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KPA 473/85

THE MINISTER OF LAW AND ORDER ....FIRST APPELLANT

COMMISSIONER OF POLICE .....SECOND APPELLANT

DIVISIONAL COMMISSIONER

OF POLICE, CAPE TOWN .....THIRD APPELLANT

DISTRICT COMMANDANT,ATHLONE.....FOURTH APPELLANT

DISTRICT COMMANDANT,BELLVILLE ....FIFTH APPELLANT

DETECTIVE SERGEANT VAN WYK.....SIXTH APPELLANT

and

ESMAT NORDIEN .....FIRST RESPONDENT

ESHAM NORDIEN .....SECOND RESPONDENT

J J F HEFER,JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

THE MINISTER OF LAW AND ORDER ..... FIRST APPELLANT

COMMISSIONER OF POLICE ..... SECOND APPELLANT

DIVISIONAL COMMISSIONER OF POLICE, CAPE TOWN ..... THIRD APPELLANT

DISTRICT COMMANDANT, ATHLONE ..... FOURTH APPELLANT

DISTRICT COMMANDANT, BELLVILLE ..... FIFTH APPELLANT

DETECTIVE SERGEANT VAN WYK ..... SIXTH APPELLANT

and

ESMAT NORDIEN ..... FIRST RESPONDENT

ESHAM NORDIEN ..... SECOND RESPONDENT

CORAM : RABIE, ACJ, JANSEN, JOUBERT, HEFER, JJA, et BOSHOFF, AJA.

HEARD : 12 MARCH 1987.

DELIVERED: 26 MARCH 1987.

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J U D G M E N T

HEFER, JA :

I shall refer to the parties to this appeal by their titles in the Court a quo.

On 17 September 1985 the police took the applicants into custody and detained them until the next day. After their release the applicants brought an urgent application in the Court a quo for a rule nisi calling upon the respondents to show cause why an order should not be made -

"2.1 Interdicting and restraining the police under the direction and control of First to Fifth respondents from -

2.1.1 unlawfully detaining or arresting the applicants;

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2.1.1 assaulting, threatening, harassing or intimidating the applicants in any manner whatsoever;

2.2. Directing First to Fifth respondents to take all necessary steps within their powers to prevent any member of the police from perpetrating any of the acts mentioned in paragraphs 2.1.1 and 2.1.2 supra.

2.3. Interdicting and restraining Sixth Respondent from perpetrating any of the acts as referred to in paragraphs 2.1.1 2.1.2 supra----------."

The papers were served in advance on the respondents. Opposing affidavits were filed and a dispute of fact developed which could not be resolved on the papers. The Court accordingly directed that oral evidence be heard in terms of Rule 6(5) (g) of the Consolidated Rules. It also granted the applicants interim

relief.....4

relief, pending the final determination of the matter, in the form of a temporary interdict in terms of paragraphs 2.1 and 2.3 and a mandamus in terms of paragraph 2.2 of the notice of motion. With leave of the Court a quo the respondents have now appealed against the order for interim relief.

The material allegations in the parties' affidavits need not be stated; they emerge fully from the judgment in the Court a quo which was reported in 1986(2) S A 511. Basically the applicants' case was that they had been (1) unlawfully and violently arrested, (2) assaulted and abused by the police during their detention, and (3) harassed and threatened with further detention

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after being released. Apprehending that they might be persecuted even further they sought protection from the Court.

In this Court respondents' counsel challenged the judgment of the Court a quo on two main grounds. For the first he relied on Goldsmid v The South African Amalgamated Jewish Press Ltd 1929 A D 441 and Mobil Oil Southern Africa (Pty) Ltd v Afrox Ltd 1983(1) S A 649(C), and submitted that the first five respondents could not competently be ordered to take the steps mentioned in paragraph 2.2 of the notice of motion, where there is uncontroverted evidence that they had already taken all reasonable steps to prevent members of the force from perpetrating

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the acts of which the applicants complained. If this contention is correct, it will admittedly afford a short answer to the case against the first five respondents and thus dispose of a major part of the appeal. I prefer, however, not to follow that course. We have not had the benefit of full argument (because the applicants' legal representatives withdrew from the appeal) and a legal principle of considerable importance is at stake. Accordingly, since I am of the view that the appeal must in any event succeed on the facts I shall leave that principle open for pronouncement on another occasion.

The second submission on respondents' behalf was that the application lacked an essential requirement

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for the granting of an interdict viz that there is a reasonable apprehension of future injury. What was required in the instant case, so the argument went, was a reasonable apprehension on the applicants' part of further harassment by the police, and the evidence reveals that they had no grounds for such an apprehension.

That it was incumbent on the applicants to show a reasonable apprehension of further interference with their personal integrity, is clear. (Free State Gold Areas Ltd v Merriespruit (O F S) Gold Mining Co Ltd & Another 1961 (2) S A 505 (W) at p 515). What a "reasonable apprehension" in this context means and how it is to be established, appears from a passage in the judgment of BERKER J P in Nestor and Others v Minister

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of Police and Others 1984(4) S A 223 (S W A) at p 244,

with which I respectfully agree. It reads as follows :

> "A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts (Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd 1961(2) S A 505(W) at 515). The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow : he has only to show that it is reasonable to apprehend that injury will result (Free State Gold Areas case supra at 518). However, the test for apprehension is an objective one (Ex parte Lipshitz 1913 C P D 737; Seligman Bros v Gordon 1931 O P D 164; Pickles v Pickles 1947 (3) S A 175 (W)). This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."

