

1 Boast Road
Eshowe 3815
17 November 2014

Brian Nair
Deputy Information Officer,
Legal Aid South Africa
29 De Beer Street
Braamfontein
Per email: briann@legal-aid.co.za

Mr Nair

PAIA REQUEST

Herewith a PAIA request for your personal attention and action.

Although my purpose is irrelevant under section 11(3), you'll see it's directed at categorically exposing your several perjuries at the trial of my unfair discrimination claim last year about the functioning of your so-called 'second round' interview scheme for the recruitment and appointment of Senior Litigators, and, you said, some Regional Operations Executives too. (An excerpt from my heads of argument addressing your obvious lies about this is annexed.)

If you have in mind to illegally refuse any of my requests again, as you've done before, thereby precipitating an immediate application to court to compel your compliance with the Act, adding to my three others already pending against other LASA information and deputy information officers, I suggest you consult the SAHRC's PAIA Unit for advice before doing so; because despite the special remedial training it's given your Corporate Services lawyers in how PAIA works, including on the operation of section 7, they remain as clueless about it as the useless junior advocate they've been briefing since 2010 to advise them to repeatedly violate my fundamental right to information entrenched by section 32 of the Constitution by refusing my several previous PAIA requests, with the corrupt intention of concealing inter alia the documentary evidence refuting the lying budgetary insufficiency excuse I was fed for the abortion of my appointment to LASA's top professional post in KwaZulu-Natal the year before.

Since 'perjury is a very serious crime' (R v Samuels 1930 CPD 67 at 71), you'll appreciate that section 45, barring manifestly pointless and unreasonably time-consuming record requests, isn't available to you to avoid complying with this

request, because, as said, my serious purpose in making it is to extract from you the unequivocal hard documentary evidence of your very serious crimes of perjury to defeat the ends of justice, and, for your successful future prosecution, to plug the greasy drain hole you repeatedly slithered down at trial in blaming your attorneys for their alleged mistakes in the pleadings and interlocutory affidavits whenever I showed your evidence was contradicted by LASA's pleaded and sworn case:

Under PAIA I'm requiring you as deputy information officer to produce records vouching the obviously false claims you made under oath in court about your so-called 'second round' interview scheme you conducted as National Operations Executive; and your section 23 affidavit confirming that many of the records I've specified don't exist will clinch my perjury charges against you, for referral to the Board, to the Public Service Commission, and to the Director of Public Prosecutions, supported by a finely particularised draft indictment cataloguing and demonstrating these and all your other many perjuries in the case.

The Labour Court/Appeal Court will naturally also be told.

As the author of the lies under oath in question, you're best placed to refute them for these high authorities.

In view of the post office strike, a cheque by post isn't likely to reach you any time soon, so if you email LASA's bank account details to arbrink@iafrica.com I'll pay the PAIA request fee by EFT.

'It's the perjury that gets them in the end. Not so much as the deed itself, but the lying about it afterwards.' – The District Attorney in *The Walker*, a feature film by Paul Schrader.

A handwritten signature in black ink, appearing to be 'Arbrink', written in a cursive, somewhat scribbled style.

ADV A R BRINK

Cc:

Nokwanda Molefe, PAIA Unit, South African Human Rights Commission

Sinthia Reddy, Public Protector investigator (ref: 7/2-040815/12)

Adv Richard Sizani, Deputy and Acting Chairperson, Public Service Commission

Lesleigh Timothy, LASA Board Secretary

Patrick Hundermark, LASA Chief Legal Executive

And other parties.

ANNEXURE: HEADS OF ARGUMENT EXCERPT

(My heads of argument were drawn without sight of the trial record at the time. I precisely quote Nair's recorded evidence, however, in my Form A PAIA request annexure.)

