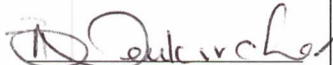


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **NO**  
(3) REVISED: **YES**

25 November 2024

DATE

  
SIGNATURE

**Case No. B3991 / 2024**

In the matter between:

**THE SOCIETY FOR THE PROTECTION OF OUR  
CONSTITUTION**

Applicant

and

**MINISTER OF CO-OPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

First Respondent

**MINISTER OF POLICE**

Second Respondent

**MINISTER OF HEALTH**

Third Respondent

## JUDGMENT

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### NEUKIRCHER J:

1] The applicant (the Society) is a voluntary association established *inter alia* to promote respect for the Constitution and the Bill of Rights and

“(ii) ... will take all necessary action, legal or demonstrative, or such measures as its members may from time to time deem fit, with the aim of preventing violations of the constitution...”

2] At 23h50 on Friday 15 November 2024 the Society launched an urgent application in which it sought an urgent *ex parte* hearing at 02h00 on Saturday 16 November 2024 at which time it would seek relief in the following terms:

“3. Ordering the respondents, the agents and employees to forthwith provide all necessary emergency disaster relief, to the miners/people trapped underground at the Stilfontein mine, North West Province, by *inter alia* providing food, water, medical aid, blankets and such other emergency relief that may be necessary.

4. Ordering the respondents, the agents and employees to do all that is reasonably possible, to extract the trapped miners from the mine referred to in (3) above.”

3] At my direction, the application was served on the respondents. Service took place at approximately 00h37 on 16 November 2024 on the State Attorney via email. At the time the application was heard by me on 16 November 2024 at 12h00, the

respondents had managed to brief counsel to appear on their behalf, but of course had not been able to file any answering affidavits. Brief submissions were made by both counsel and an order was issued in the following terms:

- “1 The application is postponed to Tuesday 19 November 2024 at 10h00.
2. Costs are reserved.
3. Pending finalization of the application:
  - 3.1 the mine shaft in Stilfontein, that forms the subject matter of this application, shall be unblocked and may not be blocked by any person or institution whether government or private;
  - 3.2 any miners trapped in the mine shaft shall be permitted to exit;
  - 3.3 no non-emergency personnel may enter the mine shaft.”

4] By the time the matter was heard on 21 November 2024, the issues had been fully ventilated in the affidavits filed by the applicant, the second respondent (the Minister of Police) and the fourth respondent (the Minister of Mineral Resources). Henceforth, where I refer to “the respondents” in this judgment, it is a reference to the Minister of Police and the Minister of Mineral Resources.

5] The founding affidavit is a brief one – it is approximately seven pages long. The basis upon which the application is brought, is that the Society alleges that it seeks to protect the life and liberty of approximately 4000 persons (the miners) trapped inside a closed gold mine shaft at the Stilfontein mine in North West Province (NWP).

6] These miners have been described by various government officials as “illegal miners” and according to the Society, government has adopted a strategy to flush

them out of the mineshaft - this operation is called "*vaya umgod*" (or "close the hole").

The Society states that the strategy includes:

- a) cutting off basic supplies to the miners;
- b) closing off the entrance used to transport supplies underground to the miners;
- c) cutting off the supplies to force the miners to return to the surface and be arrested;
- d) refusing to assist the miners because they are involved in a criminal act, the latter according to government as stated in various published news reports.

7] The picture painted by the applicant in its founding affidavit is a bleak and dire one: that is that the miners are trapped in a mine shaft without recourse to exit and blocked off from access to food, water and other basic necessities "*after police closed off the entrances used to transport their supplies underground.*"

8] The Society thus alleges that:

- a) the lack of water will lead to dehydration;
- b) the miners suffering from chronic illnesses – such as high blood pressure and diabetes – are denied access to medication;
- c) "the ongoing lack of food and water invariably results in anxiety";<sup>1</sup>
- d) "with change in temperature – for example warm and cold – the trapped miners may not have warm clothes and will suffer from exposure";
- e) they risk dying through starvation and dehydration.

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<sup>1</sup> There is no medical substantiation for this allegation in either the founding or replying affidavits

9] As a result of these actions, the Society states that there is a real danger thousands of people will die of starvation “triggered by torture” in circumstances where over 1000 miners have surfaced at various mines in NWP “with many reported to be weak, hungry and sick after going for weeks without basic supplies.”

10] The Society argues that the strategy employed by Government is illegal and unconstitutional for the following reasons:

- a) it impugns the inherent dignity of these illegal miners;
- b) it disregards their right to life;
- c) it inflicts torture in contravention of s12(1)(d)<sup>2</sup> of the Constitution;
- d) it impugns their right to healthcare, food, water and social security as envisaged in s27 of the Constitution<sup>3</sup>;
- e) it violates the miners’ s34 right<sup>4</sup> to access court as “it paints the alleged illegal miners as offenders without first subjecting them to a fair trial.”

