, pervert the judge’s determination of the true facts of the case, and thereby defeat the ends of justice).

**B9.** The record of the decision, which Nair alleged in his November 2011 ‘Report to Board’ had been taken, that ‘We have since decided not to fill the remaining positions until we are reassured that our objectives determined for this position is [sic] being achieved by the current incumbents’.<sup>28</sup>

**First affidavit:** ‘No such record exists. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who, and whether the record of the alleged decision can’t be found or doesn’t exist. Vedalankar, Nair, Clark and Hundermark to be examined about whether they were present at any management meeting that decided, without Board authority, to deviate from and not implement the Strategic Plan 2009–12 to employ Senior Litigators in all LASA’s remaining vacant, budgeted, fully funded Senior Litigator posts, as alleged by Nair to the Board in November 2011 for this quoted alleged

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<sup>28</sup> Bundle addendum, page 869.

reason. (Vedalankar alleged a totally different budgetary insufficiency reason to Brink in October 2010, which she repeated in January 2011, and again under oath in April 2011. As did Nair and Clark. In her CEO report for 2012/13 Vedalankar twice mentioned that LASA had employed Senior Litigators as part of its implementation of the said Strategic Plan, and the point was made a third time in the main annual report. Naturally she didn't mention that the finalisation of appointments of selected candidates to the three remaining vacant posts had unlawfully been frozen off the record.)

**B10.** All and any records identifying the 'recruitment challenges'<sup>29</sup> alleged by Nair in his November 2011 'Report to Board' to have prevented the promotion of Durban High Court Unit Manager Bongani Mngadi to the Durban Senior Litigator post for which he was recommended on 23 November 2009.<sup>30</sup>

Contradicting this allegation to the Board, and featuring nowhere in the pleadings and several affidavits in the matter, all essaying into the alleged budgetary reason for the abortion of the substantially completed Pietermaritzburg, Durban and Mthatha Senior Litigator recruitments, Nair informed the Portfolio Committee on 11 October 2010 that 'LASA had no problems with regards to recruiting lawyers<sup>31</sup> ... There was a good trend for quality monitoring and the practitioners were performing well within target range.'<sup>32</sup>

**Second affidavit:** 'This record cannot be located. The record requested was checked with the specified official who confirmed it cannot be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. And whether a record exists showing that Mngadi didn't meet the qualifying criteria for the Durban Senior Litigator post or was found unsuitable for some other reason, but it can't be found, or no such record exists. (Or whether Nair's story told the Board for not proceeding with Mngadi's appointment and promotion was a blatant lie to cover the true reason he froze the completion of the KwaZulu-Natal Senior Litigator recruitments after Brink and Mngadi had been duly selected for Pietermaritzburg and Durban, and Brink started pressing for his appointment.)

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<sup>29</sup> Ibid.

<sup>30</sup> Bundle, pages 244–8.

<sup>31</sup> Bundle addendum, page 963.

<sup>32</sup> Bundle addendum, pages 961–2.

**B28.** Records identifying what posts were frozen as at 30 November 2009;<sup>33</sup> as at 31 March 2010;<sup>34</sup> and as at 30 June 2010.<sup>35</sup> (The recruitment/vacancy/budget statistics for these months, supplied to Brink, all claim ‘Excluding frozen positions’.)

**First affidavit:** ‘No such record exists. The requested records were checked with the Human Resource department but cannot be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who, and whether such records exist but can’t be found, or don’t exist. Clark to be examined on whether any record exists showing ‘frozen positions’, alluded to in the titles of the files emailed to Brink, with their titles first strangely changed.

**B29.** The instruction to alter the recruitment/vacancy/budget statistics as at 30 June 2010 before furnishing them to Brink on 5 July 2013.

The PDF file name given to the said statistics before supplying them is: ‘Recruitment as at 30 June 2010 with frozen removed’.<sup>36</sup>

**First affidavit:** ‘No such record exists. The requested records were checked with the Human Resource department but cannot be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who, and whether such records exist but can’t be found, or don’t exist. Clark to be examined on whether any such record exists (and on why the statistics record was tampered with, before delivering it to Brink, by altering its title to create the false impression that recruitment to some posts in LASA’s budgeted staff establishment had duly been frozen at that time, when in truth it hadn’t).

**B30.** The instruction to alter the recruitment/vacancy/budget statistics after 30 June 2010, to reflect that the Eastern Cape has only one budgeted, filled Senior Litigator post.<sup>37</sup>

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<sup>33</sup> Bundle addendum, pages 1027–9.

<sup>34</sup> Bundle addendum, pages 1030–33.

<sup>35</sup> Bundle addendum, pages 1065–9.

<sup>36</sup> Bundle addendum, page 1071.

<sup>37</sup> Bundle addendum, page 1070.

By June 2010 LASA's recruitment statistics had been duly updated in compliance with the Legal Services Technical Committee's ('LSTC') minuted instruction to then Legal Services Delivery Officer Bee-Mari Schoeman on 24 March 2010 'to update recruitment reports as well as facilitate the transfer of the budget. ... Due Date ... Immediate'.<sup>38</sup> Whereas the March 2010 statistics show one Senior Litigator post budgeted, one filled, and no vacancies,<sup>39</sup> the June 2010 statistics correctly show two Senior Litigator posts budgeted, one filled, and one vacant.<sup>40</sup> The December 2010 statistics again show one budgeted, filled Senior Litigator post.

**First affidavit:** 'No such record exists. The requested records were checked with the Human Resource department but cannot be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who, and whether such record exists but can't be found, or doesn't exist. Clark to be examined on her knowledge of this.

**B31.** The record of Chief Operations Officer Jerry Makokoane's delegation as a national deputy information officer.

At trial Nair denied, under oath, that as deputy information officer he authored LASA's section 32 report for 2011/12,<sup>41</sup> and alleged, under oath, that Makokoane had also been appointed as a national deputy information officer, so he must have written this false section 32 report to the SAHRC. Significantly, however, Makokoane never handled any of Brink's PAIA requests; and the report was signed by Corporate Legal Manager Solly Sekgota on 8 April 2011,<sup>42</sup> the same day that Nair signed his responses and section 23 affidavits in respect of Brink's first, second and third PAIA requests.<sup>43</sup> And in one of these affidavits, Nair identifies himself: 'I am the [singular] Deputy Information Officer duly delegated by the Information Officer in terms of section 17 of the Promotion of Access to Information Act 2 of 2000.'<sup>44</sup> Vedalankar appointed Nair 'the Deputy Information Officer for Legal Aid South Africa' – singular – on 1 March 2011.<sup>45</sup> (All Regional Operations Executives are deputy information officers for their regions.)

**Response:** 'The delegation of the COO is attached as appendix B31.'

<sup>38</sup> Bundle addendum, page 709.

<sup>39</sup> Bundle, addendum, page 1031.

<sup>40</sup> Bundle, addendum, page 1066.

<sup>41</sup> Bundle, addendum, page 679.

<sup>42</sup> Bundle, addendum, page 678.

<sup>43</sup> Bundle, pages 363–86.

<sup>44</sup> Bundle, page 363.

<sup>45</sup> Bundle, page 387.

**Complaint:** It wasn't.

**Repudiation:** 'We deny that we are in breach of the settlement agreement at all.'

**Issues and witnesses:** Vedalankar to be examined on whether she delegated Makokoane as a deputy information officer in writing, and if so when. Makokoane to be examined on whether he holds a written delegation as a deputy information officer.

**B34.** The record of Vedalankar's approval of the LSTC's resolution to abolish the Kimberley Senior Litigator post, create a new Senior Litigator post at Mthatha, and transfer the budget, before the Mthatha Senior Litigator post was advertised in April 2010<sup>46</sup> and Adv Nzame Skibi was recommended for appointment to it on 24 May.<sup>47</sup>

Note 17 of the Approval Framework stipulates that 'It is the responsibility of the line function Executive to ensure that such [post] is provided for in the budget and MTEF and that a vacancy exists in respect of the post concerned. HRE to confirm budget and vacancy ... with regard to a JC/region/dept.'<sup>48</sup> The post therefore could not have been advertised and recruited for if had Nair and Clark not confirmed that it existed as an approved vacant budgeted post.

**First affidavit:** 'No such record exists. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who, and whether the record exists but can't be found or doesn't exist. Vedalankar to be examined on whether she recorded her approval of the said LSTC resolution.

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<sup>46</sup> Bundle, page 46.

<sup>47</sup> Bundle addendum, pages 994–7.

<sup>48</sup> Bundle addendum, page 1040.

**B35.** The record of Vedalankar’s refusal to approve the abolition of the ‘redundant’<sup>49</sup> Kimberley Senior Litigator post, the creation of the pressingly needed Mthatha Senior Litigator post, and the transfer of the budget.

This was Nair’s new allegation in court, radically contradicting and changing the three-simultaneously-frozen-Senior-Litigator-posts story, previously alleged in correspondence with Brink, in affidavits and in the pleadings, including in the amended response setting out LASA’s defence version for trial – a new story told nowhere in any of the said documents.

**First affidavit:** ‘No such record exists. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who, and whether the record exists but can’t be found or doesn’t exist. Vedalankar to be examined in regard to Nair’s evidence in the Labour Court that she refused to approve the abolition of the ‘redundant’ Kimberley Senior Litigator post, the creation of the pressingly needed Mthatha Senior Litigator post, and the transfer of the budget. Because if Nair told the truth in the Labour Court and wasn’t committing perjury, in other words telling a new criminal lie about Vedalankar in her absence (after she causally pushed off from court without being excused as a subpoenaed witness) to mislead and defraud the judge to pervert his determination of the true facts of the case and thereby defeat the ends of justice, there’ll be a record of her decision under the Approval Framework to reject the LSTC’s resolution.

**B36.** All communications between Mlambo JP and Vedalankar and Nair regarding Brink’s first petition to the Board on 30 November 2010<sup>50</sup> protesting Vedalankar’s illegal blanket refusal<sup>51</sup> of his August 2010 request for 51 specified records under section 11(1) of PAIA or sworn certification under section 23 that they did not exist, and the manifestly irregular abortion of his recruitment in light of the surge in recruitment and new post creation in the first quarter April to June 2010, and the

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<sup>49</sup> Bundle addendum, page 738, paragraph 1.

<sup>50</sup> Bundle, pages 109–65.

<sup>51</sup> Bundle, pages 113–19, paragraphs 17–43.

advertisement in April for a Senior Litigator for Mthatha, while his recruitment remained silently unfinalised<sup>52</sup> – the dismissive response<sup>53</sup> to which was written on Vedalankar’s own computer (‘VidhuV’)<sup>54</sup> with Mlambo JP’s signature image pasted in with his ‘knowledge and consent’<sup>55</sup> according to Mtati instructed by Nair.

**Second affidavit:** ‘This record cannot be located. The record requested was checked with the specified officials who confirmed it cannot be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who; whether an IT officer searched for the records; and whether ‘the record requested was’ also ‘checked with’ Mlambo JP, being a ‘specified official’. Since the records ‘cannot be located’, implying that they exist and were accordingly searched for, Vedalankar and Nair to be examined on why the records of these communications haven’t been produced.

**B37.** The email from Vedalankar to Mlambo JP in December 2010 covering the letter she drew on her computer for him, with his signature image pasted in, to send to Brink dismissing his fundamental rights violation complaints, which letter Mlambo JP emailed to Brink on 30 December 2010.

**Second affidavit:** ‘This record cannot be located. The record requested was checked with the specified officials who confirmed it cannot be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who; whether an IT officer searched for the email record; and whether it was ‘checked with’ Mlambo JP, being a ‘specified official’. Since the email record ‘cannot be located’, implying that it exists and was accordingly searched for, and indeed must exist unless the document she forged was uploaded to a shared cloud storage system or saved to a memory stick and physically handed to Mlambo JP, Vedalankar to be examined about why this email record hasn’t been produced.

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<sup>52</sup> Bundle, page 119ff, paragraphs 44ff.

<sup>53</sup> Bundle, page 186.

<sup>54</sup> Bundle, page 187.

<sup>55</sup> Pre-trial conference bundle, answer to agenda, page 61, paragraph 69.2.

**B38.** The Minister’s demand for an explanation following Brink’s third petition to the Board on 25 February 2011, copied to the Minister and to Parliament, about Vedalankar’s persistent, repeated illegal refusal to surrender records duly requested under PAIA and the plainly irregular abortion of his recruitment to the Pietermaritzburg Senior Litigator post on the evidence then known to him.

**First affidavit:** ‘No such record exists. The requested records were checked with the relevant department where it could have been directed to but it cannot be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who, and whether Mlambo JP was asked for a copy. Since Mlambo JP wouldn’t have submitted an explanation to the Minister without a demand for it (like the demand for an explanation made by the chairperson of the Portfolio Committee, a copy of which the latter personally gave Brink in June 2011), the record must exist. And since Nair eventually admitted in the Labour Court that he ghost-wrote the ‘Confidential Report Re: Advocate Anthony Brink’ to the Minister (as proved by its PDF ‘Author’ properties, ‘Briann’), but only after first denying it characteristically dishonestly through LASA’s counsel, the Minister’s request must have been referred to him. Vedalankar and Nair to be examined about this record and why it hasn’t been produced.

