IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO:12044/10

In the matter between

T. PANDAY **Applicant**
and

MINISTER OF POLICE AND OTHERS **Respondent**

JUDGMENT

Delivered: 18 April 2012

MURUGASEN J

[1] This an application to review and set aside the issuance of subpoenas in terms of the provisions of Section 205 (1) of the Criminal Procedure Act 51 of 1977 on the grounds that the issuance is inconsistent with the Constitution of South Africa and invalid, and for an order directing the return of the documents and records obtained pursuant to the execution of the subpoenas.

[2] The applicant, Thoshan Panday, seeks the following orders:

1 an order reviewing and setting aside a decision by the Magistrate, Durban Magistrate Court (the Fourth Respondent) during May and June 2010 to issue five subpoenas in terms of the provisions of Section 205 (1) of the Criminal Procedure Act 51 of 1977;

2 an order declaring that the issuance of the subpoenas is inconsistent with the Constitution and invalid;

3 an order declaring that the issuance of subpoenas in terms of Section 205 of the Criminal Procedure Act 51 of 1977 (the CPA) by the Fourth Respondent without keeping proper records of the application and decisions leading to the issuance of the subpoenas is unconstitutional;

4 an order declaring that the authorisations issued by the Deputy National Director of Public Prosecutions dated 14 April 2005 are not the authorisations required by Section 205 of the CPA;

5 an order that the Minister of Police, the Minister of Justice and Constitutional Development and the Director of Public Prosecutions (the First, Second and Third Respondents respectively) return all the documents and records of accounts obtained pursuant to the execution of the subpoenas be returned to the applicant's legal representatives; and

6 an order for costs against the First, Second and Third respondents jointly and severally.

[3] The relief sought by the applicant is premised on the following alleged Procedural irregularities or failure to follow due process which renders the issue of the subpoenas inconsistent with the Constitution and invalid :

1 The failure of the 4th respondent to keep a proper record of the circumstances leading to the issue of the subpoenas and his decisions, and to retain copies of the section 205 applications constitutes a drastic procedural irregularity, which detracts from the accountability and obligation of the issuing officers to premise their decision on a factual basis.

2 The State did not make out a sufficient case for the subpoenas to be issued on the terms contained therein. In particular, given the paucity of relevant averments in Colonel Soobramoney's affidavits, no connection between the accounts of Goldcoast CC and the information pertaining to applicant's personal bank statements and between the alleged offences and the documentation sought, was established.

The applicant was not afforded a hearing by the magistrates nor did they order that copies of the subpoena be served on him, nor did they endorse the subpoenas to the effect that his bankers' were permitted to inform the applicant of the intended examination or production of the requested information prior to the examination or production of the documents.

As the handwritten amendments /additions were not initialled and portions of the supporting affidavits are nonsensical or the allegations therein incongruous, but no query was raised by the magistrate. They did not also query the authority of the applicants.

The applicant contends that the aforegoing is indicative that the magistrates could not have applied their minds properly in deciding whether or not to authorize the subpoenas.

3 The following jurisdictional requirements for the issue of the subpoena were not satisfied, rendering the subpoenas invalid:

3.1 the written authorizations by virtue of which Advocates Muller and Lucken applied for the subpoenas are not the necessary authorizations contemplated in section 205 of the Act and therefore the provisions of 205 (1) were not satisfied.

Lucken requires the written authority of the Director of Public Prosecutions ie the designated official but the authority was issued by the Deputy National Director of Public Prosecutions.

As Muller is not a director under the National Prosecuting Authority or in terms of S205A, he is not a designated official who may apply for a subpoena without a written authority. The objective behind the specification of the designated official is that he would guard against the potentially abusive S205 process.

The failure to obtain the specified or prescribed authority undermines the legality of Lucken's and Muller's requests.

3.2 Further the authorisations are invalid as they are dated 14 April 2005, and have no connection with the current investigation into the applicant, which had not commenced at the time.

3.3 Section 205 (1) requires an authority for the specific application; and blanket authorizations do not suffice.

4 The applicant submits that if however the court were to rule that a general authorization will suffice, then the requirements of section 20(5) read with the peremptory requirements of section 20(6) of the National Prosecuting Authority Act 32 of 1988 were not satisfied viz the authority does not set out

i) the area of jurisdiction

ii) the offences; and

iii) the court

in respect of which the powers may be exercised.