[146] Nair's new claim in court that there was nothing for him to sign, and that he did not have to approve the recommendation, is contradicted by Vedalankar's statement to the applicant in her January 2011 letter: 'the 2nd round was never approved by NOE thus was never proceeded with',¹ and it is repeatedly contradicted by the respondent's pleadings and affidavits. In its original response the respondent stated: 'The Regional Selection Panel's recommendation for a second round of interviews was never approved and accordingly, the process ended at the regional level.'² ... The Regional selection committee signs the recommendation and send[s] to NOE for his approval. Thereafter it will be sent to the HRE who prepares the second panel of interviews.³ ... the line executive responsible herein – Mr Brian Nair who is the NOE – did not sign the said recommendation thus rendering the said recommendation ineffective.⁴ The respondent 'Agreed'⁵ this as an admitted fact in its answer to the applicant's agenda⁶ for the pre-trial conference in October 2011, and averred in the same pleading: 'The KZN Regional Panel's recommendation had to be approved and by the time when the Applicant and Mr Brijlal conversed, such recommendation had not been approved.'⁷ Mtati insisted in an affidavit on 16 January 2013 that Nair's 'signature is a necessary jurisdictional fact before the second round interviews could take place.'⁸ ... I repeat that without Nair's signature the recommendation for the second round of interviews was ineffectual.⁹ And in his confirmatory affidavit, Nair agreed,¹⁰ contradicting his evidence in court.

[147] The obvious reason Nair lied to court in claiming he did not have to consider the recommendation and record his approval by signing it before the second interviews could take place was to fake a justification to support his allegation that he did not read the recommendation and the applicant's CV until a year after receiving them, by pretending he did not need to, so could not possibly have silently rejected the applicant on political grounds.

[148] Nair's claim that he did not have to record his approval or rejection of the candidates recommended for second round interviews, because all candidates interviewed by the selection panel would be interviewed by the national panel again, including those eliminated

¹ Bundle, page 215, paragraph V7.

² Pleadings bundle, original response, page 158, paragraph 40.6.

³ Pleadings bundle, original response, page 158, paragraph 40.7.

⁴ Pleadings bundle, original response, page 154, paragraph 36.7.

⁵ Pre-trial conference bundle, answer to agenda, page 50, paragraph 11.1.

⁶ Pre-trial conference bundle, answer to agenda, page 10, paragraph 10.

⁷ Pre-trial conference bundle, answer to agenda, page 51, paragraph 15.2.

⁸ Application to subpoena Mlambo JP, Mtati's answering affidavit, page 100, paragraph 68.2

⁹ Application to subpoena Mlambo JP, Mtati's answering affidavit, page 101, paragraph 71.

¹⁰ Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122–3.

by the selection panel, had only to be stated to be rejected. Not only is it false on its face, it is repeatedly contradicted by the respondent's correspondence, pleadings and affidavits, including by Nair. In her email to the applicant of 30 April 2010 Clark claimed: 'At this stage it is not even clear which applicants will be considered in the second round'.¹¹ (It was perfectly clear.)¹² Nair swore in his PAIA section 23 affidavit on 8 April 2011: 'The second interview panel would consider all candidates recommended from the first round of interviews to the second rounds of interviews.'¹³ The respondent alleged in its answer to the applicant's agenda for the October 2011 pre-trial conference: 'The two persons referred to herein were eliminated early in the selection process and were not recommended for the second round of interviews. Accordingly, they were not entitled to any information that pertains to the second round of interviews.'¹⁴ In his affidavit in February 2012 Mtati wrote of 'those applicants that made it to the second round of interviews',¹⁵ clearly implying, correctly, obviously, that those applicants eliminated by the selection panel would not be interviewed again. In his affidavit in January 2013, Mtati recorded: 'Nair did not pass the fact that he did not approve the second round of interviews arising from the KZN interviews to Ms Clark'.¹⁶ In his confirmatory affidavit Nair agreed.¹⁷ The amended response alleged consistently that 'the selection panel had to identify candidates who had to undergo a second round of interviews.'¹⁸ Nair's opposite claim in court, contradicting evidence he had previously given in two affidavits, was a transparent lie.

[149] Re-interviewing the candidates who had been rejected as unsuitable by the duly constituted selection panel with a view to appointing one of them in place of the recommended candidate, was manifestly irregular and unlawful. It follows that the probable reason Brijal received special 'instructions ... telephonically'¹⁹ to send over all interviewed shortlisted candidates' CVs, 'including those who had neither been shortlisted nor recommended for a second round of interviews',²⁰ is because this was manifestly irregular, and Nair intended interviewing a rejected candidate for appointment instead of the recommended applicant, having heard of his problematic selection. Indeed, as Clark put it to the applicant, dishonestly contradicting the selection panel's clear recommendations of him and Mngadi for the Pietermaritzburg and Durban posts: 'it is not even clear which applicants will be considered in the second round'.²¹

¹¹ Pre-trial conference bundle, answer to agenda, page 54, paragraph 26.1.

