



## **JUDICIAL CONDUCT COMMITTEE**

In the matter between:

**ADVOCATE ANDRE BRINK**

**APPELLANT**

**and**

**JUDGE PRESIDENT DUNSTAN MLAMBO**

**RESPONDENT**

**Coram: Nkabinde J, Mathopo J and Makgoka JA**

**19 February 2024**

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### **APPEAL RULING**

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**NKABINDE J and MAKGOKA JA):**

This ruling has taken inordinately long. The inordinate delay, deeply regretted, is a result of a confluence of factors, including personal circumstances and other

judicial responsibilities. We apologise for the inconvenience it must have caused to all concerned.

## **Introduction**

[1] This is an appeal in terms of section 17 of the Judicial Service Commission Act<sup>1</sup> (JSC Act) against a decision of the Judicial Conduct Committee, per Zondi JA, who was designated in terms of section 17 (the Designated Judge) to investigate eight complaints lodged by Advocate Andre Brink (the appellant) against Judge President Dunstan Mlambo of the Gauteng Division of the High Court (the respondent). During the relevant period to the complaints, the respondent was the Judge President of the Labour Court and the Labour Appeal Court, and later, the Judge President of the Gauteng Division. The appellant alleged that the respondent committed “impeachable” gross misconduct as envisaged in terms of section 14(4)(a) of the JSC Act, as well as breach of Articles 5 and 6 of the Code. The Designated Judge dismissed the complaints for lack of substance.

[2] The complaints against respondent do not relate to the discharge of his judicial functions. They arose in his capacity as the then Chairperson of the Board of the Legal Aid South Africa (LASA). However, the Judicial Service Commission has jurisdiction to deal with the complaint under section 14(4) of the JSC Act, which we turn to next.

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<sup>1</sup> 9 of 1994.

## **Background**

[10] The appellant had responded to LASA's advertisement for a Senior Litigator post at its Pietermaritzburg office, one of the three, the others being for Durban and Mthatha. He was shortlisted, and on 12 November 2019 he, together with other candidates, was interviewed by LASA's selection panel for the position. By April 2010, almost five months after the interview, LASA had not communicated with the applicants about the outcome of the interview. The appellant made enquiries with LASA about the outcome of his interview. His letter was not promptly responded to until 23 August 2010, when he was informed, at the direction of LASA's National Operations Executive, Mr Brian Nair (Nair), that a decision had been taken not to fill the vacancy.

[11] Upon receipt of this information, in August 2010, the appellant made a request for information to LASA's Chief Executive Officer, Ms Vidhu Vedalankar (Vedalankar) in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), for access to a number of specified documents including the selection panel's recommendation report.

[12] On 18 October 2010 Ms Vedalankar responded to the appellant's letter and refused his request on the basis, among others, that the requested information involved "privacy of a third party and constituted confidential information of a third party". She explained that given the seniority of the Senior Litigator positions, it was decided to implement a two-stage interview process in filling them. The first phase would take place at Regional Office level where the

Interview Panel would make a recommendation for candidates to proceed to the second stage of interviews.

[13] According to Vedalankar, the second phase would be conducted by a national office panel, including the Chairperson of the Board – respondent, the National Operations Executive, Mr Nair (Nair), the Human Resource Executive and the Chief Operations Officer. This panel does not have to recommend for appointment any of the recommended candidates from the first phase. In terms of section 8.2.2 (b) of the November 2009 Legal Aid SA Approval Framework (the Approval Framework) the recommendation of the second phase would be finalised by the responsible executive.

[14] Vedalankar also pointed out that in terms of section 8.1.2 (b) of the Approval Framework, the National Operations Executive may motivate for a change in the organisational structure of LASA, including the freezing of positions, for discussion and finalisation with the CEO. Furthermore, she stated that in early 2010, Management had identified potential positions to be frozen. These were all Senior Litigator posts, i.e. one of the positions for which the appellant had applied. Vedalankar mentioned that in July 2010 she and Nair, decided to freeze all the Senior Litigator posts with immediate effect. Additionally, Vedalankar explained to the appellant as follows:

“7.1 You were interviewed together with other candidates in the first round of interviews.

7.2 You were recommended together with other candidates, for the second round of interviews. As explained above that [was however not] a guarantee that you would get the position. We have instances in the past when our nationally constituted panel has not recommended for appointment any of the recommended candidates from the first phase interviews conducted by the region.

7.3 The NOE and CEO took the decisions that all senior litigator posts that were vacant would be frozen. The three vacant Senior Litigator positions for Durban, Pietermaritzburg and Mthatha have been frozen.

