5(b)

136/87

Case no 436/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WELLINGTON APLENI ..... Appellant

(Applicant in the Court a quo)

- and -

MINISTER OF LAW AND ORDER ..... First Respondent

DIVISIONAL COMMISSIONER OF
S A POLICE EASTERN PROVINCE ..... Second Respondent

DISTRICT COMMANDER OF
S A POLICE PORT ELIZABETH ..... Third Respondent

STATION COMMANDER OF
S A POLICE BETHELSDORP POLICE STATION ..... Fourth Respondent

SERGEANT FAKU of S A POLICE ..... Fifth Respondent

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Case no 437/86 .....

Case No 437/86

In the matter between :

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| TANGO LAMANI | ..... | Appellant (Applicant in the Court a quo) |
| - and - | | |
| MINISTER OF LAW AND ORDER | ..... | First Respondent |
| DIVISIONAL COMMISSIONER OF S A POLICE EASTERN PROVINCE | ..... | Second Respondent |
| DISTRICT COMMANDER OF S A POLICE PORT ELIZABETH | ..... | Third Respondent |
| STATION COMMANDER OF S A POLICE ALGOA POLICE STATION | ..... | Fourth Respondent |
| LIEUTENANT NIEUWOUDT of S A POLICE | ..... | Fifth Respondent |
| SERGEANT JAM of S A POLICE | ..... | Sixth Respondent |

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Coram: RABIE ACJ et VILJOEN, HEFER, GROSSKOPF et VIVIER JJA.

Heard: 3 November 1987.

Delivered: 26 November 1987.

J U D G M E N T

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VIVIER JA :-

In separate applications, arising from similar circumstances, the two appellants applied before MULLINS J in the South Eastern Cape Local Division for substantially similar relief. Both had been detained pursuant to the provisions of reg 3 of the emergency regulations promulgated by Proc R 109 in Government Gazette 10280 of 12 June 1986 in terms of sec 3(1)(a) of the Public Safety Act 3 of 1953. Both alleged that they had been assaulted and subjected to unlawful interrogation, pressure and duress during their detention by members of the South

African Police, resulting in their admission to Livingstone Hospital where they were still receiving treatment at the time the applications were lodged 45 days later on 1 September 1986. Both appellants expressed a fear of similar unlawful conduct after their discharge from hospital. A rule nisi was sought in each case, operating as a temporary interdict, restraining members of the South African Police from assaulting or subjecting the appellants to unlawful interrogation, pressure or duress during their detention. Certain additional relief was sought in order to provide the appellants with evidence to support their allegations, relating to the production

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of hospital records and medical examinations by the District Surgeon. Both applications were opposed by the respondents who filed opposing affidavits in which all the allegations of assaults and other unlawful conduct were specifically denied. The appellants in turn filed replying affidavits.

At the hearing of the applications, in view of the disputes of fact which had arisen, each appellant applied for an order that the matter be referred for oral evidence and that, pending the hearing and adjudication thereon, an interim interdict be granted restraining the police from assaulting or otherwise unlawfully treating him. In the alternative each appellant sought an order postponing the matter for the hearing of oral evidence

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to a date after his release from detention and granting him an interim interdict.

Both applications were dismissed with costs by MULLINS J, who granted leave to the appellants to appeal to this Court. The learned Judge in effect found that, despite the disputes of fact on the affi= davits, each appellant had satisfied all the requisites for an interim interdict and that, were it not for the provisions of reg 3(10) of the said regulations, he would have made an order in each application referring the matter for oral evidence in terms of Rule of Court 6(5)(g) and granting an interim interdict pending the final determination of the matter.

Regulation 3(10) provides as follows :-

"3 (10) No person, other than the Minister or a person acting by virtue of his office in the service of the State —

(a) shall have access to any person detained in terms of the pro= visions of this regulation, except with the consent of and subject to such conditions as may be determined by the Minister or a person authorized thereto by him; or

(b) shall be entitled to any official information relating to such person, or to any other infor= mation of whatever nature obtained from or in respect of such person."