**B39.** Mlambo JP’s letter or email to the Minister covering the ‘Confidential ... report ... Re: Adv Anthony Brink’<sup>56</sup> on 9 March 2011 that Nair wrote.<sup>57</sup>

**First affidavit:** ‘No such record exists. The officials specified were consulted and they have no recollection of the existence of such record.’

**Issues and witnesses:** Mtati to be examined on who ‘consulted’ who, and whether Mlambo JP was asked for a copy of his covering letter or email, being an ‘official ... specified’. Besides Mlambo JP, if he was indeed ‘consulted’, what other ‘officials specified were consulted’, in other words who are ‘they’? Did Mlambo JP say he submitted his report without a covering letter – unlike the covering letter he wrote

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<sup>56</sup> Bundle addendum, page 1012.

<sup>57</sup> Bundle addendum, page 1015. In court, Nair admitted having written it, having left his electronic fingerprints on it in the ‘Author’ properties folder: ‘Briann’.

for the chairperson of the Portfolio Committee (Labour Court Bundle 1, page 504) to defame Brink and wreck his reputation and the credibility of his extraordinarily serious fundamental rights violation complaints? The reference to ‘the attached email’ in the penultimate paragraph of the report (Labour Court Bundle 2, page 1014) further implies the existence of a covering letter to the Minister, like the defamatory, lying covering letter Mlambo JP wrote to the chairperson of the Portfolio Committee. Like the lying, defamatory ‘memorandum’ slipped to the Judge President of the Labour Appeal Court to successfully pervert the decision of Brink’s petition for leave to appeal. (It’s annexed to Brink’s agenda for the pre-trial conference on 15 February 2016 to illustrate the scale of the corruption he’s up against.)

**B40.** Nair’s covering email to Vedalankar to which he attached the letter he drew for her to send Brink on 18 October 2010,<sup>58</sup> refusing his entire 51-item PAIA request of August 2010 on the basis of a false statement of legal principles claimed applicable and a fake quotation from a reported judgment claimed to support them, putting words in the judge’s mouth exactly the opposite of what her reported judgment states,<sup>59</sup> and alleging that the ‘Durban, Pietermaritzburg and Mthatha’<sup>60</sup> Senior Litigator posts had been ‘frozen ... In July 2010’ on account of budgetary insufficiency.<sup>61</sup>

Under penalty of perjury, Vedalankar, Nair and Clark all confirmed this story on affidavit on 8 April 2011.<sup>62</sup> In court, however, Nair changed this story and alleged that the Mthatha Senior Litigator post was not frozen; instead, despite his repeated attempts to persuade her, Vedalankar had refused to approve the abolition of the unwanted Kimberley Senior Litigator post, the creation of a new sorely needed Senior Litigator post at Mthatha and the transfer of the budget. Notwithstanding the repeated use in Vedalankar’s October 2010 letter of Nair’s characteristic (he admitted in court) sentence lead-in, ‘Noting [etc]’, Nair denied in court, under oath, that he drafted the letter for Vedalankar, thus implicitly blaming and inculpating her for telling Brink the lies it contained, some of which lies Nair retracted in court. (In evidence, Brink recorded that he was satisfied that Nair had ghost-written Vedalankar’s letters to him, and that for this reason he held Vedalankar clear of

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<sup>58</sup> Bundle, pages 101–4.

<sup>59</sup> Bundle, pages 113–19, paragraphs 17–43.

<sup>60</sup> Bundle, page 104, paragraph 7.3.

<sup>61</sup> Bundle, page 101, paragraph 6.7.

<sup>62</sup> Bundle, pages 380–1, paragraph 13; pages 390–1; and 392–3.

responsibility for them. Likewise, for the same reason, he held Mlambo JP clear for the false reports Nair wrote for him to sign and submit to the Minister<sup>63</sup> and to the chairperson of the Portfolio Committee<sup>64</sup> to pervert<sup>65</sup> their independent enquiries launched into Brink's fundamental rights violation complaints. Nair's authorship<sup>66</sup> of these false reports to the Minister and to Parliament that he gave Mlambo JP to sign and submit was discovered by Brink only a month before trial.)<sup>67</sup>

**First affidavit:** 'No such record exists. The officials specified were consulted and they have no recollection of the existence of such record.'

**Issues and witnesses:** Mtati to be examined on who 'consulted' who, and whether an IT officer searched for this record. Vedalankar and Nair to be examined on the existence of this record.

**B41.** Nair's covering email to Vedalankar to which he attached the letter he drew for Vedalankar to send Brink on 28 January 2011,<sup>68</sup> refusing his second PAIA request on 15 December 2010, refusing his August 2010 request again, and reiterating the budgetary justification advanced in October 2010 for the abortion of the applicant's recruitment.<sup>69</sup>

In court, Nair also denied, under oath, that he drafted this January 2011 letter for Vedalankar, thus implicitly blaming and inculcating her for telling Brink the lies it contained, some of which lies Nair retracted in court.

**First affidavit:** 'No such record exists. The officials specified were consulted and they have no recollection of the existence of such record.'

**Issues and witnesses:** Mtati to be examined on who 'consulted' who, and whether an IT officer searched for this record. Vedalankar and Nair to be examined on the existence of this record.

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<sup>63</sup> Bundle addendum, pages 1012–4.

<sup>64</sup> Bundle, pages 505–7.

<sup>65</sup> Bundle, page 502.

<sup>66</sup> Bundle addendum, page 1015.

<sup>67</sup> Bundle addendum, 1019, paragraph 8.1; page 1017: date of conference: 7 June 2013. As he undertook to do, Mtati duly emailed Brink a PDF of the 'Confidential ... Report ... Re: Adv Anthony Brink' to the Minister a couple of days later.

<sup>68</sup> Bundle, pages 210–24.

<sup>69</sup> Bundle, page 223, paragraph 39.

C. The spreadsheet attached to Nair's email to Makokoane on 15 July 2010 under the 'Subject' heading: 'Budget cuts – Reduction in Criminal Court Coverage – July 2010.xlsx'.

**First affidavit:** 'No such record can be found. The record requested was checked with the relevant officials but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who, and whether an IT officer searched for this emailed document of which an electronic record must exist (its existence isn't disputed). Nair and Makokoane to be examined on why they are unable to produce this record attached to a documented email exchange between them, of which the email record itself was produced in January 2011.

**D2.** All and any communications between:

- the Free State and North West regional office, and/or
- the Mahikeng Justice Centre, and/or
- Mahikeng Senior Litigator Adv Nzame Skibi, and
- the LASA national office, and/or
- the Eastern Cape regional office, and/or
- the Mthatha Justice Centre

concerning Adv Skibi's:

- application,
- short-listing,
- interview,
- selection, and,
- approval

for the Mthatha Senior Litigator post, and,

- the subsequent cancellation of the recruitment and of Adv Skibi's transfer and appointment to the said post, and the reasons given therefor.

**Second affidavit:** 'No such record can be found. The record requested was checked with the specified officials but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who, and whether an IT officer has searched LASA's email records over the material period

on the keyword 'Skibi'.

**D3.** All and any communications between:

- the Free State and North West regional office, and/or
- the Mahikeng Justice Centre, and
- the LASA national office

concerning the replacement of Adv Skibi at Mahikeng with another Senior Litigator, and/or the intended advertisement of the post being vacated by Adv Skibi, and/or any decision not to seek a replacement to fill the Mahikeng Senior Litigator post that Adv Skibi was to vacate on being transferred to the equivalent post at Mthatha before the cancellation of the recruitment.

**Second affidavit:** 'No such record can be found. The record requested was checked with the specified offices but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who, and whether an IT officer searched LASA's email records over the material period on the keyword 'Skibi'.

**D4.** All and any communications between Adv Skibi and:

- the Free State and North West regional office, and/or
- the Mahikeng Justice Centre, and/or
- the LASA national office

concerning his relocation to Mthatha, before the cancellation of his recruitment to the Mthatha Senior Litigator post.

**Second affidavit:** 'No such record can be found. The record requested was checked with the specified official but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who (besides Skibi, there's no 'specified official'), and whether an IT officer searched LASA's email records over the material period on the keyword 'Skibi'. Skibi to be examined on the existence of these records.

**E1.** The minute of the regional management meeting at which it was decided that the Durban Justice Centre required a Children’s Court Practitioner and to apply for the creation of such post at such centre.

**First affidavit:** ‘No such record exists. The record requested was checked with the KwaZulu Natal Regional Office and the National Office but same cannot be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who, and whether the record exists but can’t be found, or doesn’t exist. Mdaka and Brijlal to be examined about this.

**E2.** KwaZulu-Natal Regional Operations Executive Vela Mdaka’s motivation under section 8.1.2(b) of the Approval Framework to the Legal Services Committee to recommend (he ‘originates’) the creation of the post at the Durban Justice Centre.

**First affidavit:** ‘No such record exists. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ Mdaka, and whether the record exists but can’t be found, or doesn’t exist. Mdaka and Brijlal to be examined about this.

**E3.** The record showing that Human Resources Executive Amanda Clark was ‘consulted (before)’ the post was created, as required by section 8.1.2(b) of the Approval Framework.

**First affidavit:** ‘No such record exists. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ Clark. Clark to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E4.** The LSTC’s resolution to recommend the creation of the post.

**First affidavit:** ‘No such record exists. The record requested was checked with the specified LSTC but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Nair to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E5.** National Operations Executive Brian Nair’s and Chief Executive Officer Vidhu Vedalankar’s approval of the LSTC’s resolution to recommend the creation of the post, in their capacities as executing authorities delegated by section 8.1.2(b) of the Approval Framework to co-approve the creation of new posts at ‘levels 11–13’ and ‘OSD-LP- 9 & 10’.

**First affidavit:** ‘No such record exists. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar and Nair to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E6.** The record of HRE Amanda Clark’s confirmation, under Note 17 of the Approval Framework, that the vacancy and budget for the post existed before it was advertised.

**First affidavit:** ‘No such record exists. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ Clark. Clark to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E7.** The record showing the vacancy existed prior to the advertisement.

**First affidavit:** ‘No such record exists. The record requested was checked with the Human Resources department who would have knowledge thereof but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Clark to

be examined on whether this record exists but can't be found, or doesn't exist.

**E8.** The record showing the post was budgeted for prior to the advertisement.

**First affidavit:** 'No such record exists. The record requested was checked with the Human Resources Department who would have knowledge thereof but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Clark to be examined on whether this record exists but can't be found, or doesn't exist.

**E9.** The advertisement for the post.

**First affidavit:** 'No such record exists. The record requested was checked with the Human Resources department who would have knowledge thereof but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Clark, Mdaka and Brijlal to be examined on whether this record exists but can't be found, or doesn't exist.

**E10.** The shortlist of applicants for the post.

**First affidavit:** 'No such record exists. The record requested was checked with the Human Resources department who would have knowledge thereof but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Brijlal, Mdaka and Clark to be examined on whether this record exists but can't be found, or doesn't exist.

**E11.** The portion of the interview minute showing that Ngcamu disclosed to LASA his two convictions for professional misconduct by the Law Society, and his rebuke

by the Judicial Service Commission for not disclosing these when applying for a Labour Court judgeship in 2007.

**First affidavit:** ‘No such record exists. The record requested was checked with the KwaZulu Natal Regional Office and the National Office but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Mdaka, Brijlal, Nair and Clark to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E12.** The selection panel’s recommendation of Ngcamu, showing the names of the panel members, the names of the interviewed candidates, and whether or not they met the advertised qualifying criteria. (Confidential information within the meaning of section 34(1) of PAIA may be blacked out.)

**First affidavit:** ‘No such record exists. The record requested was checked with the Human Resources department who would have knowledge thereof but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Mdaka, Brijlal, Nair and Clark to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E13.** The covering letter or email transmitting the recommendation to NOE Nair for his approval under section 8.2.2(b) of the Approval Framework.

**First affidavit:** ‘No such record exists. The record requested was checked with the Human Resources department and the NOE who would have knowledge thereof but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Mdaka, Brijlal, Nair and Clark to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E14.** The record of Nair’s approval of the recommendation, and if applicable to the level of the post, Vedalankar’s agreement per the said section.

**First affidavit:** ‘No such record exists. The record requested was checked with the official specified but same could not be located.’

**Issues and witnesses:** Nair and Vedalankar to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E15.** Ngcamu’s contract of employment as Children’s Practitioner.

**First affidavit:** ‘No such record can be found. The record requested was checked with the Human Resource department but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Clark to be examined on whether this record exists but can’t be found, or doesn’t exist.

**E16.** The letters to the other shortlisted, interviewed candidates informing them that they had been unsuccessful, as required by section 1.5 of the Policies and Procedures on Recruitment.

**First affidavit:** ‘No such record can be found. The record requested was checked with the Human Resource department but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Mdaka, Brijlal and Clark to be examined on whether these records exist but can’t be found, or don’t exist.

**E17.** If it’s not indicated in the advertisement or Ngcamu’s employment contract, any record showing the grade of the post (e.g. LP9).

**First affidavit:** ‘No such record can be found. The record requested was checked with the Human Resource department but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Clark and

Brijlal to be examined on whether this record exists but can't be found, or doesn't exist.