7.4 You were sent a final letter of regret from our Regional Operations Executive dated 23 August 2010 indicating that [LASA] will not be proceeding with the filling of the Senior Litigator Post. A copy of the aforementioned letter is also attached for your reference.

7.5 Should we decide to unfreeze these positions in the future, the positions will be duly advertised and you will be at liberty to submit your application for any of the positions. The above information is provided to clarify the position and to definitively address your suspicion that your right to a fair administrative process is threatened breached or may be rendered unenforceable.

Accordingly, your request for the detailed information requested in your letter, other than the information and explanation provided above, is declined as it is not relevant to you exercising any right you may have in law.”

[15] To the letter was attached, among others, the Interview Panel’s recommendation report dated 6 November 2009 in which it appeared that the appellant had been recommended for the next round of interviews for the Pietermaritzburg post. The report was, however, redacted. It concealed the identity of the other candidates and the Interview Panel’s comments on them.

[16] Dissatisfied, on 30 November 2010 the appellant addressed a petition to the respondent as the Chairperson of the LASA Board and to the Board, requesting them to intervene in Vedalankar’s rejection of his PAIA request, and her alleged blocking of his appointment. Among other things, the appellant alleged that there was an “illegal political/racial discrimination – covered with false reasons advanced to justify” his non-appointment, and that “two African candidates selected and recommended for similar posts sacrificed to effect [the alleged political/racial discrimination].” The appellant accused the Management

Executive Committee of: (a) failure to execute a key component of Legal Aid South Africa's Strategic Plan, concealed from the [Board] and from Parliamentary Portfolio Committee for Justice and Constitutional Development the fact the Senior Litigator posts had not been filled; (b) multiple contraventions of the Public Finance Management Act, including the presentation of false financial information in Legal Aid South Africa's 2009/10 Annual Report; and (c) refusal to comply with a request for records in terms of [PAIA] on bogus and factual grounds.

[17] On 30 December 2010 the respondent replied to the appellant as follows:

“I have reviewed the actions of Legal Aid South Africa regarding your candidature for the Senior Litigator position in KwaZulu-Natal. I could find no unfairness or arbitrariness towards you as you allege or at all.”

[18] This response forms the basis of the appellant's second complaint.

[19] On 24 January 2011 the appellant addressed a second petition to the respondent and the Board seeking their intervention in Vedalankar's refusal to grant him access to LASA's records pursuant to his PAIA requests. In that petition, the appellant complained that the respondent's “perfunctory one-line response” of 30 December 2010 did not address his complaint against Vedalankar's refusal to grant his PAIA request. The appellant further asked the respondent whether he was the author of the said letter. He asked:

“Did you actually write the letter? According to its PDF properties file, Vedalankar did – on 15 December 2010, while you were still away in the US. It [is] even signed off with ‘Regards’, just as she does – a strikingly unconventional and inappropriate style for formal business letters. . . All this suggests a legally unqualified person wrote your letter, and indeed Vedalankar has left her fingerprints on it.”

[20] The appellant threatened to launch a PAIA application in February 2011 to vindicate his right of access to the LASA's records. He pointed out that the financial reason for aborting his recruitment was a lie, stating that the Senior Litigator posts for which he was selected and recommended, "had been budgeted for and funded as part of LASA's critical professional senior staff establishment since as far back as 2007/2008." He accused Vedalankar of defying the Minister's opposition to the freezing of posts when she reported to the Portfolio Committee in October 2010. The appellant said that if he did not receive a response he would petition the Minister, Deputy Minister and Members of the Portfolio Committee, as the next levels of authority and accountability, to intervene in his main alleged discrimination complaint. Failing which, he warned, he would claim his constitutional right in court "with its patient and efficient machinery for separating truth from lies."

[21] In response, on the same day, the respondent reiterated his view expressed in the letter of 30 December 2010 – that he had found nothing untoward in how the appellant had been treated by LASA. He stated that the appellant's persistent correspondence bordered on harassment and that he and the Board would in the future ignore it. This response forms the basis of the appellant's third complaint.

[22] On 28 January 2011 Ms-Vedalankar sent an email to the appellant in which she totally refused his second PAIA request made on 15 December 2010 on the basis that it merely repeated the first one made in August 2010. She also revisited his first PAIA request and, for additional reasons, refused it again. To the email Vedalankar attached additional documents, most of which were aimed at demonstrating that LASA was facing budgetary constraints and that a range of cost-cutting measures were considered by its Board. The email was copied to the respondent. This forms the basis of the fourth complaint.

