IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 2023/067142

In the matter between:

ERIC ZANOXOLO MNISI	Applicant
and	
LT COLONEL MATHIPA	First Respondents
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Second Respondents
SENIOR PUBLIC PROSECUTOR FOR DISTRICT OF JOHANNESBURG NORTH	Third Respondents
DIRECTOR OF PUBLIC PROSECUTIONS JOHANNESBURG	Fourth Respondents
MINISTER OF POLICE	Fifth Respondents
MAGISTRATE OF DISTRICT OF JOHANNESBURG NORTH, RANDBURG NO	Sixth Respondents

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FIRST, SECOND AND FIFTH RESPONDENTS' HEADS OF ARGUMENT

Introduction

1. These heads of argument are filed on behalf of the first, second and fifth respondents in support of the opposition of the urgent application brought by the applicant.

2. As can be gleaned from the notice of motion, the applicant approaches this Honourable Court for an order in the following terms:

"1. That the applicant's non-compliance with the rules of Court relating to filing, service and time frame be condoned and this matter be dispensed with as urgent in terms of Rule 6(12) of the Uniform Rules of Court;

2. That pending the finalisation of the review application to be instituted by the applicant within a period of two weeks from granting of this order, the first, second, third and fifth respondents be interdicted and restrained from proceeding with the Section 205 of the Criminal Procedure Act 51 of 1977 enquiry which requires the applicant to appear before a Magistrate in Randburg Magistrate's Court 3 on 27 July 2023;

3. That any respondents opposing this application be ordered to pay the costs thereof jointly and severally, the one paying the other to be absolved;

4. Further and/or alternative relief"

3. The respondents oppose the application on the following grounds:

3.1. The applicant has not satisfied the entire requirements for an interim interdict.

3.2. In this democratic era the Constitutional Court has confirmed that the Section 205 of the *Criminal Procedure Act* is constitutional and that if properly applied, the Section is an important evidence gathering mechanism in the preparation of criminal prosecutions.

3.3. In the event that the person so subpoenaed wished to attack the validity of the subpoena it would be up to that person to produce countervailing evidence to persuade the Magistrate that the subpoena was not validly authorised. In *casu*, the applicant does not produce any countervailing evidence to the effect that the subpoena was not validly authorised.

3.4. Section 205 does not require the person subpoenaed to appear on a particular date without more. That if the person so subpoenaed is willing to provide the documentations sought to the police, that is the end of the matter and the date becomes irrelevant. The date becomes relevant only if the person wishes to oppose the subpoena. In that event, the person may appear, legally represented if he so wishes, and attempt to persuade the Magistrate why he should not be ordered to handover what was sought.

3.5. The applicant seeks to rely on the provisions of the *Intergovernmental Relations Framework Act*, 13 of 2005 yet he alleges in paragraph 5 of the founding affidavit that he deposes to the affidavit in his personal capacity. The provisions of the *Intergovernmental Relations Framework Act* do not apply to the applicant in his personal capacity.

3.6. To the extent that the applicant relies on the provisions of section 38 of the Constitution in bringing the application on behalf of the SANDF, it is settled law that the provisions in the Bill of Rights do not apply to the State including the SANDF as an Organ of State.

3.7. The applicant seeks the court to limit the respondents' performance of their duties in terms of the Constitution and legislation. The Courts are loath to

limit State Organs' performance of their duties which duties are performed in terms of the Constitution and statute, it is only in the clearest of cases that the court will interfere. This case is evidently not one of the clearest of cases.

4. It is on the above set of facts and circumstances that it is submitted that in any event, the applicant has not made out a case for the relief sought in the notice of motion.

5. Accordingly, the application deserves to be dismissed with costs on any or all of the above grounds.

Urgency and legal prescripts

6. First and foremost, it is submitted that the application ought to be struck off the roll due to that the applicant has failed to show the following:

6.1. That the matter must be dealt with as one of urgency in that:

6.1.1. There are sufficient grounds to justify the abridgement of time and the deviation from the prescribed time period;

6.1.2. That if the matter is not heard immediately, the applicant will not be afforded substantial redress at the hearing in due course.