¹² Bundle, pages 244–8.

¹³ Bundle, page 380, paragraph 11.

¹⁴ Pre-trial conference bundle, answer to agenda, page 55, paragraph 34.2.

¹⁵ Application to compel, Mtati's answering affidavit, Volume 2A, page 4, paragraph 14.

¹⁶ Application to subpoena Mlambo JP, Mtati's answering affidavit, page 101, paragraph 69.3.

¹⁷ Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122–3.

¹⁸ Pleadings bundle, amended response, page 21, paragraph 4.6.

¹⁹ Bundle addendum, page 987, Part 2, document 11, paragraph 27.

²⁰ Pleadings bundle, amended response, page 23, paragraph 10.3.

²¹ Pre-trial conference bundle, answer to agenda, page 54, paragraph 26.1.

FORM A

REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY

(Section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000))

[Regulation 2]

FOR DEPARTMENTAL USE

Reference number:

Request received by (state rank, name and surname of information officer/deputy information officer) on (date) at (place).

Request fee (if any): R

Deposit (if any): R

Access fee: R

SIGNATURE OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER

A. Particulars of public body

Legal Aid SA

Brian Nair

Deputy Information Officer,

National Office

29 De Beer Street

Braamfontein

B. Particulars of person requesting access to the record

(a) The particulars of the person who requests access to the record must be recorded below.

(b) Furnish an address and/or fax number in the Republic to which information must be sent.

(c) Proof of the capacity in which the request is made, if applicable, must be attached.

Full names and surname : **Anthony Robin Brink**
Identity number : **590225 5116 081**
Postal address : **1 Boast Street, Eshowe 3815, KwaZulu-Natal**
Fax number : **086 672 0776**
Telephone number : **035 474 0145**
E-mail address : **arbrink@iafrica.com**

Capacity in which request is made, when made on behalf of another person:

N/A

C. Particulars of person on whose behalf request is made

This section must be completed only if a request for information is made on behalf of another person.

Full names and surname : **N/A**
Identity number : **N/A**

D. Particulars of record

(a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.

*(b) If the provided space is inadequate please continue on a separate folio and attach it to this form. **The requester must sign all the additional folios.***

1. Description of record or relevant part of the record:
2. Reference number, if available:
3. Any further particulars of record:

See annexure

E. Fees

- (a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a **request fee** has been paid.*
- (b) You will be notified of the amount required to be paid as the request fee.*
- (c) The **fee payable for access** to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.*
- (d) If you qualify for exemption of the payment of any fee, please state the reason therefor.*

Reason for exemption from payment of fees:

N/A

F. Form of access to record

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 hereunder, state your disability and indicate in which form the record is required.

Disability: N/A		Form in which record is required:	
<p>Mark the appropriate box with an "X".</p> <p>NOTES:</p> <p><i>(a) Your indication as to the required form of access depends on the form in which the record is available.</i></p> <p><i>(b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.</i></p> <p><i>(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.</i></p>			
1. If the record is in written or printed form -			
X	copy of record*		inspection of record

2. If record consists of visual images -

(this includes photographs, slides, video recordings, computer-generated images, sketches, etc.)

	view the images	X	copy of the images*		transcription of the images*
--	-----------------	----------	---------------------	--	------------------------------

3. If record consists of recorded words or information which can be reproduced in sound -

	listen to the soundtrack (audio cassette)	X	transcription of soundtrack* (written or printed document)
--	--	----------	---

4. If record is held on computer or in an electronic or machine-readable form -

	printed copy of record*		printed copy of information derived from the record*	X	copy in computer readable form* (on compact disc)
--	-------------------------	--	--	----------	--

*If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?

YES**A postal fee is payable.**

Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.

In which language would you prefer the record? **English**

G. Notice of decision regarding request for access

You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

How would you prefer to be informed of the decision regarding your request for access to the record? **By email**

Signed at Eshowe on 17 November 2014

A handwritten signature in black ink, consisting of several overlapping loops and a central vertical stroke, positioned above the text 'SIGNATURE OF REQUESTER'.