[4] In opposing the relief sought, the 1st, 2nd and 3rd respondents make the following in response to the applicant's contentions :

1 A failure to keep copies of the application or reasons for the decision does not constitute a procedural irregularity as there is no requirement in Section 205 which renders it peremptory for the magistrate to retain a copy of the record, although such a practice may be recommended.

The deponent has on behalf of the respondents, confirmed under oath that the record furnished to the applicant is correct and complete, and as there is no genuine dispute as to its correctness, the applicant has not been prejudiced by the failure to keep records.

2 The offences upon which the information was sought were clearly stated in the subpoenas. Further or a greater degree of particularity before a potential witness attends the enquiry would frustrate the objective and purpose of the section.

It is not mandatory that the applicant be given notice of an intended examination. No examination of witnesses was conducted.

Section 205 does not prescribe that the Fourth Respondent must afford the applicant a hearing prior to the issuing of the subpoena. Such forewarning would have jeopardized and compromised the very purpose of obtaining the documents via the subpoenas in respect of serious offences.

A proper case was made out justifying the issue of the subpoenas. The supporting affidavits contained the evidence which gave rise to reasonable suspicion that there was a close connection between the applicant and the suspected criminal conduct under investigation. The bank statements to be furnished in terms of the subpoenas were crucial to the investigation as they were important evidence of the movement of funds.

Any intrusion into the privacy interests of the applicant is justified by the need for proper police investigation to crimes and the bank statements being evidence of the movement of funds, may assist in the exposure of serious economic crimes, such as fraud and money laundering.

The applicant had consequently failed to make out a case for his complaint of misdirection on the part of the magistrates or their failure to apply their minds properly before arriving at a decision to grant the applications in terms of Section 205.

3 In terms of Section 22(1) of the National Prosecuting Authority Act 32 of 1998 (the NPAA) the authority conferred on the Director of Public Prosecutions by any law may be exercised by the National Director of Public Prosecutions.
In terms of Section 23 of the NPAA, the Deputy National Director of Public Prosecutions exercises authority over the Special Commercial Crime Unit, and is therefore duly authorised by the National Director of Public Prosecutions to authorise public prosecutors in the Special Commercial Crimes Unit to bring requests and apply for subpoenas contemplated in Section 205. Section 23 does not contemplate that the authorisation of the Deputy National Director by the National Director must be in writing. The authorisation of Lucken in terms of s 205(1) of the CPA read with Section 20(5) of the NPAA under and by virtue of which she applied for the subpoenas, was therefore proper and valid.

Muller in his capacity as Deputy Director of Public Prosecutions and the Coordinator of the Specialised Commercial Crimes unit was in terms of

S20(4) of the NPAA conferred with statutory authority to exercise the powers referred to in Section 20(1) of the NPAA which are broad enough to include the power to deal .

There was therefore no validity or merit in the applicant's challenge to the authority under which the prosecutors applied for the subpoenas.

4 The provisions of Section 205 do not prescribe that the authority under which the prosecutor applies for the subpoena has to be granted specifically for each individual application, which would create an administrative burden without serving a meaningful purpose. There is also no requirement that there must be an investigation in place when the authority is granted.

5 The respondents deny that the authority issued to Lucken does not comply with Section 20(5).

[5] The respondents also contend that if the applicant was prepared to co-operate, there was no need for him to complain now about the police obtaining his bank records. The applicant's offer of co-operation is also viewed with scepticism by the head investigating officer, Major General Booysen, as at the meetings held with the police, the applicant did not indicate how he would co-operate or disclose any pertinent information that would have assisted in the investigation According to Booysen, the concern of the applicant was to terminate the investigation rather than to assist in the investigation or provide information, which would clear his nam **Section 205 of the Criminal Procedure Act** provides as follows:

205 **Judge, regional court magistrate or magistrate may take evidence as to the alleged offence**

(1) A Judge of a High Court, a regional court magistrate or magistrate may, subject to the provisions of subsection (4) and section 15 of Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorised hereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorised hereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided

that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

[Sub-s (1) substituted by s 59 of Act 70 of 2002.]