[23] On 25 February 2011 the appellant addressed a third petition to the respondent and LASA's Board members, in which he detailed his earlier petition to him, again seeking their intervention in his PAIA request to Ms Vedalankar. In the letter, the appellant, stated, among other things, that the reason furnished to him for not proceeding with the filling of the Senior Litigator posts the alleged budgetary constraints, was false, given LASA's own records.

[24] The appellant pointed out the following: the single cost-cutting measure agreed by the Management Executive Committee of LASA on 16 July 2010 in its report to the Board, and approved by the Board on 31 July 2010, was the reduction of some junior criminal practitioner posts serving the district and regional courts. According to him, Senior Litigator posts were never identified as part of the cost-cutting measures, nor were they approved for abolition as a cost-saving measure. On the contrary, the report to the Board specifically distinguished vacant critical posts, of which the Senior Litigator posts were, from the rest and prioritized them for recruitment.

[25] That, asserted the appellant, was shown by: (a) Board meeting minutes; (b) Management Executive Committee's Report to the Board; (c) Nair's recommendations for cost-saving and (d) Vedalankar's letter to the Director-General on 16 April 2010 contemplating the abolition of some junior criminal defense practitioner posts, which was ultimately proposed, agreed and approved by the Board. He also pointed out that Vedalankar's report to the Portfolio Committee on 12 October 2010 did not mention the freezing of the positions.

[26] In the circumstances, the appellant requested that his non-appointment to the Senior Litigator post (Pietermaritzburg) be discussed at the Board's meeting the following day, 26 November 2010. He copied, among others, the Minister and the Chairperson of the Justice Portfolio Committee of the National Assembly (the

Portfolio Committee) charged with oversight over LASA by section 55(2) of the Constitution. True to his word earlier, the respondent ignored the appellant's third petition. This forms the basis of the fifth complaint.

[27] Upon receipt of the appellant's third petition to the respondent and the Board, referred to above, the Minister apparently requested the respondent to respond to the allegations against LASA and its CEO with specific reference to the appellant's recruitment as Senior Litigator-Pietermaritzburg and the refusal to comply with PAIA as well as the freezing of posts. The report referred to below was a sequel to the Ministerial request.

[28] The respondent reported to the Minister on March 2011. In his report, he explained that the appellant was interviewed and recommended by a regional selection panel to the second stage of the interview process, that was to be conducted before a nationally constituted interview panel. The latter panel, however, did not sit to consider applicants recommended for the second stage of the interviews. The initial reason for the national panel not sitting was caused by delays in coordinating a meeting time suitable for all members of the panel.

[29] The respondent further said that financial constraints facing LASA resulted in a decision not to proceed with the filling of the vacant posts, and that the appellant was informed of the decision. This was because "LASA was going through an uncertain period with regard to the provision of funding by the Department of Justice to finance the LASA's OSD phase 1 implementation, which resulted in an unbalanced budget for 2010/2011." It is not clear from the papers what the Minister's response to the report was. The contents of the report to the Minister form the basis of the sixth complaint.

[30] On 22 June 2011, in response to the Portfolio Committee, the respondent attached a report he had submitted to the Minister as explained above. The report

to the Portfolio Committee contained additional information which did not appear in the one to the Minister. It was stated that the appellant had, in the conciliation before the CCMA, sought monetary compensation of R55 000 per month from January 2011 (the compensation allegation). Subsequently, the Portfolio Committee advised the appellant that neither the Portfolio Committee nor its Chairperson become involved in the day-to-day operational matters of the LASA. The Portfolio Committee then regarded the matter as closed. The contents of the respondent's report to the Portfolio Committee form the basis of the seventh complaint.

[31] Subsequently, the appellant instituted an action in the Labour Court, based on section 6 (1) of the Employment Equity Act 55 of 1998, claiming that his non-appointment as the Senior Litigator was due to unfair discrimination against him because of his political views.<sup>3</sup> On 31 October 2012, he lodged a substantive application in which he sought an order in terms of section 25 of the then Supreme Court Act 59 of 1959 for leave to subpoena the respondent for cross-examination in the pending trial of his claim against LASA (the subpoena application).<sup>4</sup>

[32] The respondent opposed the subpoena application. He authorised Mr Thembile Mtati (Mtati), LASA's in-house attorney, to depose to the answering affidavit on his part. For present purposes, the relevance of Mtati's affidavit is two-fold.