SIGNATURE OF REQUESTER

Annexure to Form A

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

1. The minutes kept by HRE Amanda Clark¹ of the 'second round interviews' held 'for some Regional Operations Executive posts',² as alleged by LASA's single witness NOE Brian Nair at the trial of case LC D529/11.
2. The recommendations made by the selection panels of candidates (i) for the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, (ii) for the Pietermaritzburg Senior Litigator post when it was first advertised, and (iii) for the Kimberly Senior Litigator post – if a recommendation was made – showing inter alia the names of (a) the shortlisted and interviewed candidates, (b) the recommended candidates, and (c) the members of the selection panels.
3. In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, the emails sent by the ROEs to Nair³ (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'⁴ 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.'⁵
4. 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

¹ 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'.

² Record, page 338, lines 8–9.

³ Record, page 407, lines 11–14. '[I] would then have found that email again because it would have been in my box'.

⁴ 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.'

⁵ Record, page 349, lines 10–17.



Litigator post⁶ 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.

5. The email 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.
6. In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, Nair's emails to the five⁷ 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,⁸ in which emails Nair asked the five members of the 'second round' panel to advise him as to who they 'would like to see'⁹ and 'interview'.¹⁰ (As to the identities of the alleged five members of the so-called second round interview panel, see the Appendix hereto, paragraph [96].)

⁶ Record, page 410, lines 15–21.

⁷ Record, page 409, line 11.

⁸ 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.'

⁹ Record, page 409, lines 10–11. 'I would send it to the five panellists and say, "Please advise who you would like to see."'

¹⁰ 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



7. 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.
8. 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.
9. 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.¹¹
10. 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.
11. 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

panellists could consider if there was anyone else [besides the recommended candidate] they would be interested to interview.'

¹¹ 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.'



candidates who had been shortlisted and interviewed by the selection panel but not recommended by it.

12. 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.
13. The minutes¹² 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’,¹³ 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’¹⁴ him/her.
14. 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 D529/11.¹⁵ (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.)

¹² 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’.

¹³ Record: Page 366, lines 14–21.

¹⁴ Record, page 410, lines 21–4.

¹⁵ 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.’



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'¹⁶ 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 candidates¹⁷ and to make a recommendation, and once it had 'identified the most suitable candidate for appointment in a post'¹⁸ 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]'.¹⁹ Section 8.2.2 (b) of the Approval Framework²⁰ governing 'Appointments', read with 'Key to Levels',²¹ stipulates that the management executives 'delegated for approval' of 'appointment recommendations' concerning grade LP10²² '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'²³ 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'²⁴ as they see fit, and, as the respondent pleaded, 'may follow recruitment methods that are not specifically provided for in the Recruitment Code',²⁵ 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 recruitment procedures are

¹⁶ Pleadings bundle, amended response, page 21, paragraph 4.4.

¹⁷ Bundle, pages 230–1, paragraphs 1.2.2.1–2.

¹⁸ Bundle, page 233, section 1.2.3.4.

¹⁹ Bundle, page 234 'NB: Motivation ...'.

²⁰ Bundle addendum, page 1036.

²¹ Bundle addendum, page 1034.

²² Bundle addendum, page 1036, and bundle addendum, page 1002, paragraph 16.

²³ Bundle addendum, pages 1034 and 1036.

²⁴ Bundle, page 214, paragraph V2.

²⁵ Pleadings bundle, amended response, page 21, paragraph 4.3.



followed, in line with statutory legislation and business practices²⁶ ... This policy and procedure provides the Legal Aid Board with clear guidelines to be followed when a vacancy exists.²⁷ 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 2008'²⁸ 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 verbally²⁹ ... The Chairperson of the Board was also invited to participate in this panel.³⁰ ... The second round of interviews is, in fact, the brainchild of the Chairperson together with the executive management'.³¹ 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'³² and 'the Chairperson of the Board';³³ 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',³⁴ still in force.³⁵

[93] Consequently, no section of the respondent's Recruitment code³⁶ provides for 'a second round of interviews'³⁷ by any 'identified National Office executives'³⁸ and by 'the Chairperson of the Board ... invited'³⁹ to join them; and the respondent finally conceded this, with Nair confirming on affidavit:⁴⁰ 'On close scrutiny it will be noted that [the Board's Recruitment code] does not provide for the two-stage interview

²⁶ Bundle, page 228, section 1.1.2.