7. The applicant was served with the Section 205 subpoena on 13 June 2023, more than a month ago. There was ample time for him to challenge the subpoena on review as he intimates that he is going to, or to address communication to the respondents immediately or shortly thereafter, or to furnish the required information

to the Investigating Officer ("the IO") or the Public Prosecutor ("the PP"). However, the applicant delayed and/or simply ignored the speed within which he ought to have acted upon receipt of the subpoena.

8. The subpoena calls upon the applicant to appear in person before the Magistrate Court at Randburg on 27 July 2023 at 08h30 to be examined by the PP and to testify about all that he knows about the alleged offence of kidnapping suspected to have been committed by unknown suspects.

9. The subpoena further provides that if the applicant furnishes the required information to the satisfaction of the PP or IO on or before 20 July 2023 then the applicant shall be under no further obligation to appear before the Court.

10. Almost three weeks after receipt of the subpoena, the applicant's attorneys drafted a letter which was dispatched to some of the respondents on 04 July 2023. The respondents wasted no time in responding to the letter especially the third and fourth respondents.

11. In the premises, there are no sufficient grounds to justify the abridgement of time and the deviation from the prescribed time period given the time that the applicant had and took after receipt of the subpoena and given his actions thereafter. It is then submitted that the applicant's urgency is self-created urgency.

12. All-the-more so, the applicant does not pertinently deal with the grounds why the matter is urgent nor establish satisfactorily that if the matter is not heard immediately, he will not be afforded substantial redress at a hearing in due course.

13. It is submitted that the applicant will be afforded substantial redress at a hearing in due course on the 27th of July 2023 when he appears before the Randburg Magistrate's Court. The applicant may appear either in person or legally represented if he so wishes, and he may attempt to persuade the Magistrate why he should not be ordered to handover the information sought. I submit that that is the substantial redress that the applicant will be afforded.

14. Tritely, mere lip service that the matter is urgent is not sufficient. The applicant must make out a case justifying departure from the day and time periods prescribed by the rules.[1] As can be gleaned *ex-facie* the subpoena, the following information is sought from the applicant:

(i) Tracking company name and records of the following four vehicles, grey Audi registration number HW 39 ZS GP, white Mercedes Benz registration number KH 69 0Y GP, white BMW registration number JZ 60 DH GP, silver Volkwagen Polo registration JG 85 BG GP from the period 2022/12/29 to 2023/01/30;

(ii) The list of members in their personal particulars like ID numbers and cellphone numbers that were conducting the training exercise on the 29 December 2022 at Mall of Africa under the command of Colonel Sunnyboy Pinny Wambi;

(iii) Operational plan for the operation.

1 *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (T/A Makin's Furniture Manufacturers)* [1977] 2 All SA 156 (W) page 158.

15. The IO in this matter made an application before the Randburg Magistrate's Court for the Section 205 subpoena to be sued to the applicant following a series of investigations that he had conducted with regard to the kidnapping of the two foreign nationals at the Mall of Africa on 29 December 2022. At this current juncture the subpoena itself is not being impugned.

16. I am advised that the Courts have taken a stance that once the subpoena has been authorised, it could be assumed in the absence of evidence to the contrary that the Magistrate authorising issue had done so after the exercise of a proper judgment.[2]

17. In *casu*, the Magistrate, upon perusing the documents placed before him or her, was satisfied that the person subpoenaed was likely to give the material and relevant evidence referred to in the subpoena and the Magistrate was under a duty to authorise the subpoena.

18. It is further submitted that the Section 205 subpoena does not just require a person to appear on a particular date without stating more. The Section further states that if the person is amenable to provide such information to the public prosecutor or to the police prior to the date on which he must appear, then he may do so and that is going to be the end of the matter and the date becomes irrelevant.[3]

19. That it is only in the circumstances where the person opposes the subpoena that the date becomes relevant and the person must appear, legally represented if he so

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2 *S v Miller and others* [2015] 4 All SA 503 (WCC) 22.
3 *S v Miller and others* 26.

wishes, and attempt to persuade the Magistrate why he should not be ordered to handover the information that is sought.[4] This contention is precisely the basis upon which the respondents' opposition is premised.