[33] The first relates to the reason for not proceeding with the second round of interviews (the delay reason). It should be recalled that, the reason initially furnished by LASA for not proceeding with the second phase of the interviews

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<sup>3</sup> Apparently the appellant is a so-called AIDS denialist.

<sup>4</sup> Because the respondent is a Judge, section 25 of the Supreme Court Act required that leave be granted for him to testify at the trial.

was the alleged difficulty in coordinating a date on which various management executives would all be available for the second round of interviews. According to the respondent, this was discarded, as Mtati conceded that this was not correct, and put it down to an error, which Mr Nair confirmed in a confirmatory affidavit.

[34] The second arises from paragraph 51 of Mtati's affidavit, in which it was alleged that the appellant had, despite pending litigation between him and LASA, "unannounced and without warning", attended at the respondent's judicial chambers in the (then) South Gauteng High Court to serve documents. This forms the basis of the first complaint.

[35] The trial of the action commenced on 28 May 2014 in the Labour Court. At the outset of the hearing before evidence was led, and before his opening address, the appellant informed the Court that he held the respondent and Vedalankar clear of all wrong-doing in respect of his non-appointment. He later repeated this under cross-examination by LASA's counsel, during which he conceded that he had no facts to prove the allegations he had initially made against the respondent and Vedalankar, in his original statement of claim.

[36] The appellant had amended his Statement of Claim to leave out the allegations he had initially made against the respondent. In his original statement of claim, the appellant had alleged that the respondent had: (a) "aborted" his appointment motivated by unlawful political (alternatively racial) prejudice; (b) attempted to cover up the discrimination referred to above, by "concocting and advancing a false cover story based on fake financial justification"; (c) lied to the Minister and the Portfolio Committee about the reasons for his non-appointment. Thus, in the amended statement of claim, he laid the blame squarely on Nair.

[37] Nair testified on behalf of LASA. According to the appellant, the following emerged from Nair's evidence that: (a) the budgetary-constraint reason originally given to him for not proceeding with the second round of interviews, was not true; (b) he was the main author of the report given to the Minister by the respondent in March 2011, and later to the Portfolio Committee in June 2011. Nair testified that the compensation allegation in the report to the Portfolio Committee was not inserted by him. He assumed that it was inserted, possibly, by the respondent.

[38] On 18 September 2014 the Labour Court dismissed the appellant's action with costs.<sup>5</sup> His subsequent application for leave to appeal was also dismissed. The appellant petitioned the Labour Appeal Court for leave to appeal. Of relevance for present purposes, is that consistent with his evidence during the trial, the appellant asserted that Nair was the author of the reports the respondent had presented to the Minister and to the Portfolio Committee. The appellant accused Nair of lying when he testified that the respondent had added the compensation allegation to the report submitted to the Portfolio Committee). In this regard, the appellant said that "[i]t is quite clear that Nair lied to [the respondent] about this, and that he, not [the respondent] amplified the report with these additional lies . . ."

[39] In the same breath, however, the appellant revived his allegation that the respondent knew that the reasons stated in the report to the Minister and to the Portfolio Committee for not proceeding with the second phase of the interview, and for freezing the posts, were false. To recap, those reasons were the

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<sup>5</sup> The judgment is reported *sub nom Brink v Legal Aid South Africa* [2014] ZALCD 49; [2014] 12 BLLR 1188 (LC); (2015) 36 ILJ 1020 (LC).

unavailability of members of the interviewing panel and budgetary constraints.

As mentioned earlier, the first reason was later abandoned before the trial, and it was attributed to an error. Of the second reason, the appellant said:

“[The respondent] also knew full well that the budgetary justification Vedalankar had fed me to cover the true reason [why] my appointment had been aborted, which Nair repeated in the reports he drew for him, was another lie, because he [had] chaired the meeting of the Board in July 2010 at which it approved executive management’s proposal to trim costs by temporarily freezing recruitment to some lower criminal courts posts only . . .”

[40] The appellant’s petition for leave to appeal was dismissed by the Labour Appeal Court. He then turned his focus to his PAIA requests to have access to LASA’s records. By then, the applications to force LASA to accede to his requests for information, were pending in court. The appellant said:

“[A]fter the conclusion of the extraordinarily time and energy intensive labour litigation, my time and energy were again diverted by no less six separate court applications I had to bring to, compel LASA’s compliance with my requests for access to its records I [had] duly made under . . . PAIA...”

[41] In April 2016 the appellant’s application to court to compel LASA to comply with his PAIA request was settled. He was furnished with, among other documents, the selection panel’s full uncensored recommendation report. That report revealed that the person who was vying for the Pietermaritzburg post against the appellant, and who was not recommended, was a Mr Mzochitwayo Ngcamu (Ngcamu).

