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IN THE HIGH COURT OF UTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2023/018570

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

ABDURAHIM HUSSEIN ABADIGA

First Applicant

and

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Second Respondent

THE MINISTER OF POLICE

Third Respondent

**THE MINISTER OF INTERNATIONAL RELATIONS
AND CO-RPORATIONS**

Fourth Respondent

ATTACQ LTD T/A MALL OF AFRICA

Fifth Respondent

PETERS COMMUNICATION TRUST PTY LTD

Sixth Respondent

HERNERT DILEBOGO MASHEGO

Seventh Respondent

Neutral Citation: *Abdurahim Hussen Abadiga vs The minister of Defence and Others*
(Case Number: 2023/018570) [2023] ZAGPJHC 353 (20 April 2023)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 20 April 2023.

Summary: Urgent application *-habeaus corpus* or interdict *homine exhibendo*. Application for the release of the body of the abductees allegedly abducted by the SANDF Special Force. The abduction allegedly took place at Mall of Africa.

The requirements of urgency to be complied with even if the matter involves the issue of dignity and liberty of a person. The abduction occurred on 29 December 2022 and the urgent application only instituted 3 March 2023. Failure to explain the delay in the founding affidavit. The explanation for the delay by the applicant's Counsel during argument not in compliance with the requirement that the case of an applicant has to be made in the founding affidavit.

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to obtain a writ of *habeaus corpus* or interdict *homine exhibendo*. The applicant, in this respect, seeks an order directing the respondents to

declare the whereabouts of Mr Abdella Hussein Abadigga and Mr Kadir Jemal Abotose, the two persons (the abductees) who it has been alleged were abducted by the members of the Special Force of the South African Defence Force (the SANDF). He further seeks an order for the release of the two from custody. The notice of motion reads as follows:

- “1.1. Declare the present whereabouts of Abdella Hussein Abadigga and Kadir Jemal Abotese (abductees) forthwith.
- 1.2. Release the Abductees from custody forthwith, alternatively
- 1.3. Place the Abductees before a court of law having jurisdiction at the next session of such court in the event that any charges are to be preferred against them.”

[2] The essence of the applicant's case is that the abductees were unlawfully abducted by members of the SANDF from Africa Mall on 29 December 2022. The whereabouts of the abductees are since then unknown to the applicant.

[3] The first, sixth and seventh respondents (the respondents) opposed the application. They denied having participated in the abductees' disappearance and that they do not know their whereabouts. The first respondent has not opposed the application and contended that it was not obliged to file an answering affidavit because the abductees are not in its custody. The second and fourth respondents have not opposed the application, they filed a notice to abide.

Background facts,

[4] It is common cause or not disputed that the abductees entered the Africa Mall in Midrand, Johannesburg, driving in a Toyota Lexus motor vehicle registration [...]and parked at level D2.

[5] The CCTV footage shows three other motor vehicles entering the parking bay of Mall of Africa at 11h30. They parked on the same level where the abductees' Toyota Lexus was parked, D2. The motor vehicles are a white BMW with registration number

[...], a white Mercedes-Benz with registration number [...] and a grey Audi with registration number [...]. According to the applicant the CCTV footage further shows the following:

- “40.1 The abductees in the food court having a meal and meeting with approximately seven people before exiting at approximately 12:01pm. Annexed here to and marked "FA10" is a still photograph extracted from the CCTV footage that shows the abductees in the food court prior to the meeting.
- 40.2 My brother is then seen paying for his parking ticket 12.11.19 pm at the parking payment machine at level D2. The only reasonable inference in the circumstances is that he was intending to leave forthwith because a parking ticket only remains valid for exit for a short time after payment has been made. Yet, my brother and Mr Abotese did not leave the Mall in the Lexus and it is only seen leaving the parking area approximately four hours later together with the Grey Audi referred to above. Obviously it did not leave on the strength of the ticket my brother paid for at 12.11.19 pm and another ticket had to have been purchased (Annexed hereto and marked "FA11" is a still photograph extracted from the CCTV footage of my brother paying for the parking ticket. For identification, I circled his head).
- 40.3 Unfortunately there is no CCTV footage of the movements of brother and Mr Abotese after the parking ticket was purchased nor of the area where the Lexus was parked. Clearly those who abducted them chose an area which they knew was not covered by CCTV.
- 40.4 A matter of seconds after my brother paid for the parking ticket the following occurred:
- 40.5 At 12.11.22 pm a male person dressed in civilian clothes is seen paying for 3 parking tickets (Annexed marked "FA12").
- 40.6 After paying for the tickets, the aforesaid male made his way to the exit where he awaited the arrival of the aforementioned "white BMW" and "Mercedes Benz" which belong to the SANDF. 40.6 The aforementioned "white BMW" and "white Mercedes Benz" drove at high speed to the parking exit taking a short cut by going in the opposite direction shown by the arrows on the ground. The male

who had purchased the parking tickets then inserted those tickets into the exit boom facilitating the hasty departure of the two vehicles. This footage clearly shows a co-ordinated effort to allow the two SANDF vehicles to make a swift departure (Footage annexed marked "FA13").