The learned Judge held, following the decisions in Schermbrucker v Klindt N O 1965(4) SA 606 (A) at 619 D-H, 625H-626C and Ngxale v Minister of Justice of the Ciskei and Others, 1981(2) SA 554

(ECD) at 559 E, that reg 3(10) precluded the appellants from giving viva voce evidence in court while they were in detention. This meant, the learned Judge held, that the applications could not be referred for oral evidence for as long as the appellants remained in detention. The learned Judge further held that he could not grant the alternative orders sought and refer the applications for oral evidence to be given only after the appellants' release from detention as this would amount to granting final interdicts in motion proceedings where the facts were in dispute.

In my view, MULLINS J erred in not referring both applications for oral evidence in terms of Rule

6(5)(g) and granting interim interdicts pending the final determination thereof. It is nowhere stated in the affidavits, nor in the judgment of the Court a quo, nor was it contended by counsel who appeared at the hearing before us, that the consent required by reg 3(10) had been, or would be refused. The mere fact that counsel for the respondents resisted the application for referral to oral evidence, does not mean that the Minister had refused to grant his consent or that he would do so if the order was made. Indeed, it seems to me that the Minister may well have given his consent for the appellants to give viva voce evidence in Court in view of the serious nature of the allegations against the Police and the strongly expressed disapproval of the respondents' replies by the Court a quo.

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It should be borne in mind that the Minister had given his consent to the appellants consulting their legal advisors for the purpose of deposing to their founding affidavits. If he was prepared to consent to the appellants giving viva voce evidence, the question of the applicability of reg 3(10) to the present cases would not have arisen for decision.

Moreover, in concluding that he would have referred the applications for oral evidence but for the provisions of reg 3(10), MULLINS J seems to have overlooked the distinct possibility that, in the cir= cumstances of the present applications, it may not have been necessary for either of the appellants to give evidence at the hearing. As the learned Judge

correctly points out in his judgment, the replies of the police officers concerned in both applications were unsatisfactory and evasive. I share the learned Judge's surprise at the respondents' failure in both applications to place any medical evidence before the court. The prohibition contained in reg 3(10)(b) is not directed against persons receiving such infor= mation, but against anyone seeking to obtain that information. While the appellants could not, therefore, insist upon its production, the respondents were not precluded from placing the medical evidence, which was obviously available to them, before the Court a quo (see S v Moumbaris and Others 1973(3) SA 109(T) at

116C-117A, S v Mzo and Others 1984(3) SA 945(ECD) at 948F-G and Mkhize v Minister of Law and Order and Another 1985(4) SA 147(N) at 151 I-J). Depending on the nature of such evidence, or, if no such evidence were adduced at the hearing, any inference adverse to the respondents the Court may then have drawn, the need for the appellants to testify might not have arisen at all.

The importance of the medical evidence appears from the following facts. The appellant Apleni alleged that as a result of the treatment he received at the hands of members of the South

African Police on 18 July 1986 in the course of interrogation, he lost consciousness. Later that day a doctor was called and he immediately arranged for the appellant to be admitted to Livingstone Hospital where, at the time of lodging his application on 1 September 1985, he was still undergoing treat= ment. An entry in the occurrence book of the Bethelsdorp police station confirms that at 5 pm on 18 July 1986 Apleni was examined by a Dr du Plessis after complaining that he had been assaulted by members of the South African Police. He was referred to

Livingstone Hospital and escorted there by constable Van der Linde. The reply to these allegations by Lieutenant Bezuidenhout of the Security Police was to the effect that after Apleni had been interrogated on 18 July 1986 he was taken back to the Bethelsdorp police station. While he was being booked in, he suddenly fell to the ground and began screaming. This only lasted for a few seconds and he then stood up again. The police thought that he was suffering from epilepsy or something of that nature and for this reason immediately arranged for a doctor to examine him.

Bezuidenhout denied that Apleni was assaulted in any way or that anything was done to him which could have caused him to be admitted to hospital. No satisfactory explanation was given by respondents as to why Apleni was admitted to hospital and kept there for such a long time. Apart from the medical evidence, the one man who could say what Apleni's condition was when he was taken to hospital, constable Van der Linde, remained silent. No reason was advanced by respondents as to why an affidavit had not been obtained from Van der Linde.