[42] According to the appellant, Ngcamu had a close relationship with the respondent when the latter was the Judge President of the Labour Court, and the former enjoyed extended acting appointments as a Judge in that Court. Thus,

surmised the appellant, the true reason for the freezing of the Senior Litigator posts was that the respondent's preferred candidate was not recommended. According to him, the respondent had "hijacked" the recruitment drive to get Ngcamu appointed, despite having been eliminated for not meeting the qualifying criteria.

[43] However, the appellant readily conceded that he did not have direct evidence to back up his claim and invited the Committee to draw inferences for this conclusion. He said:

"Obviously I don't have a record to put up of [the respondent's] communication(s) with Vedalankar, National Operations Executive Brian Nair and/or the KwaZulu-Natal Regional Operations Executive Vela Mdaka that [the respondent] wanted his former colleague in and not me, but on a preponderance of probabilities the surrounding factual countryside in the matter detailed below, and [the respondent's] extraordinary misconduct in the cover-up described in this and my preceding complaints, makes the inference irresistible on any reasonable conspectus."

### **The complaints**

[44] Conveniently, the appellant's complaints can be classed into two categories. The first category relates to his PAIA requests and how the respondent answered his petitions for intervention. That relates to second to fifth complaints. The second category of complaints relates to the appellant's allegations that the respondent knowingly made false statements. These are first, sixth, seventh and eighth complaints. Below, we summarise the essence of the complaints; the respondent's response to them; and a discussion on whether any of the complaints has been established.

First category of complaints

*Second complaint*

effect thereof is that the respondent stands by them. This somehow undermines the assumption that the allegations could have resulted from miscommunication.

[79] In our view, the Designated Judge erred by attributing the allegations against the appellant to miscommunication between the respondent and his former secretary. Properly considered and regard being had to all the circumstances, the Designated Judge, having broad investigative powers, should have asked the respondent to clarify the facts around the allegations against the appellant. Since this did not occur, we, as the Appeal Committee, are none the wiser about why the respondent made the allegations against the appellant. The appeal in this regard must therefore be allowed.

*Sixth, seventh and eighth complaints*

[80] The essence of these complaints was that the respondent lied to the Minister and the Portfolio Committee in the reports he made to them in March and June 2011, respectively, about the reasons why the interview process for the Senior Litigator posts was terminated, and the posts permanently frozen. To recap, in those reports, which were essentially identical, the respondent gave two reasons for not proceeding with the interview process not proceeding and for freezing the posts. First, that the initial reason for the panel of interviews not sitting was caused by delays in coordinating a meeting time suitable for all members of the panel, of which the respondent was one (the delay reason). Second, that the posts were permanently frozen due to LASA's financial constraints (the financial constraints reason). The appellant asserted that both reasons were false, and that the respondent was aware of that.

[81] The report to the Portfolio Committee contained additional information that the appellant had, in the conciliation before the CCMA, sought monetary compensation of R55 000 per month from January 2011 (the compensation

allegation). The appellant complained that the compensation allegation was untrue, and, that by including this in his report, the respondent deliberately misled the Portfolio Committee about his basic dispute with LASA and “disparaged [him] as a money-grabber.”

[82] As to the delay reason, it would be recalled that it was first mentioned in Vedalankar’s letter to the appellant on 18 October 2010. The appellant alleged that in the subpoena application, he established that no effort was ever made to convene the panel at all, and that no one on it was asked for available dates, including the respondent. He stated that Mtati, on behalf of the respondent in the subpoena application, conceded that this was not correct, and put it down to an error.

[83] With regard to the financial constraints reason, the appellant asserted that it was false, and that the respondent, as Chairperson of LASA, was fully aware of this when he reported to both the Minister and the Portfolio Committee and cited it as a reason for freezing the Senior Litigator posts. The appellant’s complaint had two subsets. The first was that LASA had no financial constraints as far as the Senior Litigator posts were concerned, as the posts had been properly budgeted for in the relevant financial year. He pointed to LASA’s own records to support his assertion.

[84] The second was that there is no lawful and official decision by LASA to freeze the Senior Litigator posts. That decision, asserted the appellant, was an unofficial one, taken for ulterior motives. He characterised it as “an illegal, unauthorised, unapproved, off-the-record, corruptly motivated abortion” of his appointment after he was successfully interviewed for the position. He said that if such a decision had been legitimately taken by LASA, it would appear in its minutes of meetings, annual reports, and engagements with the Ministry.