(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.

(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or magistrate for examination, and who refuse or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

[S 205 substituted by s 11 of Act 204 of 1993]

The constitutionality of Section 205

[6] It is common cause that Section 205(1) is a valid provision and does not offend against any constitutional right.

In **Nel v Le Roux N O & Others 1996 (3) SA 562 (CC) at para 20** the Constitutional Court rejected the contention that S 205 infringed a number of fundamental constitutional rights and held that S 205 was 'narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime', and that witnesses have a duty to testify. This decision was based on the provisions of Section 205 post the 1993 amendment which introduced the proviso whereby the hearing and inquiry before a judicial officer falls away when the documents are produced.

[7] Despite a scrutiny of Section 205, when the Constitutional Court held that the provisions thereof were not unconstitutional, the Court did not find it necessary to interfere with the procedure envisaged by the section as being inconsistent with the Constitution or potentially unconstitutional, or prescribe any procedural

formality to preserve the constitutionality, although it is apparent that applications in terms of Section 205 although demanding 'the exercise of invasive and compulsive powers' are subject only to the exercise of judicial discretion by the presiding officers after due consideration of the facts disclosed in the application.

[8] The impugning of the subpoenas by the applicant is premised on procedural irregularities which tainted the application in terms of which the subpoenas were authorised and the conduct giving rise to the authorisation.

The failure to keep records

[9] Section 205 does not prescribe the formality that the 4th respondent must retain copies of the application or record.

[10] The applicant however avers that the failure of the Fourth Respondent to retain the affidavits and other relevant information in the application placed before the magistrate, is inconsistent with the Constitution as he is consequent to such failure, deprived of access to the information.

[11] The applicant avers further that the respondents seem to acknowledge the validity of his objection and complaint in this respect, as the procedure relating to the records of applications in terms of Section 205 has been revised. He relies on a Circular 16/2010 issued by the Acting Judicial Head : Administrative Region 7, the contents of which relate to the keeping of records and registers for search warrants and subpoenas in terms of section 205 (the circular).

[12] In the circular the acting Judicial Head, S F van Niekerk, refers to a lack of uniformity of practice relating to the keeping of records of search warrants and subpoenas in terms of Section 205. After pointing out the obligation on judicial officers to exercise their discretion judicially in authorising warrants or subpoenas, Van Niekerk also warns of the potential for constitutional challenges which occur after the lapse of a period of time after the authorisation and will therefore entail sight of the application in order for the judicial officer to furnish reasons and to demonstrate that his discretion was exercised judicially.

Van Niekerk therefore suggests in the circular that a register of the details of such applications are maintained at each office, and a copy of each application be kept

in a file.
The circular, firstly, confirms that there is no peremptory requirement relating to the keeping of records of Section 205 applications or the recording of reasons therefor.

[13] However, contrary to the contention of the applicant, the effect of the circular is not an acknowledgement that the failure to retain the records constitutes an infringement of or non compliance with Section 205 or any other statutory requirement or that such failure constitutes a drastic procedural irregularity which vitiates or taints the issuing of the subpoenas, rendering same unconstitutional. Nor does the circular have the effect of a prescriptive directive to ensure compliance with the requirements of Section 205.

[14] The circular sets out the obligations on the magistrate before whom an application in terms of S205 lies for determination, and thereafter suggests a formalised process to be implemented in respect of record keeping, which will assist the magistrate in responding to any subsequent query, as 'it is not expected of a judicial officer to have a precise recollection of every such matter that came before him/her'.

[15] Therefore while it is acknowledged in the circular that the retention of the record of a request and the decision by the magistrate may facilitate the resolution of any queries raised in connection therewith and subsequently assist the magistrate to provide reasons for his decision, the circular does not impinge on the validity of the procedure under and in terms of which the subpoenas were issued nor does it sustain the applicant's allegation that the failure to keep records of the Section 205 applications constitutes a drastic procedural irregularity on which this review application is grounded. The reliance on this circular is, in my view, illconceived.