**E19.** All email or letter communications between Ngcamu and Legal Aid SA prior to his employment as Children's Practitioner at the Durban Justice Centre or any other employment by LASA.

**First affidavit:** 'No such record could be located. The requested records were checked with the relevant department which could have been sent the communication but same cannot be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who, and whether an IT officer has searched LASA's email records on the keyword 'Ngcamu'.

**E21.** The letter sent Ngcamu informing him that he had been unsuccessful as a shortlisted candidate in his application for the Senior Litigator post, as required by section 1.5 of the Policies and Procedures on Recruitment.

**First affidavit:** 'No such record can be found. The record was checked with the Human Resource department but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Mdaka and Brijlal to be examined on whether the letter exists but can't be found, or doesn't exist.

**E22.** The letter sent Ngcamu informing him that LASA has decided not to fill the KwaZulu-Natal Senior Litigator posts (like the identical letters sent the other shortlisted and interviewed candidates Brink, Mngadi and van Wyk on 23 August 2010).

**First affidavit:** 'No such record can be found. The record was checked with the Human Resource department but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Mdaka

and Brijlal to be examined on whether the letter exists but can't be found, or doesn't exist. That is, whether former long-term Acting Labour Court Judge Ngcamu, eliminated by the selection panel, was also told the story the other candidates were told, unsupported by any record, that the KwaZulu-Natal Senior Litigator posts had been frozen.

**E23.** Deputy information officer Patrick Hundermark's written delegation by information officer Vedalankar under section 17(3) of PAIA.

**Second affidavit:** 'The record did exist but could not be found after search. The record requested was checked with the specified official.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who – two 'official[s]' are 'specified'. Vedalankar to be examined on whether she issued Hundermark with this document, and if so when. Hundermark to be examined on whether he told Mtati, or other person searching on his behalf, that Vedalankar had indeed issued him with a written delegation as a deputy information officer, but strangely enough he just can't find it anywhere no matter how hard he looks for it high and low. Or whether Mtati is telling a criminal lie about this under oath to cover the embarrassing fact that he amended LASA's PAIA manual to state Hundermark is a deputy information officer, when in fact he isn't because he doesn't hold a written delegation as one. Even though he's acted as one, unlawfully. And even as a 'relevant authority' too, to decide an appeal. Even though you can't be both a deputy information officer and a relevant authority at the same time. And under PAIA, LASA has no appeal procedure. Since when it comes to PAIA, no one at LASA has the faintest idea of what they're doing.

**F1.** Apropos of National Operations Executive Brian Nair's allegation in his 'Report to Board' on Senior Litigators in November 2011, concerning which he volunteered at the trial of case LC D529/11, 'I was the author of this',<sup>70</sup> 'It is felt that the current system of evaluating their performance by the High Court Unit Managers and thereafter by our Legal Quality Assurance Unit may not be appropriate',<sup>71</sup> the

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<sup>70</sup> Record, page 359, lines 10–15.

<sup>71</sup> Bundle (trial documents), page 870, section 4.

minute of the meeting at which this alleged view was expressed, and/or the record of the communication of this view to Nair or other executive.

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified official but same could be located.’

**Issues and witnesses:** Nair to be examined on whether this record exists but can’t be found, or doesn’t exist.

**F2.** The record of Nair’s instruction to ‘the Chief Legal Executive, then the Legal Development Executive’ Patrick Hundermark to draft the ‘terms of reference’<sup>72</sup> of a ‘review panel’<sup>73</sup> to conduct ‘performance reviews or quality reviews’ for ‘senior litigators’,<sup>74</sup> being the ‘person’ to whom Nair claimed at the trial to have ‘allocated the responsibility’<sup>75</sup> for doing this.

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who (more than one ‘official’ is ‘specified’). Nair and Hundermark to be examined on whether this record exists or not, and if it doesn’t, whether Nair issued this important instruction to Hundermark verbally. (Or whether Nair issued no such instruction to Hundermark, and he was committing perjury in the witness stand about this, as usual.)

**F3.** The minutes of the ‘number of meetings’ that Nair claimed Hundermark has ‘hosted’ in the allegedly ‘on-going ... process ... still being attended to’ by him, in the two years since Nair claimed to have ‘allocated the responsibility’ to him ‘to properly develop terms of reference, to identify possible people to contribute to the panel, and to consult’<sup>76</sup> with a view to conducting ‘performance reviews or quality reviews’ for

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<sup>72</sup> Record, page 398, lines 1–3.

<sup>73</sup> Record, page 397, line 21.

<sup>74</sup> Record, page 397, line 15.

<sup>75</sup> Record, page 398, lines 1–3.

<sup>76</sup> Record, page 398, lines 3–10.

‘senior litigators’.<sup>77</sup> [By April 2016, the ‘two years’ had become four-and-a-half years.]

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Hundermark and Nair to be examined on whether these records exist or not. If Nair told the judge the truth, and wasn’t committing perjury in just making this story up in the witness stand as he went along, even though he was testifying under oath under penalty of going to jail for perjury, records will obviously exist of these several meetings and will show with whom Hundermark met.

**F4.** All and any records vouching that Hundermark has acted to (i) ‘develop [the] terms of reference’ set out in Nair’s said Report to Board, (ii) ‘to identify possible people to contribute to the panel’, and (iii) ‘to consult’ anyone about it.

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified official but same could be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who (there’s more than one ‘specified official’). Hundermark to be examined on whether these records exist or not. As said above, if Nair told the judge the truth in court, and didn’t perjure himself in just making this story up as he went along, even though he was testifying under oath under penalty of going to jail for perjury, records will exist of Hundermark’s actions in ‘develop[ing the] terms of reference’, ‘identify[ing] possible people to contribute to the panel’, and ‘consult[ing]’ people about it.

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<sup>77</sup> Record, page 397, line 15.

[Original note above the following PAIA request annexure:]

Confidential information within the meaning of 34(1) of PAIA may be blacked out.

**G1.** The minutes kept by HRE Amanda Clark<sup>78</sup> of the ‘second round interviews’ held ‘for some Regional Operations Executive posts’,<sup>79</sup> as alleged by LASA’s single witness NOE Brian Nair at the trial of case LC D529/11.

**Second affidavit:** ‘No such record could be found after search. The record was checked with the specified official.’

**Issues and witnesses:** Clark to be examined on whether these records exist or not.

**G3.** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, the emails sent by the ROEs to Nair<sup>80</sup> (or by the RHRMs to Clark, forwarded to Nair) covering the selection panels’ recommendations and the CVs of the recommended candidates, as well as the CVs of the other candidates who were shortlisted and interviewed by the selection panels but not recommended by them – in compliance with the ‘specific requirement of the second [round interview] panel’<sup>81</sup> to send all CVs, and not only those of the recommended candidates, since it was ‘The practice of the ... second round panellists to ... consider if there was anyone else they would be interested to interview.’<sup>82</sup>

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on whether an IT officer has searched for these email records. Nair and Clark to be examined on why these records haven’t been produced. If Nair was telling the judge the truth and not telling him

<sup>78</sup> Record, page 372, line 23 to page 373, line 2. ‘[HRE Clark] would assist in the writing up of whatever recommendations flow out of the [‘second round interview’] panel’.

<sup>79</sup> Record, page 338, lines 8–9.

<sup>80</sup> Record, page 407, lines 11–14. ‘[I] would then have found that email again because it would have been in my box’.

<sup>81</sup> Record, page 349, lines 7–15. ‘In fact, a specific requirement of the second panel was that all candidates who were interviewed or shortlisted for the first round, their CVs had to be sent ... so that the second round panellists could consider if there was anyone else [besides the recommended candidate] they would be interested to interview.’

<sup>82</sup> Record, page 349, lines 10–17.

criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist.

**G4.** The email that KwaZulu-Natal ROE Vela Mdaka sent to Nair (or RHRM Baboo Brijlal sent to Clark, forwarded to Nair) covering the selection panel's recommendation of LASA attorney Ashok Kaloo for the Pietermaritzburg Senior Litigator post<sup>83</sup> and his CV, as well as the CVs of the other candidates who were shortlisted and interviewed by the selection panel for the post but not recommended by it, when it was first advertised.

**Second affidavit:** 'No such records could be found. The record requested was checked with the specified officials but same could not be located.'

**Issues and witnesses:** Mtati to be examined on whether an IT officer has searched for this email record. Mdaka and Brijlal to be examined on why this record hasn't been produced. If Nair was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email record must exist.

**G5.** The email that the Free State and North West ROE sent to Nair (or its RHRM sent to Clark, forwarded to Nair) covering the selection panel's recommendation of a candidate for the Kimberly Senior Litigator post – if a recommendation was made – and his/her CV, as well as the CVs of the other candidates who were shortlisted and interviewed by the selection panel for the post but not recommended by it.

**Second affidavit:** 'No such records could be found. The record requested was checked with the specified officials but same could not be located.'

**Issues and witnesses:** Mtati to be examined on whether an IT officer has searched for this email record. Nair and Clark to be examined on why this record hasn't been produced. If a recommendation was made and Nair was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the

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<sup>83</sup> Record, page 410, lines 15–21.

email record must exist.

**G6.** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, Nair’s emails to the five<sup>84</sup> members of the ‘second round’ panel, forwarding the selection panels’ Senior Litigator candidate recommendations in each case and the CVs of all candidates who were shortlisted and interviewed by the selection panels, including the CVs of those candidates who were not recommended,<sup>85</sup> in which emails Nair asked the five members of the ‘second round’ panel to advise him as to who they ‘would like to see’<sup>86</sup> and ‘interview’.<sup>87</sup> (As to the identities of the alleged five members of the so-called second round interview panel, see the Appendix hereto, paragraph [96].)

**First affidavit:** ‘No such record could be found. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on whether an IT officer has searched for these emails. Nair to be examined about where these emails are. If he was

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<sup>84</sup> Record, page 409, line 11.

<sup>85</sup> Record, page 407, lines 13–17. ‘I would have sent it [the email with recommendation and CVs attached] to the panellists to advise who they would like to see (indistinct) the recommended candidate. Therefore, all four [CVs] would have been sent to the panellists and everyone would have the opportunity to see who they would have liked to have (indistinct).’

Record, page 409, lines 24–5 to page 410, lines 1–2. ‘...we do not only interview the recommended candidates.’

Record, page 408, line 25 to page 409, lines 1–2. ‘The panellists can look at all people who were interviewed at the first round and they can say, “we would also like to see X, Y and Z”.’

Page 409, lines 10–11. ‘I would send it to the five panellists and say, “Please advise who you would like to see.”

Record page 409, lines 16–20. ‘By email, Ja --- Yes. [Through] correspondence --- Yes. Okay, so by email that is done --- Yes.’

Record, page 349, lines 21–3. ‘... in deciding who will be in [the] interview for the second round, we look at all four [‘candidates interviewed for the first level’] again and not only the person that the first round panellist[s] interviewed or recommended.’

Record, page 450, lines 7–10. ‘... the second panel does have sight of ... all CVs and it can also select others in addition to whoever is recommended.’

Record, page 350, lines 10–11. ‘[The second round interview panel] is free to make the decision it wants to make and to interview whoever it wants to interview.’

<sup>86</sup> Record, page 409, lines 10–11. ‘I would send it to the five panellists and say, “Please advise who you would like to see.”’

<sup>87</sup> Record, page 349, lines 7–15. ‘In fact, a specific requirement of the second panel was that all candidates who were interviewed or shortlisted for the first round, their CVs had to be sent ... so that the second round panellists could consider if there was anyone else [besides the recommended candidate] they would be interested to interview.’

telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist. Makokoane, Hundermark and Clark to be examined on whether they received such emails.

**G7.** In respect of the Pietermaritzburg Senior Litigator post when it was first advertised, Nair's emails to the five members of the 'second round' panel, forwarding the selection panel's recommendation of attorney Kaloo, his CV, and the CVs of those candidates who were not recommended, in which emails Nair asked the five members of the 'second round' panel to advise him as to who they 'would like to see' and interview.

**First affidavit:** 'No such record could be found. The record requested was checked with the specified official but same could not be located.'

**Issues and witnesses:** Mtati to be examined on whether an IT officer searched for these emails. Nair to be examined on why these email records haven't been produced. If he was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist. Makokoane, Hundermark and Clark to be examined on whether they ever received such emails.

**G8.** In respect of the Kimberly Senior Litigator post, Nair's emails to the five members of the 'second round' panel, forwarding the selection panel's recommendation – if one was made – of the recommended candidate and his CV, and the CVs of those candidates who were not recommended, in which emails Nair asked the five members of the 'second round' panel to advise him as to who they 'would like to see' and interview.

**First affidavit:** 'No such records could be found. The record requested was checked with the specified official but same could not be located.'

**Issues and witnesses:** Mtati to be examined on whether an IT officer searched for these emails. Nair to be examined about where these emails are. If he was telling

the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist. Makokoane, Hundermark and Clark to be examined on whether they ever received such emails.