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<sup>2</sup> “**12 Freedom and security of the person**

(1) Everyone has the right to freedom and security of the person, which includes the right—

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

<sup>3</sup> “(1) Everyone has the right to have access to—

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.”

<sup>4</sup> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

11] Thus, when the matter was heard on 16 November 2024, and given that the respondents wished to consult with their legal representatives and file answering papers, I proposed an order in the interim that would provide a practical solution to the issue whilst preserving the respondents' right to file answering papers. The order granted was that set out in paragraph 3 supra.

12] On 19 November 2024 the application was called again. By then, the respondents had filed their affidavits and the Society indicated it would file a replying affidavit by 14h00. The matter was stood down to 21 November 2024 and the replying affidavit was filed one and a half days later than the undertaking.

13] In their answering affidavits the respondents argue that there is a material non-joinder of Buffelsfontein Gold Mines Ltd (Buffelsfontein) which is the owner of Stilfontein mine. This is because Regulation 16.5 of the Health Mine and Safety Act 29 of 1996 (HMSA) provides for rescue, first aid and emergency preparedness and response and places the obligation squarely on Buffelsfontein.

14] They argue that the obligation is clear from Regulation 16.5(4) of the HMSA which states:

“Whenever an emergency occurs at a mine that requires the deployment of mine rescue teams, the employer and any mine rescue service provider notified in terms of regulation 16.5(1)(d) and whose assistance has been requested, must take reasonable measures to ensure that the required mine rescue teams are deployed as soon as possible.”

15] Be that as it may, Buffelsfontein has in any event assumed responsibility for the rescue operations. Although it should have been joined as owner of the mine - because it has a direct and substantial interest in the outcome of the application - in my view the non-joinder in the circumstances of this matter and the allegations made by the respondents themselves are not sufficient to warrant an outright dismissal of the application.

16] However, it is trite that in *ex parte* applications the duty of utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from the fundamental principle of the administration of justice - being *audi alteram partem*. Where it is established that material information was not disclosed to the court at the time the order was sought, that should put an end to any advantage obtained by that litigant.<sup>5</sup>

17] In my view, given the fact that this application was brought close to midnight on 15 November 2024, and directed service took place on the State Attorney at 00h37 on 16 November 2024, the principle of *uberrima fides* equally applies to applications brought in this fashion, on these extremely truncated time periods and where the respondents have barely had time to appoint a legal representative much less consult and give instructions.

18] It now transpires, after reading the affidavits filed by the respondents, that the applicant failed to place crucial facts before this court in its founding affidavit – facts

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<sup>5</sup> *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA)

which, had the court been made aware of them at the time – would have resulted in the application failing. The Society seeks to avoid the defects in its application by arguing that the respondents' conduct is unconstitutional. But even in making this argument, the Society must still comply with the basic legal tenants in anchoring its application.

19] The facts placed before the court by the respondents are the following:

- a) there is, in fact, an alternative safe exit for the miners via the "Margaret mine shaft" and to date more than 500 miners have utilised this shaft to exit the mine. In fact, as at the date of the hearing of this application, 1187 miners have resurfaced via the Margaret and Stilfontein mine shafts;
- b) the police have not blocked any of the miners from exiting through the mine shaft - although the police have surrounded the mine shaft, it is not blocked. What the police are doing is preventing explosives, alcohol, generators and illegal firearms from being passed to the miners through the Stilfontein shaft;
- c) the Stilfontein mine shaft is over 2 km deep – the entrance and exit is unsafe and the second respondent states that it is unsafe for any emergency personnel to enter the mine through the shaft before an expert has conducted a risk assessment analysis;
- d) the police have permitted limited supplies of food and water to be passed to the miners, but have not allowed "bulk supplies" of food, explosives, generators, firearms and alcohol as they state that this will encourage



the miners to stay in the mine shaft. The respondents however deny that the miners are cut off from food and water;

- e) Buffelsfontein has engaged the Mine Rescue Services (MRS) to assist the miners in exiting the Stilfontein mine shaft. It is also preparing a place on surface for MRS to establish a base for its operations. MRS will conduct a risk assessment analysis so that they can commence operations at the Stilfontein shaft – in the meantime, the miners can exit safely at Margaret shaft.

20] The respondents argue that, given this, it is quite clear that the miners are not “trapped” as has been stated by the Society. They argue that those who are still underground remain so as they fear arrest were they to surface.

21] I pause to mention that Margaret shaft is part of Harmony Gold Mining Company Limited’s operations. It is equipped with a cage and is usually used by Harmony’s employees to enter the shaft. As stated, so far more than 500 miners have exited the mine using this means and it is available to the other miners to use as well.