40.7 All of this coincided exactly with the disappearance of the abductees. My brother and Mr Abotese were not seen again after my brother paid for his parking ticket. On this evidence alone the inference overwhelming that my brother and Mr Abotese were abducted SANDF vehicles.

40.8 The unknown male person then proceeded back into the mall and is seen at 16.48.03pm paying for two parking tickets at the same parking ticket payment machine referred to above. After paying for the two tickets, he facilitates the exit of the "grey Audi" and the Toyota Lexus (which the abductees arrived in) which are seen leaving, one behind the other at 16.55.16 pm (Annexed here to and marked "FA14 to FA16" are still photographs extracted from the CCTV footage of the unknown male person paying for two parking tickets and the motor vehicles at the exit)."

[6] The other important image that appears on the CCTV footage is that showing a male person paying for a number of parking tickets. Upon enlargement of the person, that person was holding a purse with the emblem appearing there on being that of SANDF Special Forces Association. The SANDF has subsequently conceded that that person was their member.

[7] The applicant reported a missing persons case at the Midrand police station under CAS238/01/2023. The investigating officer is Detective Selowa.

[8] The initial investigation revealed three motor vehicles registered under the name of Peter's Communications Pty Ltd, a company registered in terms of South African company laws. The seventh respondent Major General, Mashego, is one of its directors of that company."

[9] The case of the applicant is based on the contention that the members of the SANDF, Special Force unlawfully clandestinely arrested and detained the abductees on 29 December 2022. This conduct, according to the applicant, amounted to a gross violation of the rights of the abductees. The applicant, in this regard, relies on several provisions of the Bill of Rights and the Constitution. The provisions include the right to human dignity provided for in section 7, 10, and 12 of the Constitution, and the right of the arrested or detained person to be brought before the court with 48 hours after arrest in terms of section 35 of the Constitution read with section 50 of the Criminal Procedure Act.¹

[10] In support of his contention that the abductees were abducted and unlawfully arrested by members of the SANDF, the applicant relies on circumstantial evidence. In this respect, it is common cause, as indicated above, that the abductees and the members of the SANDF arrived on the day in question and parked at the same parking level, D2 of Africa Mall. The CCTV footage showing the motor vehicles driven by the members of the SANDF and the abductees has not been disputed by the respondents.

[11] It is also not in dispute that Major Wambi of the SANDF purchased three parking tickets a few seconds after the abductee, Mr Abaddiga paid for his parking ticket. After paying for the parking tickets, Mr Wambi proceeded to the parking exit and facilitated the exit of the three motor vehicles, which drove at high speed as they exited the parking bay.

[12] It is also common cause that Major Wambi returned to Africa Mall at 16.48.03 and again paid for the grey Audi, and a silver Polo driven by Sergeant Matlou. As they left the parking area of the Mall, the Toyota Lexus of the abductees was between the two cars belonging to the SANDF, Polo and Audi.

¹ Act number 51 of 1977.

[13] It is based on the above circumstantial evidence that the applicant contends that there exists an irresistible inference that the abductees were abducted and arrested by the members of the SANDF. He further contends that this inference is supported by the fact that the members of the SANDF were aware that Mr Abaddiga was placed under the US Sanctions list.

[14] As indicated earlier, the first, sixth and seventh respondents opposed the application. They denied knowledge relating to the circumstances that led to the disappearance of the abductees. They did not dispute that they attended Mall of Africa on the day in question, driving the three motor vehicles mentioned above. They contended, however, that their presence at the Mall was to conduct a training exercise, which according to them, is performed from time to time. These kinds of exercises, according to the SANDF, are conducted to provide the members of the special force with intimate knowledge of the surroundings of the Mall with a view to developing a rescue plan should the need arise. They also did not deny that the Mall management did not know about the exercise.