[85] The appellant pointed out that none of the above reflects such a decision. Had it been made, he said, it would have been mentioned in at least the following records:

(a) the minutes of a meeting of the Board with the Deputy Minister on 29 May 2010, which record the respondent's presence, which meeting was also mentioned in his 2010/11 Chairperson's Report;

(b) a meeting with the Portfolio Committee on 14 July 2010; and

(c) the respondent's Chairperson's Report for 2012/13.

The appellant pointed out that none of these has any reference to such a decision.

[86] To contrast the decision to freeze the Senior Litigator posts with legitimately taken decisions, the appellant cited two examples of decisions by the Board which were properly recorded, thus evidencing their legitimacy. Firstly, a decision in March 2010 to abolish the vacant Kimberley post, where it was reportedly redundant to create a new one at Mthatha, where it was reportedly needed for several compelling reasons, and for all ancillary decisions. Secondly, he referred to a Board meeting in July 2010, which the respondent chaired. That meeting approved the temporary freezing of recruitment to some non-critical lower criminal court public defender posts until the OSD funding issue was sorted out. By these examples, the appellant argued that if a legitimate decision had been taken by the Board to freeze the posts, it would have been properly reflected in like the others, as those above, more so, he said, because it involved critical posts.

[87] The appellant further asserted that the respondent concealed from the Deputy Minister and the Portfolio Committee in his meetings with them as set out above, and in his annual report, the fact that the Senior Litigator posts had not been filled. According to him, this concealment confirmed that his non-

appointment “was aborted unofficially and silently for ulterior motives”, a fact which alleges, the respondent was aware of.

[88] In this regard, the appellant refers to his first petition to the respondent on November 2010 in which he explained in detail and with reference to relevant documents, why the budgetary constraint reason advanced by Vedalankar for his non-appointment, was not true. He repeated this in his second and third petitions to the respondent in December 2010 and February 2011, and pleaded that his appointment be finalised. Given the contents of his three petitions to him, the appellant charged that the respondent “was well aware that the financial cover-story I [had] been told was a lie’ as he had ‘presented the then available evidence that it was a lie in my first petition.”

[89] The appellant also pointed out that Nair, in his response to his PAIA request, repeatedly confirmed on oath that no record exists of any “decision being made [by LASA] not to proceed with the filling of vacant senior litigator posts”. He further asserted that a decision to freeze the Senior Litigator posts could not have been legitimately taken because, on its own version in the Labour Court pleadings, the posts were critical, and their filling was “a priority in the implementation of LASA’s Strategic Plan 2009–12”. He pointed out in this regard, among other things, to Vedalankar’s repeated mention of the employment of Senior Litigators in her CEO report for 2012/13 on the completion of the Strategic Plan.

[90] By not mentioning the freezing of the Senior Litigator posts in his 2012/13 Chairperson’s Report, charged the appellant, the respondent deceived and misled both LASA’s executive authority and its oversight authority into believing that these budgeted and funded critical specialist legal professional posts had been filled. The appellant further stated that a further reason why in their respective

reports for 2012/13 the respondent and Vedalankar did not mention that the three Senior Litigator posts had not been filled, was that they knew that the Deputy Minister and the Portfolio Committee had expressly opposed the freezing of posts, especially critical ones.

[91] The appellant further referred to a July 2010 Report to the Board. There, reference was made to the minutes of a Board meeting on 29 May 2010 which the Deputy Minister had attended and made it clear that that he did not want any posts frozen and assured the Board that LASA's OSD phase 1 funding for legal professional staff salary increases was going to be included in the mid-term national budget later in the year.

*The respondent's response to the fifth, sixth, seventh and eighth complaints*

[92] In his response to the Chief Justice dated 7 June 2018, the respondent set out the factual background, a summary of the complaints, the dismissal of the appellant's Labour Court case and the fact that during that case, the appellant "exonerated" him of any wrong-doing. He attached a schedule of excerpts from the evidence during which, under cross-examination, the appellant stated that he had come to appreciate that the person behind his non-appointment as a Senior Litigator, was not the respondent or Vedalankar, but Nair. The respondent also pointed out that the appellant owed LASA over R1 million in taxed costs from his unsuccessful Labour Court case. He accused the appellant of abuse of process by seeking "to re-litigate" his matter on a "new basis" that he was not appointed due to alleged corruption by the respondent.