[16] Although the Fourth Respondent acknowledges that the maintenance of a register and a file of applications is good practice, the mere failure to keep records cannot detract from the accountability and obligation of the issuing officers to premise their decision on a factual basis. Section 205 imposes these obligations on the judicial officers without imposing the formal requirement to maintain records.

The issuing officers have confirmed that they applied their minds before authorising the subpoenas although they did not retain copies of the applications.

[17] Although the Fourth Respondent did not keep records of the processes by virtue of which the subpoenas were issued, the applicant has been furnished with copies of the applications and the subpoenas, the correctness and completeness of which have been confirmed by the respondents.

[18] The onus lies on the applicant to show that he is prejudiced in his claim to review the decisions to issue the subpoenas because he does not have access to the same and all the information placed before the magistrates or that the record furnished to him is unreliable or susceptible to manipulation by the respondents. I am unable to find that the applicant has shown such prejudice because of the lack of particularity in his objections as to why the records furnished to him are susceptible to a challenge based on a failure to access the correct and complete information considered by the magistrates.

[19] In the premises the applicant cannot rely on a dispute of fact, and there is merit in the submission on behalf of the respondents that the material averments of Van Loggerenberg confirming that the record furnished to the applicant is a true copy, remain unchallenged and fall to be accepted as correct in accordance with the legal principle set out in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635 A-C.**

[20] Consequently I do not find any merit in the contention that the failure by the magistrates to keep records of Section 205 applications constitutes an unconstitutional practice and a fatal procedural irregularity making the issuance of the subpoenas susceptible to being reviewed and set aside.

The Failure of the Issuing Officers to Exercise their Discretion Judicially

[21] The applicant avers that the information in the applications considered by the magistrates is inadequate to justify the decision to authorise the subpoenas.

[22] Section 205 provides that the subpoenas may only be issued in respect of

persons who are 'likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed'. The provision clearly envisages that the objective of the subpoenas is to obtain information in the course of, or to assist in the investigation of, the alleged offence and involves the exercise of a judicial discretion.

[23] The applications for the subpoenas specify the alleged offences as 'fraud/corruption' and the name of the suspect as 'Thoshan Panday'. The supporting affidavits by Soobramoney set out *inter alia* the circumstances under which the facts and other information pertaining to the alleged offence have been discovered, nature of the investigation being conducted, the relationship between the Goldcoast Trading CC and the suspect (the applicant), and need to obtain further relevant information on monies received, disbursed or transferred by the applicant in connection with the alleged offences.

[24] Therefore although the offending transactions may have been made by the juristic entity, Goldcoast Trading CC, of which the applicant is the director, the alleged involvement of the applicant in related transactions in his personal capacity, is in my view, sufficiently established in the affidavit to justify the authorisation of the subpoenas within the parameters of Section 205.

[25] In **Nel supra at para [20]** the court based its finding that the Section 205 proceedings are 'narrowly tailored as possible' on, *inter alia*, the role of the independent judicial officers in the implementation of the proceedings. The issuing officers have confirmed under oath that the applications were properly considered and that they did apply their minds before authorising the issuance of the subpoenas and did not merely 'rubber stamp' the applications.

[26] There is no legal basis on which the court may reject their averments or facts which render such averments improbable or false, even though the magistrate Nieuwoudt could not confirm the presence of manuscript amendments appended to the affidavit of Soobramoney and the formalities relating to the amendments were not complied with. Nieuwoudt nevertheless confirms that he was satisfied from the application presented to him that that the subpoenas lay to

be authorised.

[27] The applicant also contends that the information was obtained from the banks in violation of the applicant's rights to privacy entrenched in terms of section 14(d) of the Constitution, but the magistrates did not take into account this invasion of the rights of confidentiality and privacy of the applicant.

[28] In **R v Parker1966 (2) SA 56 (RA) at 58** although the decision is pre-constitutional, the court recognised that the interest of an individual to privacy is unequal when weighed against the competing interest of justice. It accordingly held that it would not be a proper exercise of discretion if the available facts indicate that the enquiry is to be based on vague supposition and that the magistrate had a duty 'to ensure that the members of the public are not **unduly** harassed by inquisitions'.(my emphasis). Therefore although key word 'unduly' emphasizes the obligation on the magistrate to apply his mind to the application and not act as 'a rubber stamp' in authorising an invasive enquiry into the affairs of an individual, the court also recognised that such invasion may be necessary and justified in the interests of justice, provided that it is properly grounded.