Points *in limine*

[15] The respondents raised two preliminary points: lack of urgency and *locus standi*.

[16] It seems convenient that the issue of *locus standi* is dealt with first. The contention of the respondents is that the applicant lacks *locus standi* simply because he, in the founding affidavit, avers that he deposes to the affidavit on the basis that Mr Abadiga is his brother and in the replying affidavit, he deposes to the affidavit on behalf of his brother.

[17] The respondents contrast the two statements and submit that the contradictory nature of the statements is indicative of the fact that the applicant does not have *locus standi*. This, in my view, has no merit. Reliance on what was said in the two affidavits to contest *locus standi* is overly technical and ignores the circumstances in which the

applicant instituted the application. It has not been disputed that the applicant is the brother of Mr Abadiga. It is thus clear from the facts and circumstances of this matter that he would be entitled to institute these proceedings. Accordingly, this point stands to fail.

Urgency

[18] As concerning urgency, the respondents contend that the applicant delayed in instituting this application and failed to explain that default.

[19] Applications for urgent relief are governed by rule 6(12) of the Uniform Rules of Court (the Rules). The approach to adopt when dealing with urgency is set out in several decisions of the courts, the leading case in this regard being *Luna Meubelsvervaardigers (Edms) Bpk v Makin and another*.²

[20] An applicant in an urgent application is, in terms of the Practice Directive of this Division, required to set out explicitly the circumstances that render the matter urgent. In *Re: Several Matters on Urgent Roll on 18 September 2012*,³ the court held that:

"Urgency is a matter of degree...Some applicants who abuse the court process should be penalised, and the matter should be simply struck off the roll with costs for lack of urgency".

[21] The principle governing the approach to dealing with urgency was dealt with in the often-quoted case of *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo*,⁴ wherein the court held that:

² 1997(4) SA 135.

³ In re: Several matters on the urgent court roll [2012] ZAGPJHC 165; [2012] 4 All SA 570 (GSJ); 2013 (1) SA 549 (GSJ) (18 September 2012).

⁴ (2014) JOL 32103 (GP),

"I proceed to evaluate the respondent's submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant's case taken together with allegations by the respondent, which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently...It seems to me that when urgency is an issue, the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application is not urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited) to whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often, usually by Counsel acting for respondents, self-created urgency."

[22] In *Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited*,⁵ the court held that self - created urgency does not constitute acceptable urgency for purposes of uniform rule 6(12) justifying the determination of a matter on an urgent basis.

[23] In this matter, as indicated earlier, the respondents contend that the urgency is self-created in that the applicant delayed in launching the application. The timeline relevant to this contention is as follows:

23.1 The alleged abduction at the Mall of Africa took place on 29 December 2022.

Five days thereafter the matter was reported to the police according to the applicant. However, only after the lapse of two and half months did the applicant initiate this application.

23.2 It is common cause that this matter was enrolled and heard in the urgent court before Wepenaar J on 2 March 2023.

⁵ (2019/8846) [2019] ZAGPJHC 122 (3 May 2019)

23.3 The other period related to the delay to institute the application by the applicant concerns the removal of the matter from the roll on 3 March 2023 after the respondents filed their answering affidavits.

[24] The applicant is silent in his founding affidavit about the reason for this delay. The explanation by the applicant's Counsel that the reason for the delay was because the applicant had to investigate and verify the facts related to the abduction does not assist the case of the applicant because that does not satisfy the requirement in motion proceedings that the applicant has to make his or her case in the founding affidavit.

[25] As stated above the application was heard in the urgent court on 2 March 2023. If indeed the matter was urgent, as the applicant contends, the question is why did he not re-enrol the matter on the first available opportunity, for instance, 6 March 2023. It should also be noted that the applicant's replying affidavit was only deposed to on 23 March 2023.

[26] Another important requirement that the applicant failed to deal with in the founding affidavit relates to failure to explain why he cannot be afforded substantial redress in the normal course.

[27] For the above reasons, the applicant's papers have failed to make out a case for urgency, and thus the matter warrants being struck off the roll.

Order

[28] In the premises the following order is made:

1. The matter is struck from the roll for lack of urgency.
2. The applicant must pay the costs of the respondents who opposed the application.

E Molahlehi
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG.

Representation:

For the applicant: Adv J Howse SC

Instructed by: Yusuf Cassim and Associates

For the respondents: Adv B T Moeletse

Instructed by: State Attorney

Heard on: 5 April 2023

Delivered: 20 April 2023