The appellant Lamani alleged in his appli= cation that both his hands were severely injured by excessively tight handcuffs, resulting in a loss of

sensation in both hands and an inability to grip properly. Partly as a result of these injuries and partly due to a chest complaint he was admitted to Livingstone Hospital on 17 July 1986 where he had since received treatment for his hands as well as for his chest complaint. Upon his admission to hospital the scars on his wrists were considered to be so serious that they were photographed by a doctor. Lieutenant Nieuwoudt's reply to these allegations was that he denied all knowledge of

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any injuries to Lamani's wrists or of any photo=graphs taken of the wrists and he added that if Lamani's wrists had been injured such injuries were self inflicted. As in the case of Apleni, the Court a quo was left totally in the dark by the respondents as to why it had been necessary to keep Lamani in hospital for such a long time.

In these circumstances it seems to me that MULLINS J prematurely held that reg 3(10) precluded a detainee from giving viva voce evidence in Court. In my view he should have granted the main orders sought, namely, to

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refer the matters for oral evidence to be heard as soon as possible and to grant the interim interdicts sought, pending the final determination of the applications.

I should add that I cannot agree with the reasoning of MULLINS J, following similar reasoning of CLOETE JP in Ngxale's case, supra, at 561F-H, that he could not refer the applications for oral evidence to be heard after the appellants' release from detention and grant the interim interdicts sought, as this would amount to granting final interdicts on motion where the facts are in dispute. The interim interdicts sought would have been operative for the

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duration of the appellants' detention. In this sense it would have had final effect in that nothing which may subsequently have been decided could detract from the efficacy which the orders enjoyed while they were in force (see the judgment of GROSSKOPF JA in Airoadexpress (Pty) Ltd v Chairman, Local Road Tranportation Board, Durban, and Others 1986(2) SA 663(A) at 677 C-D). However, on the facts of the present applications, the grant of interim interdicts did not involve a final determination of the rights of the parties and did not affect such determination (Joubert, LAWSA Vol II, para 321). The grant of interim interdicts did not amount to any finding on the facts, which would only have been made, together with appropriate orders as to costs, upon the

final determination of the issues between the parties. Although final in effect, the interdicts sought were thus certainly not final in substance. The fact that the determination of the issues would only have taken place after the risk of injury had passed, was obviously no bar to the grant of the orders. (See Fourie v Uys 1957(2) SA 125(C) at 127D-128G; Van Niekerk v Van Rensburg 1959(2) SA 185(T) at 187H-188B and Gosschalk v Rossouw 1966(2) SA 476(C) at 488 B-D, 494 B-F.) In my view, therefore, the Court a quo should at least have granted the alternative orders sought.

In the result both appeals succeed with costs, including the costs of two counsel.

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The following order is substituted in each case for order in the Court a quo:

1. The matter is referred for the hearing of oral evidence on a date to be fixed by the Registrar of the South Eastern Cape Local Division as a matter of urgency for the purposes of determining whether or not the interdict sought in terms of prayer 2(a) of the Notice of Motion should be granted.

2. The evidence shall be that of any witnesses whom the parties or any of them may elect to call, subject however, to what is provided in paragraph 3 hereunder.

3. Save in the case of those witnesses whose affidavits have already been filed of record in the application, no party shall be entitled to call any witnesses unless:

   (a) He has served on the other parties at least 10 days before the date appointed for the hearing, a statement setting out the evidence

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to be given in chief by such person; or

(b) The Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

4. The fact that a party has served a statement in terms of paragraph 3 hereof, or has sub= poenaed a witness, shall not oblige such party to call the witness concerned.

5. Pending the final determination of the matter, the South African Police are interdicted and restrained for the duration of the detention in custody of the applicant, from either directly or indirectly, through their own actions, or those of anyone under their command or control :

(i) Assaulting;

(ii) Interrogating in any manner other than that prescribed or permitted by law;

(iii)/...

(iii) Employing any undue or unlawful pressure on;

(iv) Subjecting any form of unlawful duress on the applicant.

6. The costs of the application are reserved for decision by the Court hearing the evidence.

W. VIVIER JA.

RABIE ACJ)
VILJOEN JA)
HEFER JA) Concur.
GROSSKOPF JA)