**G9.** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, the records of the ‘second round’ panel members’ responses to Nair’s enquiries as to which Senior Litigator candidate(s) they wished to see and interview, notifying him as to whom they wished to see and interview, including candidates who had been shortlisted and interviewed by selection panels but not recommended by them.<sup>88</sup>

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on whether an IT officer has searched for these emails. Clark, Hundermark and Makokoane to be examined on whether they sent Nair such strange emails in a grotesque breach of the Recruitment code which made it the responsibility of duly constituted selection panels, and no one else, to recommend the most suitable candidate from among those shortlisted and interviewed. If Nair was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist.

**G10.** In respect of the Pietermaritzburg Senior Litigator post when it was first advertised, the records of the ‘second round’ panel members’ responses to Nair’s enquiries as to which Senior Litigator candidate(s) they ‘would like to see’ and interview besides attorney Kaloo, notifying him as to whom they ‘would like to see’ and ‘interview’, including candidates who had been shortlisted and interviewed by the selection panel but not recommended by it.

**Second affidavit:** ‘No such records could be found. The record requested was

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<sup>88</sup> Record, page 410, lines 10–12. ‘... the panel does not confine itself to only the person that is recommended. The [second round interview] panel, has in the past, requested to see other candidates who were interviewed.’

checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ what officials besides Nair, and whether an IT officer has searched for these emails. Clark, Hundermark and Makokoane to be examined on whether they sent Nair such strange emails in a grotesque breach of the Recruitment code which made it the responsibility of duly constituted selection panels, and no one else, to recommend the most suitable candidate from among those shortlisted and interviewed. If Nair was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist.

**G11.** In respect of the Kimberly Senior Litigator post when it was first advertised, the records of the ‘second round’ panel members’ responses to Nair’s enquiries as to which Senior Litigator candidate(s) they ‘would like to see’ and ‘interview’ besides the recommended candidate – if a recommendation was made – notifying him as to whom they ‘would like to see’ and ‘interview’, including candidates who had been shortlisted and interviewed by the selection panel but not recommended by it.

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ what officials besides Nair, and whether an IT officer has searched for these emails. Clark, Hundermark and Makokoane to be examined on whether they sent Nair such strange emails in a grotesque breach of the Recruitment code which made it the responsibility of duly constituted selection panels, and no one else, to recommend the most suitable candidate from among those shortlisted and interviewed. If Nair was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist.

**G12.** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts; the Kimberly Senior Litigator post – if a recommendation was made; and the Pietermaritzburg Senior Litigator post

when it was first advertised, the records of the invitations to attend ‘second round’ interviews sent to Senior Litigator candidates recommended by the selection panels, and the invitations to attend ‘second round’ interviews also sent to any candidates who had been shortlisted and interviewed by the selection panels but not recommended by them, on the basis that the ‘second round’ interview panel had indicated to Nair that it ‘would like to see’ and ‘interview’ them too.

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ what officials besides Nair, and whether an IT officer has searched for these records. If Nair was telling the judge the truth and not telling him criminal lies under oath to mislead and defraud him, pervert his determination of the true facts of the case and thereby defeat the ends of justice, the email records must exist.

**G13.** The minutes<sup>89</sup> of the meetings of the ‘second interview panel’ on the ‘three separate occasions’ on which it has ‘sat ... to select prospective candidates ... for [appointment as] senior litigators’,<sup>90</sup> at which (i) the current six incumbent Senior Litigators at Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria were chosen; (ii) LASA attorney Ashok Kaloo was rejected, and (iii) ‘one other person [besides Kaloo] that was recommended as possible, as possibly appointable’ was also rejected because ‘we did not like’<sup>91</sup> him/her.

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Nair, Clark, Hundermark and Makokoane to be examined on the existence of these records, and whether these interviews were conducted off the record in a further gross irregularity, besides being unlawfully conducted (see Appendix below).

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<sup>89</sup> Record, page 372, line 23 to page 373, line 2: ‘[HRE Clark] would assist in the writing up of whatever recommendations flow out of the [second round interview] panel’.

<sup>90</sup> Record: Page 366, lines 14–21.

<sup>91</sup> Record, page 410, lines 21–4.

**G14.** The record of Mlambo JP’s communication to executive management of his ‘brain-child’ of a ‘second round of interviews’ referred to in LASA’s original response to the original statement of claim in case LC D529/11.<sup>92</sup> (As to the basic illegality of this scheme, including the illegal involvement of non-executive Board chairperson Mlambo JP, see the Appendix hereto, paragraphs [90] et seq.)

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ what ‘specified officials’ (only Mlambo JP is ‘specified’). Mtati’s declaration implies that the record exists.

APPENDIX: AN EXCERPT FROM THE RECORDS REQUESTER’S HEADS OF ARGUMENT

[90] Addressing the respondent’s pleaded allegation that he was required to undergo ‘a second round of interviews after the interviews conducted by the selection panel’<sup>93</sup> before he could be appointed, the applicant referred in his evidence to the operative provisions of the Board’s Recruitment code and Approval Framework governing Senior Litigator recruitment and appointment. The selection panel’s terms of reference under the Recruitment code were to interview all short-listed candidates<sup>94</sup> and to make a recommendation, and once it had ‘identified the most suitable candidate for appointment in a post’<sup>95</sup> the ‘Motivation has to be signed off by all members of the panel and the line executive before being sent to the HRE/COO/CEO/ delegated for approval, appointment recommendations will be approve in line with the approval framework [sic: comma splice and spelling]’.<sup>96</sup> Section 8.2.2 (b) of the Approval Framework<sup>97</sup> governing ‘Appointments’, read with ‘Key to Levels’,<sup>98</sup> stipulates that the management executives ‘delegated for approval’ of ‘appointment recommendations’ concerning grade LP10<sup>99</sup> ‘Senior Professional staff’ posts, such as Senior Litigator posts, are the NOE who gives ‘Final approval’, subject to the CEO’s assent: she ‘Must agree’<sup>100</sup> with the selection panel’s recommendation. That is, Nair and Vedalankar are the executives ‘delegated for approval’, and no others.

[91] The applicant contended that Nair’s second round interview scheme was incompetent and unlawful for several reasons. Contrary to Vedalankar’s claim in her letter to him of 28 January 2011 that ‘Legal Aid SA Executives are not precluded from formulating processes for recruitment’<sup>101</sup> as they see fit, and, as the respondent pleaded, ‘may follow recruitment methods that are not specifically provided for in the Recruitment Code,’<sup>102</sup> only the Board has the power to set the respondent’s recruitment policy and procedure, and it does so in its Recruitment code: ‘This policy and procedure aims at ensuring that appropriate

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<sup>92</sup> Pleadings bundle, page 143, paragraph 8: ‘The second round of interviews is, in fact, the brain-child of the Chairperson together with the executive management after it was realised that most of the senior practitioners who were recruited without having undergone a second interview were lacking experience in vital areas like High Court litigation skills and also given the seniority of the position involved herein.’

<sup>93</sup> Pleadings bundle, amended response, page 21, paragraph 4.4.

<sup>94</sup> Bundle, pages 230–1, paragraphs 1.2.2.1–2.

<sup>95</sup> Bundle, page 233, section 1.2.3.4.

<sup>96</sup> Bundle, page 234 ‘NB: Motivation ...’.

<sup>97</sup> Bundle addendum, page 1036.

<sup>98</sup> Bundle addendum, page 1034.

<sup>99</sup> Bundle addendum, page 1036, and bundle addendum, page 1002, paragraph 16.

<sup>100</sup> Bundle addendum, pages 1034 and 1036.

<sup>101</sup> Bundle, page 214, paragraph V2.

<sup>102</sup> Pleadings bundle, amended response, page 21, paragraph 4.3.

recruitment procedures are followed, in line with statutory legislation and business practices<sup>103</sup> ... This policy and procedure provides the Legal Aid Board with clear guidelines to be followed when a vacancy exists.<sup>104</sup> The respondent's executives and other officers are not at large to depart from it and make up new recruitment policy and procedure as and when they feel like it.

[92] In his PAIA section 23 affidavit of 8 April 2011, Nair stated that in 'April 2008'<sup>105</sup> he as 'National Operations Executive, in consultation with both the Chief Executive Officer and the Human Resources Executive agreed that the process of recruitment for Senior Litigators will include a second round of interviews. This decision was taken verbally<sup>106</sup> ... The Chairperson of the Board was also invited to participate in this panel.<sup>107</sup> ... The second round of interviews is, in fact, the brainchild of the Chairperson together with the executive management'.<sup>108</sup> But when several months later on 29 November 2008 the Board reconsidered and resolved to amend its Recruitment code, it was not proposed that it include a novel provision for a 'second round of interviews' of a Senior Litigator candidate, duly selected and recommended by a selection panel of senior lawyers, to be conducted by some 'National Office executives'<sup>109</sup> and 'the Chairperson of the Board';<sup>110</sup> and accordingly in amending its Recruitment code the Board did not consider and resolve to include any such novel provision in its 'Version 2\_Approved by Board 29 November 2008',<sup>111</sup> still in force.<sup>112</sup>

[93] Consequently, no section of the respondent's Recruitment code<sup>113</sup> provides for 'a second round of interviews'<sup>114</sup> by any 'identified National Office executives'<sup>115</sup> and by 'the Chairperson of the Board ... invited'<sup>116</sup> to join them; and the respondent finally conceded this, with Nair confirming on affidavit:<sup>117</sup> 'On close scrutiny it will be noted that [the Board's Recruitment code] does not provide for the two-stage interview process referred to'.<sup>118</sup> Before making this true concession, the respondent had meretriciously alleged to this court in its original response that the Recruitment code 'does not in peremptory terms proscribe the use of more than one interviewing methods. On the contrary, clause 1.2.3.5 (page 233 of the Bundle) indicates that there are other possible methods that may still be utilised to complement the interview process adopted by the selection panel.<sup>119</sup> In fact, looked up, clause 1.2.3.5 provides quite differently: 'The selection committee may require certain short listed candidates undergo psychometric assessment to supplement the interview results.'<sup>120</sup>

[94] The applicant contended that notwithstanding his preeminent legal acumen as a senior judge, Board chairperson Mlambo JP has no legal authority as a non-executive director<sup>121</sup> of the respondent to involve himself in such operational processes as staff recruitment and the interviewing of applicants for the respondent's advertised vacant posts, so as to decide whether he agrees with a selection panel's recommendation and whether an applicant 'identified' by it as 'the most suitable candidate for appointment in a post',<sup>122</sup> is indeed the 'most suitable candidate for appointment' in his opinion, and should be appointed or not. The applicant contended with reference to the Approval Framework that Mlambo JP has no approval power in regard to the appointment of Senior Litigators duly selected and recommended for appointment by duly constituted selection panels, and that his authority to approve or disapprove appointment recommendations is limited to the appointment

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<sup>103</sup> Bundle, page 228, section 1.1.2.

<sup>104</sup> Bundle, page 228, section 1.1.3.

<sup>105</sup> Bundle, pages 379–80, paragraph 8.

<sup>106</sup> Ibid.

<sup>107</sup> Bundle, page 380, paragraph 10.

<sup>108</sup> Pleadings bundle, original response, page 143, paragraph 8.

<sup>109</sup> Bundle, page 380, paragraph 9.

<sup>110</sup> Bundle, page 380, paragraph 10.

<sup>111</sup> Bundle, page 228, footer.

<sup>112</sup> Bundle, pages 228–34; bundle addendum, pages 717–8.

<sup>113</sup> Ibid.

<sup>114</sup> Bundle, page 379, paragraph 8.

<sup>115</sup> Bundle, page 380, paragraph 9.

<sup>116</sup> Bundle, page 380, paragraph 10.

<sup>117</sup> Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122–3.

<sup>118</sup> Application to subpoena Mlambo JP, Mtati's answering affidavit, page 81, paragraph 8.

<sup>119</sup> Pleadings bundle, original response, page 176, paragraph 53.3.

<sup>120</sup> Bundle, page 233.

<sup>121</sup> Bundle addendum, page 748.

<sup>122</sup> Bundle, page 233, section 1.2.3.4.

of the CEO and the NOE<sup>123</sup> – his approval authority here shared with the rest of the Board, and not exercised on his own or in committee with any management executives. According to the King III principles of corporate governance<sup>124</sup> which the respondent claims to observe,<sup>125</sup> Mlambo JP's function as the chairperson of the respondent's Board of Directors is inter alia to serve as 'a link between the board and management', while 'Maintaining an arms-length relationship'<sup>126</sup> with them, not to re-interview and approve or reject candidates duly recommended by selection panels.

[95] Regarding the powers and functions of the respondent's non-executive directors such as chairperson Mlambo JP, Nair confirmed<sup>127</sup> the respondent's correct assertion: 'The Board's responsibility primarily relates to policy issues and not operations, hence appointments ... are dealt with by Executives.'<sup>128</sup> So did attorney Mtati: 'Staffing of the Respondent is an issue that is ordinarily dealt with by the Respondent's executive officials.'<sup>129</sup> And again: 'The recruitment and staff issues do not fall within the realm/jurisdiction of the Respondent's board of directors. They are properly dealt with at the respondent's management level.'<sup>130</sup> And again: 'recruitment of staff is an exclusive terrain of executives.'<sup>131</sup> And again: 'the Board does not ordinarily get involved in the management of Legal Aid SA. The exception being, of course the recruitment of senior litigators'.<sup>132</sup> Only, no such 'exception' is provided for anywhere in the Board's Recruitment code, either 'of course' or at all, and it does not permit a non-executive director of the Board to 'get involved' in such operational processes and management decisions as Senior Litigator recruitment.