22] The replying affidavit, is replete with new information. It is the attempt by the Society to bolster what is clearly a case that was not properly made in their extremely cryptic founding affidavit. There are several problems with this:

- a) firstly, it is trite that the case must be made out in the founding affidavit - it is these allegations that the respondents are called upon to answer and it is this case that the respondents are called upon to meet;

- b) secondly, the Society relies heavily on second hand knowledge of so-called “facts on the ground” which it has gleaned through news media reports which it then proceeds to attach to the replying affidavit as “evidence”;
- c) there are no confirmatory affidavits by either the Society’s own deponent or any other person with direct knowledge of what is happening at the Stilfontein mine. This Ms Omar<sup>6</sup> in fact conceded in argument. In the five days between the time that the matter was called on 16 November 2024 and the time the application was heard on 21 November 2024, the Society had made no effort at all to visit the site, or speak to any of the community members at Stilfontein, or obtain confirmatory affidavits by any of the re-surfaced miners.

23] Thus, all the information placed before the court was obtained by the applicant third hand. This being so, there is no basis upon which to refute any of the allegations made by the respondents as to the efforts they are making to rescue the miners; or to refute the denial that they are in any way infringing any of the miners’ access to food, water or medical supplies.

24] The Society also seems to suggest that this court should exercise its discretion to interfere with the functions of the police who arrest the miners as they exit the mine shafts and it argues that this is the reason that the miners are refusing to exit the mine. The latter is confirmed by the respondents. The Society has argued that there are alternative methods of ensuring that the miners appear in court besides arresting

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<sup>6</sup> Who acts for the Society

them, and that the police have “prejudged” the guilt of the miners “and are utilising the power of arrest, in an attempt at punishing, scaring and harassing” the miners. The argument concludes that the police have used their power to arrest “to torture and kill”<sup>7</sup> the miners.

25] But, firstly, this is not the case the Society has sought to make in its founding affidavit, and this court is not at liberty to interfere with the constitutionally mandated authority of the police “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.”<sup>8</sup> Obviously, the police must act within the bounds of the law when fulfilling their duties. Secondly, the argument is emotive, used to create atmosphere and unsupported. There is absolutely no evidence at all to show that the police are using the means of arrest to “torture and kill” the miners.

26] The Society also argues in reply that the respondents have stopped the community in Stilfontein from extracting the miners by dismantling the equipment they used to assist the miners in exiting the mine. They argue that this conduct is also unlawful and unconstitutional. But the Society cannot have it both ways: they seek an order that the respondents be ordered to conduct these rescue operations – not that the community be allowed to conduct them. In any event, this was also not the case sought to be made out in the founding affidavit and in respect of which the Society sought to compel the respondents to rescue the miners. The respondents have

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<sup>7</sup> This appears to be an extension of the argument set out in paragraph 10(c) supra

<sup>8</sup> Section 205(3) of the Constitution

explained how dangerous and unstable Stilfontein mine shaft is – this is why they have engaged experts to assist them with the rescue operation.

27] All this being so, the Society has offered no cogent proof to show that the respondents' response to the situation is not measured, considered and proportional.

28] In my view, given that the Society has no expertise of its own in this area, has not engaged an expert to put evidence on this issue before court, and has not demonstrated that the rescue efforts can and should be conducted differently, the only conclusion to be drawn is that mine rescue operations are underway and all necessary efforts are being made to rescue the miners. There are also other exit avenues available to the miners to utilise, as there have been from the outset. This being so, the allegations made by the Society have been placed in context by the respondents and have been demonstrated to be incorrect.

29] In my view, and given the facts as set out supra, the issues of the constitutionality of the respondents' actions are not engaged at all as the application was premised upon facts which have been shown to be incorrect.

30] Given this, the application must fail.

31] As to costs, the respondents have asked that the Society be ordered to pay the costs of this application. In argument, they have sought a costs order commensurate

with Scale C. In considering this issue, I am mindful of the principle set out in *Biowatch Trust v Registrar Genetic Resources and Others*<sup>9</sup>, that

“...the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful it should have its costs paid by the state, and if unsuccessful, each party should pay its own costs.”

32] Although the application was misconceived for the reasons set out *supra*, I am not convinced that I should depart from the general *Biowatch* principle. This is because I am of the view that the Society is acting in good faith. This being so, I am of the view that the just and equitable order is that no order is made as to costs.

#### **ORDER**

33] The order I make is the following:

1. The application is dismissed.
2. No order as to costs.



**B NEUKIRCHER  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 November 2024.

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<sup>9</sup> 2009 (6) SA 232 (CC) par 43

For the Applicants : Ms Omar  
Instructed by : Zehir Omar Attorneys  
For the First Respondent : Adv Luhele  
Instructed by : State Attorney, Pretoria  
Matter heard on : 21 November 2024  
Judgment date : 25 November 2024