20. In essence, the Applicant can still appear before the Randburg Magistrates Court on 27 July 2023 and the argument that he now advances in the founding affidavit to the effect that the information so required is classified information, can be advanced before the Magistrate in an attempt to persuade the Magistrate that he should not be ordered to handover the information so required.

21. In terms of the Constitution of the Republic of South Africa[5], RSA is one sovereign democratic state founded on the values amongst others, supremacy of the Constitution and the rule of law.[6]

22. The rule of law dictates that no one is above the law. All the Organs of State as well as administration in the sphere of government are bound by the principles enshrined in the Constitution.[7]

23. These principles include, amongst others, service that is provided impartially, fairly, equitably and without bias; accountability of the public administration, transparency that must be fostered by providing the public with timely, accessible and accurate information; and a high standard of professional ethics that must be promoted and maintained.

4 *Ibid*.
5 The Constitution, 1996.
6 Section 1 of the Constitution.
7 Section 195 of the Constitution.

24. On this basis, no Organ of State is above the law and if there is a commission of crime every person so required, must cooperate with the law enforcement that are responsible for the investigation of that crime. It is submitted that if the applicant strongly believes that the information required from him is classified information of members of the special forces of the South African National Defence Force, then the applicant needs to persuade the Magistrate that such information is classified and he should not be ordered to disclose it.

25. Be that as it may, the applicant's case is not strongly that he does not have knowledge of the information so required, his case and argument is that the information so required is classified information of members of the special forces.

26. To the extent that the applicant argues in paragraphs 12 and 13 of the founding affidavit that the subpoena forces him to violate the privacy and dignity of persons as contemplated in Section 14 and 10 of the Constitution, it is submitted that the rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[8]

27. The Constitutional Court has said that in this democratic era Section 205 of the *Criminal Procedure Act* is constitutional and the Court, fully conscious of the invasion of the various protected rights in the Bill of Rights which the Section caused, found that if properly applied, Section 205 was an important evidence gathering mechanism in the preparation of criminal prosecutions.[9]

8 Section 36 of the Constitution.
9 *S v Miller and others* 21.

28. In paragraph 14 of the founding affidavit the applicant alleges that apart from the missing persons investigation there is also another civil trial under case number 2023–018570 which has been brought by Abdurahim Hussain Abadiga in the High Court Gauteng Division, Johannesburg. The respondents' Annexure "**NFM1**" show that that matter was an urgent application that was brought by Mr. Abadiga but was struck off the roll due to lack of urgency and that it is not a civil trial.

29. Furthermore, the applicant has not attached any documentary proof to show that there is any pending civil trial in the Johannesburg High Court to substantiate the argument that proceedings in the criminal trial must be stayed pending proceedings in the civil trial.

30. In paragraph 34.1 the applicant contends that he has no knowledge of any material or relevant information that can assist the investigating officer in respect of the offence of alleged kidnapping of Mr Abadigga and Mr Abotense, further that the impugned Section 205 subpoena is void *ab initio* and unlawful.

31. In the following paragraph, 34.2, the applicant then states that the tracking records of the four vehicles referred to in the Section 205 subpoena for the period 29 December 2022 to 30 January 2023 will seriously compromise the past, current and future covert special forces operations. That it would undermine the national security and that the vehicles are not registered in the name of SANDF as a result of the covert nature of the operations of special forces.

32. The applicant further states in paragraph 34.3 that revealing the personal particulars such as the names, identity numbers and cell phone numbers of special forces members will have a profile implication for the special forces members concerned

into the entire value chain of the operations of the special forces. He then says that this entails that the pseudo names by which such members might be known, and locations which such members visited, persons that such members contacted for the period requested in the Section 205 subpoena would be revealed. Further that the operational plan is a top secret in a classified document. That he would be committing an offence if he were to testify and answer any question in respect thereof or to furnish a copy thereof to any other person not having appropriate security clearance.