[96] According to Vedalankar, alleging this to the applicant on 18 October 2010, 'The second stage comprises an interview process by a national office panel, including the Chairperson of the Board, National Operations Executive (NOE), Legal Development Executive, Human Resources Executive and the Chief Operations Officer';<sup>133</sup> and the respondent claimed the same in the pleadings: 'The second stage of the interview process was to be conducted by a panel including the Chairperson, the National Operations Executive, the Legal Development Executive, the Human Resource Executive and the Chief Operations Officer.'<sup>134</sup>

[97] Besides her formal responsibility stipulated by Note 17 of the Approval Framework: 'HRE to confirm budget and vacancy and EE statistics with regard to a JC/region/dept',<sup>135</sup> the Approval Framework does not vest Clark with any authority to vet and approve or reject a selection panel's recommendation of a candidate 'identified' as 'the most suitable candidate for appointment' as a Senior Litigator, following the panel's interview of him and interrogation of his professional qualifications and experience. Nor under the Approval Framework does LDE Hundermark have any such authority either. Nor does COO Makokoane – as Vedalankar pointed out to the applicant,<sup>136</sup> Note 31 of the Approval Framework specifically ousts him: 'The COO shall not have authority to approve matters relating to functions that are the responsibility of the NOE and vice versa.'<sup>137</sup> Nor, as said, does chairperson Mlambo JP. Under the Approval Framework, NOE Nair does indeed have the power to approve or reject a selection panel's recommendation of a Senior Litigator candidate – but upon a review of the selection panel's recommendation, and not after interviewing him again. This is because, lacking any legal qualifications, Nair is not professionally competent to interview and thereupon assess and vet an appointment recommendation of a senior legal professional for a Senior Litigator post made by a selection panel comprised of the respondent's senior legal professionals. For the same reason HRE Clark and COO Makokoane are not professionally competent to reassess such senior legal professionals' qualifications, experience and expertise either.

[98] It follows that to the extent that the selection panel's recommendation of the applicant specified a further interview in keeping with Nair's unapproved, unauthorised and unlawful second interview scheme, such language is legally incompetent,

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<sup>123</sup> Bundle, page 372, section 8.2.1.

<sup>124</sup> Bundle addendum, pages 749–51.

<sup>125</sup> Bundle addendum, page 751.

<sup>126</sup> Bundle, page 751.

<sup>127</sup> Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122–3.

<sup>128</sup> Bundle, page 364, paragraph 6.

<sup>129</sup> Pleadings bundle, original response, page 155, paragraph 37.8.

<sup>130</sup> Pre-trial conference bundle, answer to agenda, page 62, paragraph 74.2.

<sup>131</sup> Application to subpoena Mlambo JP, Mtati's answering affidavit, page 110, paragraph 93.4.

<sup>132</sup> Application to subpoena Mlambo JP, Mtati's answering affidavit, page 93, paragraph 57.3.

<sup>133</sup> Bundle, page 103, paragraph 6.4.

<sup>134</sup> Pleadings bundle, original response, page 143, paragraph 6.

<sup>135</sup> Bundle addendum, page 1040.

<sup>136</sup> Bundle, page 213, paragraph V1.

<sup>137</sup> Ibid.

pro non scripto, and severable. After interrogating the professional qualifications and experience of the several shortlisted candidates at their interviews, the selection panel duly identified the applicant and Mngadi for the Pietermaritzburg and Durban Senior Litigator posts respectively, in accordance with its prescribed terms of reference under the Recruitment code. The Recruitment code and Approval Framework thereafter required Nair and Vedalankar to exercise their discretion as executing authorities as to whether or not to approve the recommendation upon a consideration of the papers.

**H1. Judge Cele's suggestion to LASA that Brink's request for a directive that LASA hand over the copy of the trial record it printed for him in case LC D529/11 be satisfied by giving him 'an electronic copy of the record' instead.**

Note: CSE Mtati alleged in paragraph 7 of his letter to the registrar of 1 October 2014, later copied to Brink:

'Cele J, through his office, suggested that the Respondent accommodate the Applicant by providing him with an electronic copy of the record which the Respondent did.'

This alleged suggestion was not conveyed to Brink by Cele J's secretary/associate or by the registrar; and Brink's written request on 22 October 2014 that Mtati provide him with a copy of this alleged suggestion of 'Cele J, through his office', was ignored.

**Second affidavit:** 'No such record exists. The existence of the requested record requested was checked with the legal representatives in the case and confirmed the non-existence of such record.'

**Issues and witnesses:** Mtati to be examined on which 'legal representatives ... confirmed the non-existence of such record'; how he knew that 'Cele J, through his office, suggested that the Respondent accommodate the Applicant by providing him with an electronic copy of the record' if indeed no record exists of this; and whether he accordingly means to imply by his declaration that Cele J was conducting back-channel verbal communications, ex parte, and off the record with a LASA representative during the case behind Brink's back and without his knowledge at the time. Vedalankar, Nair, Mtati and Sekgota to be examined on whether Cele J communicated his completely useless suggestion (no page and line numbers in the audio recording to refer to) to any of them, or whether Cele J was perhaps talking to LASA chairperson Mlambo JP, his judicial colleague and until recently his head of court in the Labour Court. Who counsels' fee-notes reveal was very interestingly consulted at length before trial, in a matter in which he was supposed to be completely uninvolved. And in Brink's claim in the Labour Court to his appointment to a top-level professional post for which Mlambo JP's erstwhile colleague for about six years Ngcamu AJ (as he had been) had also applied, but had been eliminated and 'not recommended' because he 'does not have any High Court (does not have right of appearance). Therefore candidate does not meet the

minimum High Court requirements as per the advert' (per the unredacted recommendation report provided Brink on 15 April 2016). But who was employed at LASA's Empangeni and then Durban Justice Centres nonetheless. Whereas when Brink then applied for, and was unanimously selected for, a contract Professional Assistant post, Mdaka blocked his appointment, telling the Justice Centre Executive by email to 'redo the interviews' for the post so as to employ someone else for it, but at around the same time telling Brink through Mthimkhulu (H54) very oppositely that it had been decided not to fill the post. (No record of this alleged decision has been produced.) Also appointing several Professional Assistants who'd never been interviewed to determine whether they were qualified and suitable, as required by the Recruitment code. And insisting on the reappointment of a Professional Assistant who'd also never been interviewed and who, in repeated and persistent written complaints both by his LASA supervisors and by court staff, had been reported to be incompetent. (Which is to say Professional Assistant recruitment in KwaZulu-Natal is utterly corrupt as well.)

**H3.** All and any records vouching that a meeting took place between the SAHRC and LASA's 'CEO and some of our senior members' to discuss the SAHRC's allegedly 'incorrect finding' contained in its section 84 report for 2011/12 on public body compliance with PAIA, presented to the National Assembly in October 2012, namely the finding that LASA (Vedalankar) had failed to comply with its (her) reporting obligations under section 32. The record(s) will show the date and place of the meeting, who attended it, and the outcome.

Note: In paragraph 183.2 of his answering affidavit in Brink's application in the Eshowe Magistrate's Court under case number 258/14 to compel Vedalankar's compliance with his PAIA request in October 2013, CSE Thembile Mtati swore to a commissioner of oaths under penalty of perjury:

'As an organisation, we denied the said finding by SAHRC and I am aware that the CEO and some of our senior members met with SAHRC to deal with the said incorrect finding.'

In paragraph 2 of her confirmatory affidavit 'TM3', Vedalankar swore to a commissioner of oaths under penalty of perjury that this allegation was true:

'I have read the Answering Affidavit of Thembile Vuyo Mtati and I confirm that the content therein, in so far as it relates to me, are both true and correct.'

In evidence at the trial of case LC D529/11, Nair alleged differently under oath:

'I am aware of engagements that Legal Aid South Africa has made with the Human

Rights Commission in terms of our concern with [the SAHRC's section 84 report about LASA]. And our Corporate Services Executive was requested to take it on directly with the respective officials from there, and I believe that engagement did take place. ... We were quite concerned with this report and we did address it with the Human Rights Commission ourselves.<sup>138</sup>

**Second affidavit:** 'No such record could be found. The existence of the requested record requested was checked with the specified official but same could not be located.'

**Issues and witnesses:** Mtati, Vedalankar and Nair to be examined on whether a record of the meeting exists or not. (According to then SAHRC PAIA Unit director Fola Adeleke's emailed information to Brink, contrary to Mtati's and Vedalankar's perjury about this, and Nair's different perjury about it, no such meeting with any LASA officer took place.)

**H4.** The record reflecting that, as ordered by the Legal Services Technical Committee on 24 March 2010, then 'Manager: Legal Administration, National Operations'<sup>139</sup> Bee-Mari Schoeman (responsible for 'Legal Services Delivery')<sup>140</sup> 'Immediate[ly]<sup>141</sup> ... facilitate[d] the transfer of the budget'<sup>142</sup> that existed for a Senior Litigator post at the Kimberly Justice Centre<sup>143</sup> to the Mthatha Justice Centre.

**First affidavit:** 'No such record could be found. The record requested was checked with the official who would ordinarily be expected to have knowledge of same but it could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Vedalankar, Nair and Clark to be examined on why this record hasn't been produced. The record must exist because the new post was advertised, interviews were held for it, and a candidate was selected for it, and the recruitment and vacancy statistics for June 2010 reflect that the new post at Mthatha had been

<sup>138</sup> Record, page 474, lines 13–22.

<sup>139</sup> Per Schoeman's CV posted online at LinkedIn: <http://linkd.in/17DpY3F>.

<sup>140</sup> Bundle addendum (trial documents in LC D529/11), page 708, 'Members Present'.

<sup>141</sup> Bundle addendum, page 709, section 4.1.7 under 'Due Date' column.

<sup>142</sup> Bundle addendum, page 709, section 4.1.7.

<sup>143</sup> Bundle addendum page 707.

created and was part of LASA's staff establishment by that time (see note below item H5 next).

**H5.** The records of CEO Vedalankar's and National Operations Executive Brian Nair's respective 'Final approval' and 'agree[ment]' (as he 'Must') of the abolition of the Kimberly Senior Litigator post and establishment of the Mthatha Senior Litigator post under section 8.1.2(b) of the Approval Framework as required,<sup>144</sup> before the Mthatha post was advertised.<sup>145</sup>

Note: The recruitment/vacancy/budget statistics for June 2010<sup>146</sup> supplied to Brink before trial show that the Kimberly Senior Litigator post had indeed been abolished and the Mthatha post established by that month, with the Mthatha post duly noted as vacant.

**Second affidavit:** 'No such record could be found. The record requested was checked with the specified official but it could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who – there was more than one 'specified official in the request'. Vedalankar and Nair to be examined on the existence of this record.

**H6.** After the selection panel's interviews of shortlisted candidates for the Mthatha Senior Litigator post in May 2010,<sup>147</sup> all and any records showing the form of 'transit' that 'a file that was to be delivered to Legal Aid SA Head Office in re the position of senior litigator position for Mthatha was lost in', in the form of a registered post slip, courier waybill, covering email, telefax covering page and transmission report, or other such voucher.

Note: In paragraph 183 of Eastern Cape deputy information officer Hope Bambiso's answering affidavit in Brink's application in the Eshowe Magistrate's Court under case number 257/14 to compel his compliance with Brink's PAIA request in October 2013, Bambiso stated:

'183.2. I am responsible for the Port Elizabeth, Eastern Cape Region and I am advised by Mr Sekgota that a file that was to be delivered to Legal Aid SA Head Office in re the position of senior litigator position for Mthatha was lost in transit. I believe Ms Magazi

<sup>144</sup> Bundle addendum, page 1036.

<sup>145</sup> Bundle, page 46.

<sup>146</sup> Bundle addendum, page 1066.

<sup>147</sup> Bundle addendum, page 994.

informed Mr Sekgota telephonically sometime last year.

...

183.4. The Applicant was informed of the lost file and he still does not believe the explanation given to him. I am unable to take this issue any further.'

In paragraph 2 of his confirmatory affidavit 'HB6', Corporate Legal Manager Solly Sekgota swore to a commissioner of oaths under penalty of perjury that these allegations were true:

'I have read the Answering Affidavit of Hope Bambiso and I confirm that the content therein, in so far as it relates to me, are both true and correct.'

In paragraph 2 of her confirmatory affidavit 'HB7', Eastern Cape Regional Human Resources Manager Thenjiwe Magazi also swore to a commissioner of oaths under penalty of perjury that these allegations were true:

'I have read the Answering Affidavit of Hope Bambiso and I confirm that the content therein, in so far as it relates to me, are both true and correct.'

(Provision of these records may assist a criminal court magistrate 'believe the explanation given to him' when later dealing with 'the issue' of whether or not Magazi and Sekgota committed perjury.)