[29] Even under the current Constitutional protection of an individual's rights to privacy and property, Section 205 remains an effective means to obtain disclosure and production of information despite the potential invasion of the aforesaid rights (see **Nel supra)** as it serves the 'legitimate state interest of investigating and prosecuting crime'.

[30] I am not satisfied that the applicant's has furnished compelling or even persuasive grounds for his allegations that the application was based on inadequate facts or 'vague suppositions' or that the issuing magistrates failed to apply their minds or exercise their discretion judicially in authorising the subpoenas.

[31] The further allegations that the Fourth Respondent failed to give the applicant a hearing, or to issue an order issued that the applicant be furnished with a copy of the subpoena, and that the applicant was not given notice of the

application in terms of Section 205 are not based on any legal requirements and the applicant has failed to show that the conduct of the magistrates complained of, prior to or post the issuance of the subpoenas, offend against the provisions of the section. Such procedures, if implemented, would undermine the very objective of Section 205: to obtain information in the investigation and prosecution of serious crime.

[32] The issue of the legality when compelling testimony lies to be determined by the presiding officer at the S 205 examination, who may also be called upon to balance any conflict of interest. Although no examination was held in respect of the impugned subpoenas as the documents were furnished pursuant to the execution of the subpoenas, this does not undermine the existence of an essential moderating tool to deal with any issue of legality or conflict of interest on which an examinee may rely as justifying his refusal to furnish the information requested. As held in **Nel supra** at paragraph [20] 'This affords the examinee the widest possible residual protection'.
Therefore the subpoenas do not lie to be struck down as unconstitutional because the examination was not held.

[33] Further the applicant's conclusions that the affidavits fell short based on the failure of the respondents to furnish him therewith, or that the failure to afford the applicant any notice of the S205 process is unlawful as it created the impression that the applicant is a fraudster do not sustain the allegations of procedural irregularity or constitute sound grounds for the relief sought.

[34] The allegations of the applicant that he was prepared to co-operate with the police in respect of the investigation, is denied by Booysen on the basis that that nothing constructive or pertinent was offered during meetings with the applicant and his legal representatives. The applicant has not furnished any compelling argument in favour of rejecting Booysen's denials. In my view, his resistance to the documents obtained pursuant to the execution of the subpoenas remaining with the Third Respondent undermines his protestations of cooperation.

The Validity of the authorisations under and by virtue of which the Section

205 applications were made

[35] **The relevant sections of the National Prosecuting Authority Act 32 of 1998 (the NPAA) are :**

Section 20: Power to institute and conduct criminal proceedings -

(1) The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to -

a) institute and conduct criminal proceedings on behalf of the State;

b) carry out necessary functions incidental to instituting and conducting such criminal proceedings ; and

c) discontinue criminal proceedings

vests in the *prosecuting authority* and shall, for all purposes be exercised on behalf the *Republic.*

2) Any *Deputy National Director* shall exercise the powers referred to in subsection (1) subject to the control and directions to the *National Director*.

3) …….

4) Subject to the provisions of this act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of –

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the by the National Director.

5) Any *prosecutor* shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the *National Director,* or by a person designated by the *National Director.*

Section 22 Powers, duties and functions of National Director -

(1) The *National Director,* as head of the *prosecuting authority,* shall have authority over the exercising of all the powers, and the

performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution, this Act* or any other law.

Section 23 Powers, duties and functions of Deputy National Director –

1) Any *Deputy National Director may exercise* or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform.

[36] The Deputy National Director may in terms of Section 20 (2) exercise the power set out in Section 20 (1), which includes the performing of 'necessary functions incidental to instituting and conducting such criminal proceedings', subject to the control and directions of the National Director. There is no requirement that the directives to the Deputy National Director have to be in writing. Further there is no limitation in respect of the jurisdictional area for which the National Director or Deputy National Director is appointed, as in the case of a Director under Section 20 (3).