[93] Under the heading, "[S]ubmissions" the appellant denied all allegations against him. In particular, he denied that he had been involved in recruitment and the appointment of staff at LASA. He denied the appellant's the allegation that he was involved in the cancellation of the recruitment process for the filling of

the Senior Litigator posts, and the permanent freezing of those positions, in order to have Ngcamu to be appointed.

[94] As to the complaints against him, the appellant said the following:

“[T]he report to the Justice Portfolio Committee confirmed that the reason for not proceeding with the second round of interviews was budget related which I still maintain.

I deny that I ‘falsely reported and lied to the Minister of Justice and Constitutional Development (as he was then described) to pervert his enquiry into the CEO’s repeated illegal and unconstitutional refusal to comply with PAIA, and thereby cover this up, with the object of covering up my own gross misconduct exposed by the illegally refused records’. The report to the Minister also explains the reasons why the second round of interviews was not proceeded with which related to budgetary constraints.”

[95] Other than these remarks, the respondent did not specifically deal with any of the appellant’s sixth, seventh and eighth complaints, much of which were referenced by LASA’s own records. The appellant referenced them to contend that the reasons advanced by LASA and the respondent for not appointing him, were false, and that the respondent was aware of their falsity when he furnished them to the Minister and the Portfolio Committee. The bare denials by the respondent leave many questions unanswered.

[96] One of the lingering questions is this: if indeed it was LASA’s official decision to freeze the Senior Litigator posts, why is there no record of such a decision in the minutes of the relevant meetings of its Board or annual reports? It is not disputed that these were critical posts, of which the Deputy Minister had warned against freezing. The very fact that there is no official record of the freezing decision, makes it difficult to argue against the appellant’s characterization of the decision as “an illegal, unauthorised, unapproved, off-the-

record, corruptly motivated abortion” of his appointment after he was successfully interviewed for the position. He said that the respondent, as the Chairperson of LASA’s Board, was aware of this, but nevertheless lied about it when he reported to the Minister and the Portfolio Committee.

[97] The appellant’s response to the Designated Judge’s request does not address the worrisome aspects of the complaints including that in the November 2011 Board meeting, to which the appellant referred, Nair gave another, third reason why the interview process for the Senior Litigator posts were not proceeded with, and ultimately frozen. This time around, he suggested that there was a shortage of suitable candidates. But this could not be true because the first interviewing panel in 2009 had found the appellant to be suitable for the post.

[98] The appellant also alleged that during the Labour Court trial, Nair recanted on all the reasons hitherto given to him for his non-appointment and sought to blame Vedalankar for not proceeding with his appointment. If this is true, it must be accepted that the reasons furnished to the appellant for his non-appointment were false, and that his non-appointment was for an ulterior, unlawful reason. The question is: how much of this did the respondent know, or should reasonable have known? “All of it”, says the appellant. As mentioned, the appellant asserted this with reference to LASA’s records.

[99] These allegations, undoubtedly of a serious nature, called for meaningful, comprehensive, and *seriatim* answers from the respondent. The respondent elected not to do so. The upshot is that before Designated Judge there was only the uncontroverted version of the appellant. Seen in this light, we are of the respectful view that the Designated Judge was not correct to dismiss the sixth, seventh and eighth complaints as unsubstantiated. The appeal in respect of these complaints should similarly be upheld.

### **The remedy**

[100] The appellant's complaints against the respondent were dismissed by the Designated Judge in terms of section 17(2) of the JSC Act as being unsubstantiated. We are therefore concerned with an appeal pursuant to section 17(7)(a). The powers of the appeal Committee when considering an appeal pursuant to section 17(7)(a) are set out in section 18(4) of the JSC Act, in terms of which the Appeal Committee may: (a) confirm the dismissal; (b) set aside the dismissal, and find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in section 17(8) on the respondent; or (c) set aside the dismissal and recommend to the Commission that the complaint should be investigated by a Tribunal in terms of section 19.

[101] Because of the unanswered questions we have identified above, the Designated Judge should have used his inquisitorial powers to probe the complaints further. We, as the Appeal Committee, have no such powers. Equally, we have no powers to remit the matter to the Designated Judge to investigate or clarify the issues. We are therefore left with either of the remedies provided for in section 17(4)(b) or section 17(4)(c).

[102] A finding in terms of section 17(4)(b) is to the effect that "the complaint had been established" and that a respondent Judge "has behaved in a manner which is unbecoming of a Judge." It is followed by a sanction prescribed in section 17(8), namely one or a combination of the following remedial steps: (a) an apology; (b) a reprimand; (c) a written warning; (d) compensation; (e) counselling; (f) attendance of a specific training course; and (g) appropriate corrective measure. These sanctions can only be imposed once a finding is made that "the complaint had been established" and that a respondent Judge "has behaved in a manner which is unbecoming of a Judge." We cannot make such a

finding against the respondent when the complaints against him have not been fully investigated. Thus, it would be premature, and highly prejudicial against the respondent, to make that finding at this stage.