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The Court a quo rightly examined the applicants' allegation that they had "the reasonable apprehension that further harassment, detention or intimidation might occur" in the light of the evidence presented to it, and the only question is whether the conclusion arrived at was the correct one. For the reasons which follow I am of the view that it was not.

The Court a quo based its decision on the applicants' version of the events on 17 and 18 September 1985. I am prepared to do likewise. As to the events at the applicants' home on 21 September 1985 it does not emerge from the judgment which version was accepted. But again I am prepared to accept the applicants's version as a basis for decision. This

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does not mean that the affidavits filed on respondents' behalf are to be ignored. As will appear later certain uncontradicted allegations therein must be taken into account too.

It is necessary to determine at the outset what precisely the applicants' case was. It is obvious that their real cause of complaint was not the fact of their unlawful detention nor the treatment which they received while being detained. As the learned Judge in the Court a quo said in her judgment, the assaults were past history which was relevant only to the question of possible future conduct. Nor was their real complaint the mere fact that threats had been uttered by the two

policemen.....11

policemen who had conveyed them from the Brackenfell police station on 18 September. The threats related entirely to the laying of charges against the policemen who had perpetrated the assaults and there would be no risk of reprisals unless and until charges were in fact laid. It was accordingly only when the applicants defied the threats by laying charges on 20 September that they became apprehensive of being re-arrested and maltreated again. That this is so, appears eg from the following passage in first applicant's founding affidavit :

> "I have a very real fear that now that I have laid a charge of assault against them, they will carry out their threats and that I would be unlawfully detained or arrested, or harassed and intimidated——"

Sixth.....12

Sixth respondent's threat the following day to detain them was perceived by the applicants as "an attempt to carry out the threat which was made when we were released" (according to first applicant's affidavit). That is why, directly after it had been made, applicants' attorney was instructed to proceed with an application to Court.

What becomes immediately apparent in the light of the respondents' evidence is that sixth respondent's visit to the applicants' home had no connection whatsoever with the earlier threats, and that his conduct there cannot by any manner of reasoning be construed as an attempt to carry them out. Sixth respondent says in his

affidavit.....13

affidavit that he went there on the instructions of lieutenant Hall to fetch the applicants. He was not told why he had to do so. Lieutenant Hall in turn explains that, after receiving instructions from major van der Merwe (the officer to whom the applicants had made their complaint the previous day) to take full statements regarding the complaint from the applicants, he instructed sixth respondent to go and fetch them. That was the real and only purpose of the latter's visit. Uncontradicted as it is, there is at this stage no reason for rejecting this evidence. In her judgment in the Court a quo the learned Judge expressed a considerable amount of cynicism in relation to the conduct of these and other

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deponents to affidavits filed by the respondents. In some respects her remarks were justified; in others not. At p 519A - B of the report eg major van der Merwe was censured for issuing to the applicants the slip of paper there referred to, without taking into account that van der Merwe said in his affidavit that it was merely issued in response to a request by the attorney of one of the persons concerned for something in writing "wat daarop dui dat beweerde aanrandings op die persone teenwoordig die aandag van die polisie geniet". There are other similarly unjustified critical remarks elsewhere in the judgment but I need not refer to them because no findings on credibility in the real sense were made. Reverting

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then to the evidence with which I am presently dealing, all I need say is that it had to be accepted by the Court a quo for purposes of its decision that the real and only purpose of sixth respondent's visit to the applicants' home was to take them to the Athlone police station in order for them to make statements in support of their complaint to major van der Merwe the previous day.

That being the case, the question is whether sixth respondent's visit and his statement to first applicant that he was detaining him and his brother, could reasonably have been construed as an attempt to carry out the threats. The answer is obvious. Initially

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(until the stage when Petersen spoke to Hall on the telephone) the applicants had every reason to be alarmed. They were not informed that their presence at the police station was merely required in connection with their statements; sixth respondent simply told first applicant that he and his brother were to get dressed and were to come with him. Presumably he did so because he was entirely uninformed himself and only knew that the applicants had to be fetched. Understandably, first applicant demurred and was then told that he and second applicant were being detained "in terms of section 50" which first applicant understood to entail their detention "without charges for 48 hours". Small wonder

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that a state of near panic involving the whole household then set in which only ended when, after a flurry of telephone calls, sixth respondent left. But the situation changed dramatically when Petersen spoke to Hall on the telephone. Petersen was then informed that the applicants were not to be detained; the whole position was explained to him, arrangements were made for Petersen to prepare the required statements himself and to submit them to the police, and sixth respondent was ordered away. It should then have become quite clear to the applicants that nothing sinister attached to the incident but, on the contrary, that their complaint was being investigated.

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From this it follows that the applicants' case received no support from the incident on 21 September, and the final question is whether on their remaining allegations they could reasonably have apprehended further harassment. The answer to this question is not far to be sought. Although they were allegedly fearful of the consequences of laying a charge, the applicants did not feel themselves sufficiently restrained to do so. It is difficult to resist the impression, therefore, that they did not take the threats over-seriously. Moreover, at the stage when the charge was laid they already had the assistance of an attorney; yet there is not the slightest suggestion that

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an application to Court was considered at that stage. The notice of motion was issued ten days after the charge was laid and, apart from sixth respondent's intervention, nothing untoward had happened. Faced with these facts, a reasonable man would not entertain an apprehension that the threats would be carried out.

The appeal accordingly succeeds with costs which shall include the costs of two counsel. Paragraph 4 of the order of the Court a quo is set aside.

J J F HEFER,JA.

RABIE, ACJ.)
JANSEN, JA.) CONCUR.
JOUBERT, JA.)
BOSHOFF, AJA.)