**First affidavit:** 'No such record exists. This has already been replied to in paragraph 183.2 and confirmed by Ms. Magazi with annexure HB7 to the answering affidavit deposited by Hope Bambiso under case 257/14 in Eshowe Court.'

**Issues and witnesses:** Magazi and Sekgota to be examined on whether this record exists or not. If as alleged, the file was sent, there must be a record of this, as requested.

**H8.** The complete contents of Human Resources Executive Amanda Clark's file or computer folder on the Mthatha Senior Litigator post.

**First affidavit:** 'No such record can be found. The record requested was checked with the specified official but same could not be located.'

**Issues and witnesses:** Clark to be examined on why these records haven't been produced. The declaration implies they exist.

**H9.** All records of communications between LASA's national office and its Eastern Cape Regional Office after the discovery that 'a file that was to be delivered to Legal

Aid SA Head Office in re the position of senior litigator position for Mthatha was lost in transit’ – including any request for the file, or a copy of it, to be sent again.

Note: The minute of the LSTC’s March 2010 meeting, chaired by Nair, records that it prioritised the Mthatha Senior Litigator recruitment for ‘Immediate’<sup>148</sup> implementation; and the post was advertised in April,<sup>149</sup> with interviews held in May<sup>150</sup> in short order. Nair would accordingly have been awaiting the selection panel’s recommendation in ‘Legal Aid SA Head Office’.

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified offices but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Clark, Nair and Magazi to be examined on whether these records exist but can’t be found or don’t exist, because very strangely when the hotly expected file didn’t arrive, being ‘lost in transit’, no one made enquiries and lifted a finger to obtain a copy.

**H11.** The minute of the September 2008 Board meeting at which the Strategic Plan 2009–12 was approved.<sup>151</sup>

**First affidavit:** ‘No such record can be found. The record requested was checked with the official who it would be expected to have knowledge of the record but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar to be examined on why this record of this resolution of the Board hasn’t been produced. The Board’s decision to approve the Strategic Plan must have been minuted. And the Strategic Plan, drawn in compliance with the requirements of the Public Finance Management Act, must have been approved by the Board, because it was presented both to the Minister and to Parliament.

**H12.** The minutes of all Legal Services Technical Committee meetings held in the period October 2009 to February 2011, besides the minute of its March 2010

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<sup>148</sup> Bundle addendum, page 709, paragraph 4.1.7.

<sup>149</sup> Bundle, page 46.

<sup>150</sup> Bundle addendum, page 994.

<sup>151</sup> Bundle addendum, page 1060, paragraph 3.2.1.

meeting, which Brink already has.<sup>152</sup>

**Response:** ‘The record is attached as appendix H12.’

**Complaint:** ‘This request hasn’t been properly responded to. The minutes up to May 2010 have been provided, but the rest I requested up to February 2011 haven’t been.’

**Repudiation:** ‘We deny that we are in breach of the settlement agreement at all.’

**Issues and witnesses:** Mtati, Vedalankar and Nair to be examined on why these records haven’t been produced. Concerning his failure to produce these minutes, Mtati will be examined on his perjury in his first discovery affidavit in Brink’s labour case, in which he claimed that no Senior Litigator matters of any description were discussed and minuted at any LSTC meeting in 2010. The LSTC minutes provided under this item on 15 April 2016 prove he lied on oath to conceal material records from Brink and from the trial court. Compare item 33 (Ad document 41): ‘minutes of LASA’s Legal Services Technical Committee’s (LTSC’s) monthly meetings in 2009, 2010 and 2011 concerning: (a) any minuted Senior Litigator matters of any description’ on page 9 of Brink’s agenda for the first pre-trial conference at court in January 2013 with Mtati’s sworn response in his discovery affidavit of 11 March 2013, page 4: ‘No such record exists.’ His perjury about this is exposed by the minute of the 27 May 2010 LSTC meeting minute furnished on 15 April 2016 reflecting that Senior Litigators were indeed the subject of two separate discussions. Mtati evidently doesn’t stint at lying under oath to conceal requested documents.

**H13.** The minutes of all management executive committee meetings held in the period October 2009 to February 2011.

**First affidavit:** ‘No such record can be found. The record requested was checked with the official who it would be expected to have knowledge of the record but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar to be examined on why these records haven’t been produced, and

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<sup>152</sup> Bundle addendum, pages 708–10.

whether she holds her national management executive committee meetings off the record without minuting its resolutions.

**H14.** The minutes of all Board Executive Committee meetings held in the period October 2009 to February 2011.

**Response:** ‘Section 23 of the PAIA deposed.’ (In fact, two minutes were provided.)

**First affidavit:** Silent.

**Complaint:** ‘Only two minutes for Board Executive Committee meetings have been furnished, namely for the meetings on 20 November 2009\* and on 18 February 2011. The rest of the requested minutes have not been supplied. (\*The meeting previous to the November one was in July 2009; the minute for that wasn’t requested.)’

**Second affidavit:** ‘No such record can be found. The record requested was checked with the official who it would be expected to have knowledge of the record but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar and Lethiba to be examined on why these records haven’t been produced. Contrary to Mtati’s obvious perjury about them, they certainly exist.

**H15.** The minutes of all Board meetings held in the period October 2009 to February 2011.

Note: Brink has the first page only of the minute of the July 2010 meeting.<sup>153</sup>

According to Nair’s sworn evidence at trial:

‘...the Board would have been informed at the May meeting of 2010 that ... we did not receive the [OSD] funding and what steps were being taken.’<sup>154</sup>

**Response:** ‘Section 23 of the PAIA deposed.’ (In fact three minutes were provided.)

**First affidavit:** Silent.

**Complaint:** ‘This request hasn’t been properly responded to. The only Board

<sup>153</sup> Bundle, page 251.

<sup>154</sup> Record, page 425, lines 19–23.

meeting minutes furnished are those for the meetings of 28 November 2009, 29 May 2010,\* and 31 July 2010. (\*This minute refers to a 27 February 2010 meeting.) The rest of the requested minutes haven't been supplied.'

**Second affidavit:** 'No such record can be found. The record requested was checked with the official who it would be expected to have knowledge of the record but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Vedalankar and Lethiba to be examined on why these records, whose existence isn't disputed, haven't been produced.

**H17.** Excerpts comprising the cover or first identifying page, and the pages containing provision for Senior Litigator salaries in LASA's budget for 2013/14.

**First affidavit:** 'No such record can be found. The record requested was checked with the Human Resource department but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Seeing as Nair produced these records on 14 December 2015 (annexure 'C'), in response to Brink's PAIA request for them addressed to the Department of Justice and Correctional Services on 27 November 2015, which the Department referred to LASA under section 20, Mtati, Nair, Clark and Vedalankar to be examined on why these records were concealed in response to this request addressed directly to LASA, in a criminal contravention of section 90(1)(b), under the perjured allegation in Mtati's section 23 affidavit that these records 'could not be located.' When in truth and in fact they could be and were, as annexure 'C' shows.

**H18.** The minute of the Board meeting at which LASA's budget for 2013/14 was approved.

**Second affidavit:** 'No such record can be found. The record requested was checked with the official who it would be expected to have knowledge of the record but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who.

Vedalankar and Lethiba to be examined on why this record hasn't been produced. It certainly exists, and this isn't disputed.

**H20.** The payment voucher of the Department of Justice and Constitutional Development (as it was then called) reflecting the date of its transfer of OSD phase 1 funding for 2009/10.

Note: This payment is mentioned in LASA's annual report for 2009/10:

'The Occupational Specific Dispensation (OSD) phase 1 shortfall of R23million in the 2009/10 financial year was received from the DoJ.'<sup>155</sup>

**Second affidavit:** 'No such records can be found. The record requested was checked with the specified official but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. (No 'official' was 'specified' in the request.) Vedalankar and Makokoane to be examined on why this record hasn't been produced. It isn't disputed that the record exists, and indeed it certainly exists, like the similar payment voucher the following year on 15 December 2010: see Labour Court Bundle 2, page 713.

**H21.** The record of any Strategic Plan Annual Review workshop or Board meeting<sup>156</sup> at which it was resolved not to fill LASA's remaining three vacant Senior Litigator posts.

Note: 'The Strategic Plan is reviewed annually to assess changes in the external and internal environment in which Legal Aid South Africa operates. The changes in the external and internal context are taken into account in the development of each year's business plans.'<sup>157</sup> In his 'Report to Board' in November 2011, Nair alleged:

'Six Senior Litigators were filled during our recruitment processes. The other three posts have remained vacant due to recruitment challenges. We have since decided not to fill the remaining positions until we are reassured that our objectives determined for this position is being achieved by the current incumbents.'<sup>158</sup>

**Second affidavit:** 'No such records can be found. The record requested was checked with the specified official but same could not be located.'

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<sup>155</sup> Bundle, page 1057.

<sup>156</sup> Bundle addendum, page 1061, section F2-C2-P1.

<sup>157</sup> Bundle addendum, page 1060.

<sup>158</sup> Bundle addendum, page 869.

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. (No ‘official’ was ‘specified’ in the request.) Vedalankar, Makokoane and Lethiba to be examined on whether this record exists, as implied by the declaration.

**H22.** The record showing mention or discussion by any LASA executive(s) of the issue alleged by Nair in his November 2011 ‘Report to Board’ that Senior Litigators may not be fulfilling LASA’s objectives for such posts.

**Second affidavit:** ‘No such records can be found. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar, Makokoane, Nair, Hundermark and Clark to be examined on whether this record exists, as implied by the declaration.

**H23.** All and any reviews of Senior Litigator performance pertaining to whether or not LASA’s ‘objectives’ for such posts were ‘being achieved by the current incumbents’ or not.

**Second affidavit:** ‘No such record can be found. The record requested was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar, Makokoane, Nair, Hundermark and Clark to be examined on whether this record exists, as implied by the declaration.

**H24.** The record of the decision not to fill Senior Litigator posts for the said reason, referred to in Nair’s Report to Board of November 2011.

**Second affidavit:** ‘No such records can be found. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who.

Vedalankar, Makokoane, Nair, Hundermark and Clark to be examined on whether this record exists, as implied by the declaration.

**H25.** All and any records vouching that NOE Nair was among the ‘senior executives’ who ‘began to deliberate quite intensively’<sup>159</sup> in regard to the ‘budgetary issues that suddenly confronted’<sup>160</sup> them on 10 March 2010, on learning that LASA’s expected OSD phase 1 funding hadn’t been included in the baseline budget for 2010/11<sup>161</sup> as had been assured in January 2010,<sup>162</sup> alternatively all and any records vouching that Nair was involved in pursuing the Department’s payment of LASA’s OSD phase 1 funding for 2010/11 in any manner whatsoever.

**Second affidavit:** ‘No such record can be found. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar, Makokoane, Nair, Hundermark and Clark to be examined on whether this record exists, as implied by the declaration.

**H26.** Excerpts of LASA’s recruitment statistics showing Senior Litigator post occupancies and vacancies for March, April and May 2010, and July, August, September, October, and November 2010.

Note: The June<sup>163</sup> and December<sup>164</sup> 2010 statistics were supplied to Brink before trial.

**Second affidavit:** ‘No such record can be found. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Clark to be examined on why these monthly statistics that her HR department keeps have

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<sup>159</sup> Record, page 344, line 9.

<sup>160</sup> Pleadings bundle, original response, page 144, paragraph 11.

<sup>161</sup> Bundle, page 236, paragraph 6.

<sup>162</sup> Bundle, pages 235–6, paragraphs 3 and 5.

<sup>163</sup> Bundle addendum, page 1066.

<sup>164</sup> Bundle addendum, page 1070.

not been produced – as the June and December 2010 statistics were in mid-2013, just before the trial of Brink’s labour claim.

**H27.** The executive instruction issued to transfer the Senior Litigator budget from Mthatha back to Kimberly (from which it had been transferred).

Note: Whereas the June 2010 recruitment/vacancy/budget statistics reflect a budgeted vacant Senior Litigator post at Mthatha,<sup>165</sup> the December 2010 statistics show the post and budget had reverted to Kimberly.<sup>166</sup>

**Second affidavit:** ‘No such record can be found. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar, Nair and Clark to be examined on whether this record exists, as implied by the declaration.

**H28.** Following COO Makokoane’s memorandum circulated to them on 30 September 2010, soliciting cost-cutting proposals in view of the slow recovery from the international financial recession,<sup>167</sup> the proposals submitted by:

- (a) CEO Vidhu Vedalankar,
- (b) NOE Brian Nair,
- (c) KZN ROE Vela Mdaka,
- (d) then Pietermaritzburg JCE Bertus Appel, and,
- (e) then Durban Justice Centre Executive Kishore Mehta.

**Second affidavit:** ‘No such record can be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Makokoane, Vedalankar, Nair and Mdaka to be examined on whether these records exist, as implied by the declaration. Or whether none of the latter three made any

<sup>165</sup> Bundle addendum, page 1066.

<sup>166</sup> Bundle addendum, page 1070.

<sup>167</sup> Bundle, pages 241–3.

cost-cutting proposals to Makokoane, as he requested.