[103] The option open to us as the Appeal Committee in terms of section 18(4)(b)(iii), is to make a recommendation to the Commission that the second category of complaints should be investigated by a Tribunal in terms of section 19.

### **The second ruling**

[104] It remains to comment briefly on the second ruling by our colleague, Mathopo J. The second ruling identifies the issue as being “whether a party burdened with the onus of proof has succeeded in discharging it.” It goes on to hold that “[s]ight should not be lost that the onus lies with [the appellant].” The second ruling then concludes that appellant had failed to discharge such onus, and that the first ruling, has “unwittingly shifted the onus on [the respondent].” Thus, the second ruling rests on one central plank – the discharge of onus.

[105] This with respect, is at odds with the express provisions of section 17 of the JSC Act, in terms of which these proceedings are conducted. Section 17(2) is plain, instructive, and worth repeating:

“Any inquiry contemplated in this section must be conducted in an inquisitorial manner and *there is no onus on any person to prove or to disprove any fact during such investigation.*” (Emphasis added.)

[106] In light of this clear legislative provision, the substratum of the second ruling (that the appellant bore the onus and that he had failed to discharge it), is fatally flawed. In terms of section 17(3)(a) the respondent was enjoined, when

[109] Lastly, the second ruling holds that the appellant's complaints should have been dismissed because during the trial the appellant had withdrawn the complaints against the respondent. We disagree. There is a difference between court proceedings and those in terms of the JSC Act. Whereas the former are concerned with the determination of parties' rights, the latter are about judicial probity and accountability. This explains why there is a difference in approach.

[110] In the present case, the first complaint was that the respondent had suborned Mtati to lie under oath. This stemmed from the answering affidavit in the subpoena application. However, the appellant did not proceed with the application. He did not "withdraw" the application, as the second ruling erroneously states. Be that as it may, the second ruling holds that because the subpoena application was not proceeded with, that in and of itself served as a complete answer to this complaint. That cannot be correct. The complaint is self-standing, and has a life of its own outside of the subpoena application. This is because the complaint about perjury did not form part of the subpoena application. It was also never an issue in the main action in the Labour Court.

[111] Similarly, with regard to the sixth, seventh and eighth complaints, the fact that the appellant had withdrawn allegations of impropriety against the respondent, is no bar to the lodging of a complaint in terms of the JSC Act. This is because the objectives of the complaint mechanism in terms of the JSC Act are different from what was sought in the Labour Court case. These are distinct processes that should not be conflated.

[112] In any event, none of the allegations in these complaints (that the respondent lied to the Minister and the Portfolio Committee) were issues before the Labour Court. The issues in the trial could perhaps have had some relevance

to the second, third, fourth and fifth complaints, as those related to the reasons why the appellant was not appointed. However, as far as these complaints are concerned, what happened in the Labour Court has no bearing whatsoever on these complaints.

[113] Therefore, the conclusion to partly uphold the appeal and recommend a referral to a Tribunal, is unassailable.

[114] In the result the following order is made:

1. The appeal is partly dismissed and partly upheld.
2. The dismissal of the appellant's second, third, fourth and fifth complaints is confirmed.
3. In terms of section 18(4)(b)(iii) we recommend to the Commission that the second category of complaints should be investigated by a Tribunal in terms of section 19 of the JSC Act to investigate whether the respondent:

- (a) suborned Mr Mtati to lie under oath in the subpoena application under Labour Court case number (D529/11);  
and
- (b) lied to the Minister of Justice and Correctional Services and the Parliamentary Portfolio Committee for Justice and Constitutional Development.”

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**NKABINDE J**

Member of the Judicial Conduct Committee

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**MAKGOKA JA**

Member of the Judicial Conduct Committee

**MATHOPO J**

[115] I have had the pleasure of carefully reading the judgment prepared by my colleagues, Nkabinde J and Makgoka JA (first judgment), and while I concur that the first category of complaints lack substance and should therefore be dismissed, I regrettably do not agree with the proposed outcome and reasons marshalled in support of the second category of complaints. I am of the view that the complaints levelled against Judge President Mlambo (JP Mlambo) in the second category of complaints cannot be sustained, purely on the basis of lack of *prima facie* evidence.