[37] The issuing of authorities to prosecutors to bring requests in terms of Section 205, if properly founded and motivated may be construed as falling within the ambit of a necessary function incidental to instituting and conducting criminal proceedings. It is apparent from the affidavits of Soobramoney, that the objective of the Section 205 applications consequent to which the offending subpoenas were issued, was to obtain information pertinent to contemplated criminal proceedings to be instituted or already being conducted against the applicant. The National Deputy Director may therefore, in my view, properly rely on Section 20 (2) as an empowering provision.

[38] In consequence of the National Deputy Director being so empowered, he /she may under Section 20 (5) empower a prosecutor in writing to perform such function or exercise such power as specifically conferred in writing on him/her.

[39] The exercise of this power is circumscribed in its implementation by the independent judicial officer who must grant the request after a due consideration of

the pertinent facts. This prevents arbitrary prosecutorial conduct in invoking Section 205 within the hierarchy structured by the NPAA, and effectively counters the argument that only the designated prosecuting officials with 'more than the simple status of Prosecutor' may exercise these powers of compulsion via subpoena because of the drastic invasive nature of the process.

[40] Further, by virtue of Section 23, the National Director may authorise the Deputy National Director to exercise any power or perform any of the functions of the National Director. There is no prescriptive requirement that this authorisation has to be in writing.

[41] I am therefore satisfied that Lucken's authority is not susceptible to attack on its validity on the grounds that she was not authorised by a Director but by the Deputy National Director.

[42] Insofar as Muller's authority is concerned, I am satisfied that he was conferred with the requisite authority to bring a request under Section 20 (4) (a) from the date of his appointment on 4 March 2010, on considerations similar to those set out *supra* in respect of the National Deputy Director under Section 20 (2). Muller was also authorised by the Deputy National Director on the same terms as Lucken on 11 October 2006.

[43] The challenge to Ramaite's authority by the applicant that the jurisdictional prerequisite that the Section 205 powers can only be invoked by a Director of Public Prosecutions or a public prosecutor authorised in writing by a Director of Public Prosecutions was not met, that there has been a usurpation of the statutory discretion of the designated official, and that the Respondents' reliance on Sections 20(2), 22(1) and 23 is misplaced, cannot in my view be sustained from a reading of the relevant sections. I am further satisfied that it is the empowering legislation and not the appointment (either by the President or the Minister) that is relevant in determining whether the Deputy National Director could validly confer the power to bring applications in terms of Section 205.

[44] The applicant has further not satisfied the onus on him to show that the

magistrates who authorised the issue of the subpoenas did not consider the legality of the authority relied upon by the prosecutor bringing the request. He merely makes the submission on the basis of his own interpretation of the relevant legislative provisions but provides no basis why the court should accept his contention as probable in the face of the denial by the magistrates, that they failed to apply their minds to the request.

[45] The provisions of Section 205 do not prescribe that the authority under which the prosecutor applies for the subpoena has to be granted specifically for each individual application or that there must be an investigation in place when the authority is granted. I am also of the view that there is no merit in the contention that the authority issued to Lucken does not comply with Section 20(5), and am in agreement with the submission by the respondents that the authority issued to her covers applications to all courts; that there is no need to prescribe the offences as the powers in S205 are not circumscribed by particular offences; and that the area of Lucken's jurisdiction is stipulated in her authority.

[46] Consequently, contrary to the arguments advanced by the applicant, I am unable to find that the applicant has furnished cogent or compelling grounds on which I may properly find that the process applied in obtaining the approvals necessary for issue of the subpoenas and the execution thereof is inconsistent with the Constitution or that the authorisations relied on by the respondents are not the requisite authorisations to invoke the Section 205 process, and declare the issuance of the subpoenas invalid. Nor am I persuaded that the grounds on which the applicant relies for the relief sought, merits a robust judicial oversight.

Costs:

[47] There is no reason why costs should not follow the result. I am also satisfied that this is a matter which warranted the employment of two counsel, given the nature of the issues raised by the applicant.

Order

In the premises the following order do issue : -

The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

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MURUGASEN J

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