**H29.** The ‘Treasury ... budget allocations letter ... released ... at the end of 2009’ to which Nair referred in his evidence.<sup>168</sup>

**Second affidavit:** ‘No such record can be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Vedalankar, Makokoane and Nair to be examined on why this record to which Nair referred in the Labour Court, and whose existence isn’t disputed in the declaration, hasn’t been produced.

**H30.** The records of all Nair’s ‘decisions ... take[n] ... to freeze posts’ with or without CEO Vedalankar’s agreement, and without the approval of the Board.

Note: At trial, Nair testified, on oath, under penalty of perjury, that:

‘... it was a very routine decision to freeze three posts. And I take decisions to freeze posts continuously in the organisation, and I consult with the CEO. ... It is a normal part of operations that we have got a staff establishment and for various reasons we freeze posts, we do not proceed with it. What we plan to do and what we actually do, the decisions may change. So it was not something that was abnormal.’<sup>169</sup>

Contrariwise, Nair also testified (correctly, in light of the requirement of the Approval Framework that the Board be consulted before any change to the Business Plan based on its Strategic Plan):<sup>170</sup>

‘The implementation continues until the Board revisits that issue.’<sup>171</sup>

**Second affidavit:** ‘No such record can be found. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Vedalankar, Makokoane and Nair to be examined on why these records, implied by the declaration to exist, haven’t been produced.

<sup>168</sup> Record, page 342, lines 14–15.

<sup>169</sup> Record, page 434, lines 3–18. (The Minister explicitly told Mlambo JP that he ‘didn’t want’ any posts frozen, as Vedalankar mentioned to the Portfolio Committee on 11 October 2010. Bundle, page 184.)

<sup>170</sup> Heads of argument, paragraph 61.

<sup>171</sup> Record, page 424, line 25 to page 425 line 1.

**H39.** The agenda and the minute of the Board Executive Committee meeting on Friday 23 March 2012; alternatively, if no such meeting was held on that date, the agenda and the minute of the extraordinary extra fifth Board Executive Committee meeting in 2011/12.

**Second affidavit:** ‘No such record can be found. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Lethiba to be examined on why this record, implied by the declaration to exist, hasn’t been produced.

**H40.** Vedalankar’s confirmatory affidavit, made in support of CSE Mtati’s answering affidavit in Brink’s application for leave to subpoena Mlambo JP, and referred to in paragraph 107 thereof as annexure ‘DM14’.

Note: Nair also made a confirmatory affidavit – referred to in the same paragraph as ‘DM15’. Neither Vedalankar’s nor Nair’s affidavits were annexed to Mtati’s affidavit at the time the latter was delivered to Brink. Nair’s confirmatory affidavit was delivered to Brink only after the trial; and Vedalankar’s confirmatory affidavit remains outstanding.

**Second affidavit:** ‘No such records could be found. The record requested was checked but same could not be located.’

**Issues and witnesses:** Mtati and Vedalankar to be examined on why this record, implied by the declaration to exist, hasn’t been produced.

**H41.** The records of Board chairperson Mlambo JP’s requests to other Board members on 24 January 2011 that they should ignore Brink’s repeated appeals for Board intervention in Vedalankar’s illegal, falsely justified refusal to comply with his first PAIA request and in the manifestly irregular abortion of his appointment on the several indications he identified.<sup>172</sup>

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<sup>172</sup> Bundle, pages 109–65; and 197–208.

Note: In his email to Brink rebuking Brink's second petition to the Board,<sup>173</sup> in which he again pleaded for its intervention in Vedalankar's illegal, falsely justified refusal to comply with his first PAIA request and in the manifestly irregular abortion of his appointment,<sup>174</sup> Mlambo JP alleged:

'I have, in turn, requested Board members to ignore all communications from you and/or on your behalf.'<sup>175</sup>

Unless Mlambo JP telephoned each and every Board member between the time he read Brink's second petition and the time he wrote this late-night email on the same day, records will exist to vouch the truth of his allegation that he requested each of them 'to ignore' Brink's future appeals that the Board see to it that LASA's management executives conduct themselves in accordance with the Constitution and the law.

**Second affidavit:** 'No such records could be found. The record requested was checked with the specified official.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' Mlambo JP; and whether Mlambo JP said he couldn't find these records of his emails to the other Board members on 24 January 2011 or confirmed that they don't exist, which is to say he lied to Brink in claiming, 'I have, in turn, requested Board members to ignore all communications from you and/or on your behalf', in his unsuccessful attempt to put Brink off pursuing his fundamental rights to information and equal employment opportunity. And if Mlambo JP said he couldn't find the records, whether Mtati enquired from other Board members whether they received such a request from Mlambo JP to ignore Brink's appeals to the Board that LASA's management executives conduct themselves in accordance with the Constitution and the law, and if so whether he asked them to forward copies of Mlambo JP's alleged request to him to enable him to comply with this particular PAIA request.

**H42.** The decision originally taken to employ two Professional Assistants ('PAs') per backlog court at Pietermaritzburg, or generally, provincially or nationally.

Note: Then Pietermaritzburg Justice Centre Executive Bertus Appel twice refers to this decision: in his motivation for the employment of Arnold Mahlobo in August 2008,<sup>176</sup> and in

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<sup>173</sup> Bundle, pages 197–208.

<sup>174</sup> Bundle, pages 109–65.

<sup>175</sup> Bundle, page 209.

<sup>176</sup> PA bundle (document bundle in Richards Bay CCMA case KNRB1481-14: Brink/LASA), page 116. The PA bundle is also accessible at the case document archive online: [www.tig.org.za/LASA](http://www.tig.org.za/LASA) username: lasa password: LASA2010.

his email correspondence with KwaZulu-Natal Regional Operations executive Vela Mdaka in February 2011.<sup>177</sup>

**Second affidavit:** ‘No such records could be found. The record requested was checked with the specified official but same could not be found.’

**Issues and witnesses:** Mtati to clarify whether Mdaka was ‘checked with’ about this record, and by who. Nair and Mdaka to be examined on why this record, implied by the declaration to exist, hasn’t been produced.

**H43.** The 2010/11, 2011/12, and 2012/13 budgets provided by the Department for salaries for PAs serving the backlog courts at Pietermaritzburg.

Note: LASA’s budget for 2011/12 was approved by the Board on 26 Nov 2010,<sup>178</sup> and it presumably would have provided for 8 contract PA posts at Pietermaritzburg for the four backlog courts, because this number of posts was reduced some months later.<sup>179</sup>

**Second affidavit:** ‘No such record can be found. The existence of the requested record was checked with the official who would be ordinarily expected to know of its existence but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Vedalankar, Makokoane, Nair and Clark to be examined on why these records, implied by the declaration to exist, haven’t been produced.

**H44.** The minutes of all KwaZulu-Natal regional executive management meetings over the period October 2010 to June 2011.

**First affidavit:** ‘No such record exist. The requested records were checked with the specified Regional Office which confirmed its non-existence.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who. Mdaka and Brijlal to be examined on whether Mdaka indeed conducts his KwaZulu-Natal regional executive management meetings off the record without its resolutions

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<sup>177</sup> PA bundle, page 222.

<sup>178</sup> Bundle addendum (second trial document bundle, in case LC D 529/11), page 881.

<sup>179</sup> PA bundle, pages 220 and 221.

being minuted (unlike in the Eastern Cape, whose requested regional executive management meeting minutes Mtati has now duly provided). Or whether lies have been told about this, in a criminal contravention of section 90(1)(b) of PAIA, in keeping with the culture of casual mendacity and phenomenal corruption in LASA's senior management ranks, repeatedly exhibited since Brink began pressing in April 2011 for his due appointment to the top professional post for which he'd been duly selected and recommended.

**H45.** The record of KwaZulu-Natal Regional Operations Executive Vela Mdaka's discussions with National Operations Executive Brian Nair about streamlining the backlog courts.

Note: Mdaka refers to this in email correspondence with Appel.<sup>180</sup>

**First affidavit:** 'No such record can be found. The record requested was checked with the specified officials but same could not be found.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Nair and Mdaka to be examined on whether this record exists, as implied by the declaration.

**H46.** All and any records identifying the nature of the Stanger court incident.

Note: Mdaka refers to this in his email correspondence with Appel.<sup>181</sup>

**First affidavit:** 'No such record exist. The requested records were checked with the specified KwaZulu Regional Office which confirmed that it is not aware of any such record.'

**Issues and witnesses:** Mtati to be examined on who 'checked with' who. Mdaka and Brijlal to be examined on whether the only mention of the Stanger incident in LASA's records is in Mdaka's said email to Appel and nowhere else.

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<sup>180</sup> PA bundle, page 231.

<sup>181</sup> Ibid.

**H47.** All records sent to then Board Secretary Bee-Mari Schoeman over the period October 2010 to June 2011 informing her performance of her function: ‘Monitoring of Backlog Court Staffing and compilation of costings to distribute budget received for this purpose to various cost centres’,<sup>182</sup> including but not limited to (i) any changes to the number of backlog court posts at the Pietermaritzburg Justice Centre, and (ii) any changes to the budget received for the employment of PAs in the backlog courts at Pietermaritzburg.

**Second affidavit:** ‘No such record could be located. The former employee is deceased.’

**Issues and witnesses:** Mtati to be examined on who asked who to search for these records, and what the relevance of Schoeman’s departure from LASA and later demise is, seeing as the requested documents are LASA’s business records. Vedalankar, Nair, Clark, Mdaka and Brijlal to be examined on why these records have not been produced.

**H48.** The decision to reduce the number of PAs serving the backlog courts at Pietermaritzburg from two to one, according to Nair’s emailed announcement of this to LASA’s Regional Operations Executives on 21 February 2011.<sup>183</sup>

**Response:** ‘Records attached as appendix H48.’

**Complaint:** ‘This request has not been properly responded to. The record of the decision was requested. I already have Nair’s email communicating the decision, which has been provided again, instead [of the record of the decision itself]. Is it intended to allege that Nair incompetently took the decision alone, ultra vires, without discussion and approval by the LSTC, and that for this reason no such record of such decision by the LSTC exists?’

**Repudiation:** ‘We deny that we are in breach of the settlement agreement at all.’

**Issues and witnesses:** Nair to be examined on whether this record exists or not.

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<sup>182</sup> Per Schoeman’s CV posted online at LinkedIn: <http://linkd.in/17DpY3F>.

<sup>183</sup> PA bundle, page 123.

**H50.** The minute of the ‘meeting’ in February 2011 ‘to identify the sites that will continue to function [and be] funded’, to which Mdaka referred in his email to then Pietermaritzburg Justice Centre Executive Bertus Appel and other JCEs on 7 February 2011.<sup>184</sup>

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Nair and Mdaka to be examined on why this record hasn’t been produced, since the declaration implies it exists. And it must exist because Mdaka refers to this important meeting – unless the meeting was held off the record grossly irregularly.

**H51.** The responses that the members of the selection panel, Manickum, Holtzhauzen, and Shelembe furnished Appel following his referral to them of Mdaka’s objections to Brink’s appointment to the annual contract PA post for which they’d unanimously recommended him.<sup>185</sup>

Note: On 17 November 2010, the day after receiving Mdaka’s objections to Brink’s appointment,<sup>186</sup> Appel emailed Mdaka: ‘I will refer the issues raised by you to the interviewing panel and will revert to you.’<sup>187</sup>

**First affidavit:** ‘No such record can be found. The record requested was checked with the specified officials but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who ‘checked with’ who; whether Holtzhauzen and Shelembe were among the ‘specified officials ... checked with’ (Manickum has left LASA); and whether an IT officer has searched LASA’s email records for these records. Mdaka to be examined on whether he received their responses to his objection to Brink’s appointment (inter alia on the amazing basis that he wasn’t qualified for the job, after recommending him for the Senior Litigator post the year before), i.e. whether these records exist or not.

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<sup>184</sup> PA bundle, page 219.

<sup>185</sup> PA bundle, pages 18–21.

<sup>186</sup> PA bundle, page 23.

<sup>187</sup> PA bundle, page 212.

**H52.** Appel's transmission to Mdaka of the selection panel's responses to Mdaka's objections to Brink's appointment.

**First affidavit:** 'No such record can be found. The record requested was checked with the specified officials but same could not be located.'

**Issues and witnesses:** Mdaka to be examined on whether he received the responses, i.e. whether the record exists or not. Mtati to be examined whether an IT officer has searched LASA's email records for it.

**H54.** The record of Jeffrey Mthimkhulu's appointment as acting Pietermaritzburg Justice Centre Executive<sup>188</sup> in Appel's absence on leave at the said time.

**First affidavit:** 'No such record can be found. The record requested was checked with the Human Resource department but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who asked who. Mdaka and Brijlal to be examined on whether the record exists or not.

**H56.** Any employment contracts subsequently signed between LASA and any of the rejected candidates.

**First affidavit:** 'No such record can be found. The record requested was checked with the Human Resource department but same could not be located.'

**Issues and witnesses:** Mtati to be examined on who asked who. Mdaka and Brijlal to be examined on whether the records exist or not.

**J.** (a) LASA's list of 231 critical legal posts, or other record(s), identifying what legal posts were included under the category 'Critical Occupation' in LASA's annual report for 2012/13; and (b) the subsequent motivation and resolution to exclude all but the JCE posts from the category of critical legal posts in LASA's annual reports

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<sup>188</sup> PA bundle, page 53.

to the Minister and to Parliament.