²⁷ Bundle, page 228, section 1.1.3.

²⁸ Bundle, pages 379–80, paragraph 8.

²⁹ Ibid.

³⁰ Bundle, page 380, paragraph 10.

³¹ Pleadings bundle, original response, page 143, paragraph 8.

³² Bundle, page 380, paragraph 9.

³³ Bundle, page 380, paragraph 10.

³⁴ Bundle, page 228, footer.

³⁵ Bundle, pages 228–34; bundle addendum, pages 717–8.

³⁶ Ibid.

³⁷ Bundle, page 379, paragraph 8.

³⁸ Bundle, page 380, paragraph 9.

³⁹ Bundle, page 380, paragraph 10.

⁴⁰ Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122–3.



process referred to'.⁴¹ 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.'⁴² 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.'⁴³

[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 director⁴⁴ 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',⁴⁵ 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 of the CEO and the NOE⁴⁶ – 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 governance⁴⁷ which the respondent claims to observe,⁴⁸ 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

⁴¹ Application to subpoena Mlambo JP, Mtati's answering affidavit, page 81, paragraph 8.

⁴² Pleadings bundle, original response, page 176, paragraph 53.3.

⁴³ Bundle, page 233.

⁴⁴ Bundle addendum, page 748.

⁴⁵ Bundle, page 233, section 1.2.3.4.

⁴⁶ Bundle, page 372, section 8.2.1.

⁴⁷ Bundle addendum, pages 749–51.

⁴⁸ Bundle addendum, page 751.



relationship'⁴⁹ 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 confirmed⁵⁰ the respondent's correct assertion: 'The Board's responsibility primarily relates to policy issues and not operations, hence appointments ... are dealt with by Executives.'⁵¹ So did attorney Mtati: 'Staffing of the Respondent is an issue that is ordinarily dealt with by the Respondent's executive officials.'⁵² 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.'⁵³ And again: 'recruitment of staff is an exclusive terrain of executives.'⁵⁴ 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'.⁵⁵ 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';⁵⁶ 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.'⁵⁷

[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

⁴⁹ Bundle, page 751.

⁵⁰ Application to subpoena Mlambo JP, Nair's confirmatory affidavit, pages 122-3.

⁵¹ Bundle, page 364, paragraph 6.

⁵² Pleadings bundle, original response, page 155, paragraph 37.8.

⁵³ Pre-trial conference bundle, answer to agenda, page 62, paragraph 74.2.

⁵⁴ Application to subpoena Mlambo JP, Mtati's answering affidavit, page 110, paragraph 93.4.

⁵⁵ Application to subpoena Mlambo JP, Mtati's answering affidavit, page 93, paragraph 57.3.

⁵⁶ Bundle, page 103, paragraph 6.4.

⁵⁷ Pleadings bundle, original response, page 143, paragraph 6.



JC/region/dept',⁵⁸ 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,⁵⁹ 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.'⁶⁰ 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, 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.

⁵⁸ Bundle addendum, page 1040.

⁵⁹ Bundle, page 213, paragraph V1.

⁶⁰ Ibid.



PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

90 Offences

(1) A person who with intent to deny a right of access in terms of this Act-

- (a) destroys, damages or alters a record;
- (b) conceals a record; or
- (c) falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

23 Records that cannot be found or do not exist

(1) If-

- (a) all reasonable steps have been taken to find a record requested; and
- (b) there are reasonable grounds for believing that the record-
 - (i) is in the public body's possession but cannot be found; or
 - (ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

25 Decision on request and notice thereof

(1) Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the information officer to whom the request is made or transferred, must, as soon as reasonably possible, but in any event within 30 days, after the request is received-

- (a) decide in accordance with this Act whether to grant the request; and
- (b) notify the requester of the decision and, if the requester stated, as contemplated in section 18 (2) (e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

INTERPRETATION ACT 33 OF 1957

4 Reckoning of number of days

When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