33. It is submitted, respectfully, that these paragraphs are rather contradictory in themselves. The other paragraphs say that the applicant has no personal knowledge of any material or relevant information that can assist me in the investigation of the offence.

34. On the other hand, the other paragraphs allege that the applicant states that the information is classified information and that the members involved used their pseudo names and so on. It is submitted that what the applicant has intimated in paragraph 34.2 up to and including 34.4 is material and relevant information that the DPCI needs in the investigation of the crime, therefore his lack of personal knowledge is refuted.

35. In 34.5 the applicant seeks to rely on the provisions of the *Intergovernmental Relations Framework Act*, 13 of 2005 ("the IRFA") to say that the Court should not adjudicate on the dispute between law enforcement agencies particularly in respect of sensitive intelligence matter but should rather encourage the Organs of State concerned to resolve their dispute through the mechanism provided in the IRFA.

36. Be that as it may, in paragraph 5 of the founding affidavit the applicant states that he deposes to the affidavit in his own personal capacity as well as his capacity as Head of Legal Division in the SANDF. It is submitted that it is unclear whether or not the SANDF as a government department is the one attacking the subpoena.

37. It is then submitted that to the extent that the applicant deposed to the affidavit in his own personal capacity, the provisions of the IRFA does not cover him.

38. Moreover, the respondents have established that Major van Deventer informed the IO that the former handed over the required documents to the applicant in April 2023 hence the subpoena was issued to the applicant and not to anyone else or not to a person who was in charge of the operations on that day.

The applicant has not met the requirements for an interim interdict

39. It is submitted that the applicant has not proven on a balance of probabilities that he has a *prima facie* right to bring this urgent application. The applicant has not established that a probability of an actionable nuisance exists as a result of which he will suffer harm which is unreasonable.

40. It is further submitted that the applicant has not established that his legal right has been infringed by the issuance of the Section 205 subpoena. For that fact, there is no well-grounded apprehension of irreparable harm and even if the interdict is not granted, when the time the applicant appears before the Magistrate's Court in Randburg he could simply just persuade the Magistrate that he should not be ordered to disclose the information so required, and that will be the end of the story.

41. It is submitted that the balance of convenience does not favour the granting of the relief sought herein. The irreparable harm that will be suffered by the respondents as well as the missing persons and their families is greater than the harm that may be suffered by the applicant if he is ordered to disclose the information required, or better still, if he just appears before Randburg Magistrate's Court.

42. Lastly, it is submitted that the applicant has other satisfactory remedies. As it has been shown, the Applicant can appear before the Randburg Magistrate's Court on 27 July 2023 and it is upon him to produce countervailing information to show the Magistrate that the information that is required is classified and he should not be ordered to disclose it.[10]

43. In fact, if the interdict is granted and the investigation is halted, the investigation will also come to a halt because at this stage the investigation has led to the video footage that was obtained from the Mall of Africa which revealed that there may be possibilities that the members of the SANDF that are being shielded may have a role to play in the disappearance of the two missing persons.

44. If the interdict is granted, the harm that will be suffered by the respondents will be in such a nature that important and relevant information may be dissipated and the investigation progress may be hindered.

45. On the other hand, if the applicant appears and he provides the information so required, the members concerned may be exonerated and the investigation can move on to other aspects or people.

10 *S v Miller and others* 22.

46. Furthermore, in terms of Section 198(c) of the Constitution, national security must be pursued in compliance with the law, including international law. This reinforces the principle that no one is above the law, including national security clusters. In terms of the Constitution, Section 205(3), the objects of the police service are to prevent, combat and investigate crime to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

47. In the premises, it is respectfully submitted that the applicant has failed to make out a proper case for the relief sought and consequently it may please the court to grant the following order:

47.1. That the matter is struck-off the roll due to lack of urgency.

47.2. That the applicant is ordered to pay the costs of the application.

Alternatively

47.3. That the application is dismissed with costs.

Dated at Pretoria on 17 July 2023.

H.L Kelaotswe

Counsel for the 1st, 2nd and 5th Respondents

Chambers, Pretoria

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