**Second affidavit:** ‘No such record can be found. The record requested was checked with the specified official but same could not be located.’

**Issues and witnesses:** Mtati to be examined on who asked who. (No ‘official’ is ‘specified’.) Vedalankar, Makokoane, Nair and Clark to be examined on why these records, implied by the declaration to exist, haven’t been produced.

1 Boast Street  
Eshowe 3815  
6 June 2016



Thembile Mtati,  
Deputy Information Officer and Corporate Services Executive  
Legal Aid South Africa  
29 De Beer Street  
Braamfontein

Cc:

Information Officer and Chief Executive Officer Vidhu Vedalankar  
Chief Legal Executive Patrick Hundermark  
Internal Audit Executive Sethopo Mamotheti  
Board Secretary Langa Lethiba

By email

Dear Mr Mtati

PAIA APPLICATIONS:  
RECORDS NEITHER FURNISHED NOR CERTIFIED;  
FAILURE TO COMPLY PROPERLY AND FULLY WITH SETTLEMENT AGREEMENT;  
RETURN TO COURT ON 28 JULY 2016

In your email of 19 April 2016, you very correctly stated: 'our section 23 affidavit does not address certain requested information.'

By letter to you on 29 April, I identified fourteen of these records neither supplied to me nor certified under section 23 as non-existent or untraceable. (This was besides incomplete sets provided of requested records, the missing records neither supplied nor certified.)

Your supplementary section 23 affidavit on 12 May addressed only six of these.

The eight outstanding records that you've neither furnished nor certified under section 23 are: B16, B17, B18, B31, H12, H31, H32, and H48.

As required of you by our settlement agreement made at court on 11 February 2016, kindly respond to these outstanding record requests without further delay.

Besides your total and partial omissions to respond to my record requests, your performance under the settlement agreement was otherwise massively defective and non-compliant with PAIA in all the respects detailed in my April letter.



Save that your supplementary affidavit now certifies that six records, previously not addressed, don't exist, four credibly, one dubiously, and one certainly falsely, the many basic defects in your performance under the settlement agreement that I identified in my April letter remain unresolved. Your supplementary affidavit is shot through with the same defects.

Under clause 5 of the settlement agreement, I'm consequently returning to court to compel your due compliance with my PAIA requests enumerated in my consolidated list of requested records. The PAIA-specialist magistrate will see about your emailed response to my April letter on 9 May: 'We deny that we are in breach of the settlement agreement at all.'

Although the rules of court didn't require me to do so, I served your local correspondent with a copy of my letter to the Clerk of Court on 27 May requesting the allocation of a new set-down date. In case you haven't yet seen it, I annex a copy. Its annexures, all of which you already have, can be downloaded at [tig.org.za/LC/PAIA](http://tig.org.za/LC/PAIA).

In my letter to the Clerk of Court I stated:

Under rule 55(1)(k)(ii), I intend moving for orders:

- referring my PAIA applications to oral evidence;
- directing that the deponents to the answering- and confirmatory affidavits, Vidhu Vedalankar, Brian Nair, Thembile Mtati, Solly Sekgota, Hope Bambiso and Thenjiwe Magazi, appear personally to be cross-examined about documents that haven't been furnished to me and haven't been explained to my satisfaction or at all; and,
- granting me leave to subpoena LASA Human Resources Executive Amanda Clark, Chief Operations Officer (and alleged deputy information officer) Jerry Makokoane, Chief Legal Executive (and alleged deputy information officer) Patrick Hundermark, LASA's Board Executive Subcommittee chairperson, and chief IT officer (in charge of LASA's computer servers storing its electronic business records) for the same purpose.

I've now been allocated a new date for this purpose, 28 July 2016; and once I've drawn the schedule mentioned at the end of my letter to the Clerk of Court, identifying the issues and the witnesses to be cross-examined to get to the truth about the requested documents not provided me, I'll serve a formal notice of set-down on your local correspondent with the schedule attached to it. And email you a copy.

This is to give you early, informal notice of our next date in court to ensure that you have counsel retained and ready to go. There'll be no postponement. Your prevarication has wasted enough of my time already.

A

Please provide me with the name of LASA's chief IT officer; I can't find it online or in any of LASA's reports, and I need it for his subpoena.

Finally, I record that your failure to comply fully and properly with the settlement agreement is preventing me from completing my one final PAIA request about Senior Litigator posts, to which I agreed to limit myself in clause 7 of the settlement agreement. My agreed sixty days within which to lodge it will obviously run from the date you have fully and properly complied. I cannot and will not sign off and deliver my final PAIA request until I've had sight of all the documents previously requested under PAIA or your truthful, full and proper certification of them under section 23, because as I told you at court, documents disgorged from LASA by means of previous PAIA requests (and discovery requests before trial) have sometimes generated new lines of enquiry requiring my access to further records. And as I also told you, I'm essentially conducting a criminal investigation (perjury, defeating the ends of justice, lying to Parliament), so I will not be obstructed and hampered in this exceptionally serious exercise by your continuing, persistent, unlawful failure to provide me with all the information to which sections 11 and 23 of PAIA entitle me, in flagrant breach of the settlement agreement and in contemptuous violation of my fundamental right to information held by the state entrenched by section 32(1) of the Constitution.

You'll naturally be cross-examined on your response or non-response to this letter when my applications go to oral evidence.

As well as on your many criminal contraventions of section 90(1)(b) of PAIA, disclosed by both of your clearly perjured section 23 affidavits, to be shown in my coming schedule.

Yours sincerely



ANTHONY BRINK

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN

Case No: D529/11

B

In the matter between

**ANTHONY ROBIN BRINK**

Applicant

and

**LEGAL AID SOUTH AFRICA**

Respondent

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**DISCOVERY OF DOCUMENTS IN TERMS OF RULE 35(3) OF THE RULES OF  
COURT IN RE THE PRE-TRIAL MINUTES OF 25 JANUARY 2013**

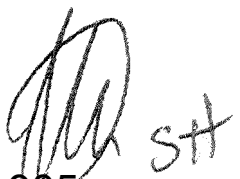
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I, the undersigned,

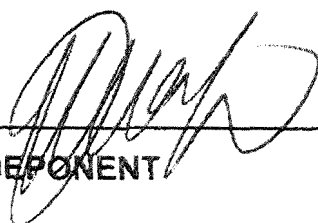
**THEMBILE VUYO MTATI**

do hereby state under oath that:

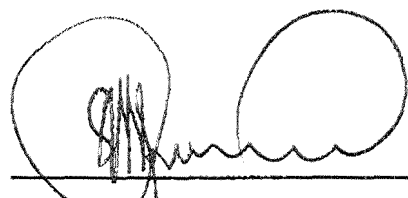
1. I am an adult practicing attorney employed as a Corporate Service Executive by the Respondent and I am duly authorised to depose to this affidavit.
2. The facts stated herein are within my personal knowledge, unless stated otherwise, and are to the best of my belief both true and correct.
3. In compliance with paragraph 4 of the parties' Pre-trial minutes held at Durban on 25 January 2013 and following the Applicant's Proposed Pre-Trial Agenda dated 25 January 2013, I wish to submit as follows:

  
985

- 3.1 That I have in my possession or under my control the documents requested by the applicant, which I herewith discover and furnish to the Applicant as required <sup>by</sup> him in his proposed pre-trial agenda, set out in Part 1 of the attached schedule.
- 3.2 That I do not have and never had in my possession documents set out in Part 2 of the attached schedule.
- 3.3 That in Part 3, I object to provide/discover all the identified records in terms of Uniform Rule of High Court 35(2) (b) on the basis that same are irrelevant to the Applicant's case.
- 3.4 That in Part 4, I further object to commenting or answering all paragraphs identified therein containing questions, interrogatories, remarks, observations, queries, or requests for further particularity, and/or requests for information.

  
 \_\_\_\_\_  
 DEPONENT

THUS SWORN AND SIGNED BEFORE ME AT BRAAMFONTEIN ON THIS THE 11<sup>TH</sup> DAY OF MARCH 2013. THE DEPENDENT HAVING ACKNOWLEDGED TO ME THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS DECLARATION, AND THAT HE HAS NO OBJECTION IN TAKING THE PRESCRIBED OATH AND WHICH HE CONSIDERS TO BE BINDING ON HIS CONSCIENCE.

  
 \_\_\_\_\_  
 COMMISSIONER OF OATH

FULL NAMES : SIMON THUNGWAYI  
 DESIGNATION : LT COLONEL  
 ADDRESS : 16 EMPIRE ROAD,  
 PARKTOWN



## PART 1

Document Number	Paragraph	
1	22	A clear original PDF Approval Framework is attached, <b>DOC1</b>
3	23	(i)The first page from which LA4 is excerpted is attached, including the full record showing the dates. All reports of Board are reports of the Chief Executive Officer irrespective of the originator. <b>DOC 3</b>
9	26	The covering email of Mdaka to Brian is attached, <b>DOC 9</b>
35	29(a)	The motivation is attached, <b>DOC 35(a)</b>
38	31	No written minute by selection panel but the document attached shows the note made by Brijlal noting the reply to the applicant's answer to the Justice Centre of his choice, <b>DOC 38</b>
Other new documents required		
43		Notification of the Board that Brink's claim for reinstatement to the post is defended, See an extract minutes of 26 November 2011 item <b>9.5.1</b> attached as <b>DOC 43</b>
46		Extract minutes of the Board on 26 November 2011 under <b>9.4.6</b> is attached <b>DOC 46</b>

## PART 2

Document Number	Paragraph	
3(vi)	23	No such written record exists.
5	24	No posts were cut and therefore no such records exist.
6	25	No such records exist and even if such records existed, they would be in possession of third party, namely Department of Justice.
11	27	The instructions were done telephonically, and therefore no written record exists
12	28	No such record exists
35(b)	29	No such record exists. The documents were in the Respondent's possession and have been lost in transit between Mthatha and Johannesburg.
35(c)	29	No such record exists. The documents were in the Respondent's possession and have been lost in transit between Mthatha and Johannesburg.

B


36	30	No such record exists
39	32	No such record exists
41	33	No such record exists
42	34(a)	No such record exists
42	34(b)	No such record exists
43	35(a)	No such record exists
43	35(b)	No such record exists
58	37	No such record exists
59	38	No such record exists
60	39	No such record exists
61	40	No such record exists. If they exists they would be in possession of third party, namely the Minister and/or the Department of Justice
62	41	No such written record exists
Other new documents required		
44		No such written record exists
47		No such written record exists
48-50		No such record exists. The panel has not been constituted and terms of reference are still under consideration.

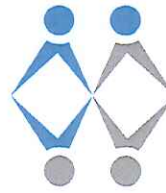
PART 3

<i>Document Required</i>
36
53 to 57

PART 4

53 to 57

  
 988 SH



14 December 2015

**Department of Justice and Constitutional Development**

Private Bag X81

Pretoria

0001

**Per e-mail: MRaswiswi@justice.gov.za**

29 De Beer Street

Braamfontein

Johannesburg 2017

Private Box X76

Braamfontein 2017

Tel: 011 877 2000

Fax: 011 877 2222

[www.legal-aid.co.za](http://www.legal-aid.co.za)

Dear Ms Raswiswi,

**NOTICE OF TRANSFER OF A REQUEST FOR ACCESS TO INFORMATION IN  
TERMS OF PAIA**

We acknowledge receipt of your letter dated 27 November 2015 received by us on the 4<sup>th</sup> instant.

Kindly note that our Chief Executive Officer is currently not available and writer hereof is acting in her stead.

Below we quote the exact request from the Requester and thereafter provide our response. The request from the Requester is as follows:

*"I request access to five public records in the possession of the Department of Justice and Correctional Services (previously the Department of Justice and Constitutional Development) namely Legal Aid South Africa's annual budget applications submitted to it for the following financial years:*

1. 2010/11
2. 2011/12
3. 2012/13
4. 2013/14
5. 2014/15

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*My requests for access to these records will be satisfied by the provision of excerpts from them, comprising only:*

*(a) the first identifying page(s) of each annual budget indicating the financial year; and,*

*(b) the pages in the budgets providing for Senior Litigator salaries.”*

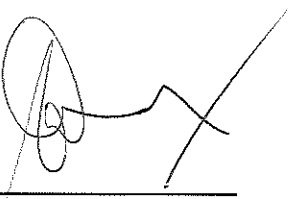
It is worth noting that the budgets requested are a consolidation of all salaries and these are not categorized per each employee level. We attach the consolidated budgets for each of the years requested with each identifying page.

Further, we also attach a spreadsheet containing budgeted salaries for Senior Litigators for each of the years as per request. These salaries are included in the consolidated budgets referred to above under “Direct Costs”.

We are simultaneously sending the information to the Requester as well.

We trust you will find the above in order.

**Yours faithfully,**



A handwritten signature in black ink, appearing to read 'Brian Nair', is written over a solid horizontal line. The signature is stylized and cursive.

**Brian Nair**

**Acting Chief Executive Officer**

Cc: Anthony Robin Brink

Per e-mail: arbrink@iafrica.com









