IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

NOLAN JAFTA..... Appellant

and

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

THE COMMISSIONER OF THE SOUTH AFRICAN POLICE..... Second Respondent

THE DIVISIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE - WITWATERSRAND.. Third Respondent

Coram: CORBETT CJ, HOEXTER, BOTHA, VAN HEERDEN, et E M GROSSKOPF JJA.

Date of hearing: 10 December 1990

Date of judgment: 30 January 1991

J U D G M E N T

CORBETT CJ:

The applicant, Nolan Jafta, made application to the Witwatersrand Local Division, citing as respondents the Minister of Law and Order (first respondent), the Commis-

sioner of the South African Police (second respondent) and the Divisional Commissioner of the South African Police for the Witwatersrand (third respondent) and claiming an order in the following terms:

"1. Dispensing with the usual forms and service provided for in the Rules of this Honourable Court in order to dispose of this matter at such time and place and in such manner and in accordance with such procedures as it deems appropriate and directing that:

1.1. the application is not placed on the ordinary Motion Court Roll;

1.2 directing that the application be heard as one of urgency;

1.3 the application be heard in camera;

1.4 these proceedings not be made public, until the execution of the order set out in paragraph 2 of

this notice.

2. The Station Commander of the Kliprivier Police Station, or, the person or persons who exercise control over access to the building and premises presently occupied by the South African Police which are situated diagonally across the road from the Kliprivier Police Station and directly across the road from the Kliprivier Post Office, are directed:

2.1 to permit the applicant, DESMOND JAFTA, (the deponent to one of the affidavits made in support hereof) the Sheriff of Vereeniging and either GREGORY ANTHONY NOTT or JAMES ANGUS SUTHERLAND, being admitted attorneys of the law firm Bell, Dewar and Hall, to be granted immediate access to the aforesaid building and premises immediately upon being presented with this order;

2.2 to allow them thereupon to inspect

such portions of the said building and premises as may be pointed out by NOLAN JAFTA and/or DESMOND JAFTA for the purpose of enabling NOLAN JAFTA and/or DESMOND JAFTA to point out and identify any apparatus or object which may be present there; and

2.3 to allow them to examine and photograph any apparatus or object pointed out by NOLAN JAFTA and/or DESMOND JAFTA which in the opinion of GREGORY ANTHONY NOTT or JAMES ANGUS SUTHERLAND may be relevant as evidence in the proceedings to be commenced by the applicant arising out of the events set out in his affidavit.

3. The aforesaid Sheriff is directed to prepare a detailed inventory of any and all apparatus or objects pointed out and identified in the manner described in paragraph 2.3 above.

3.1 The aforesaid Sheriff is directed to provide the applicant's attorneys and the aforesaid Station Commander with a copy of the inventory referred to in paragraph 3 above, and with copies of all photographs taken.

3.2 The aforesaid Sheriff is directed to retain such inventory and photographs taken in terms of the order granted in paragraph 2.3 above under his control until such time as this Honourable Court orders otherwise.

4. The aforesaid Station Commander is ordered to retain the apparatus or objects placed on the aforesaid inventory under his control until such time as this Honourable Court orders otherwise.

5. In the carrying out of the order granted in terms of paragraph 2 above the attorney accompanying the aforesaid

Sheriff shall:

5.1. supply to a responsible person apparently in control of the aforesaid building and premises a copy of this application;

5.2. explain the terms of this order to such person; and

5.3 explain to such person that the respondents, or any of them, may apply to this Honourable Court on short notice (such as is provided for in terms of the order granted in paragraph 8 below) to vary or discharge the order.

6. The attorney accompanying the aforesaid Sheriff shall, within six days of the execution of the order granted in terms of paragraph 2 above, cause to be filed an affidavit or affidavits in this matter setting out:

(a) the manner in which the order

granted in terms of paragraph 2 above was executed;

(b) the portions of the aforesaid building and premises which were inspected;

(c) the observations made by NOLAN JAFTA and Desmond JAFTA and himself in the course of such inspection.

7. A copy of this application together with a copy of the affidavit or affidavits referred to in paragraph 6 above shall be served by the applicant on each of the respondents within seven days of the execution of the order granted in terms of paragraph 2 above.

8. The respondents are given leave to apply to this Honourable Court, on not less than 24 hours written notice to the applicant, to vary or discharge this order."

The applicant filed a founding affidavit in which

he alleges that he was detained and taken into custody by certain members of the South African police on the evening of 12 September 1990 and was kept in custody at the Kliprivier police station until his release on the afternoon of 19 September 1990. While in custody the applicant was, so he avers, taken on two occasions to a building across the road from the police station, referred to in his affidavit as "the court building". (This is the building identified in par 2 of the above-quoted order claimed in applicant's notice of motion.) Applicant further avers that on these occasions he was interrogated in the court building and during the course of interrogation assaulted and tortured. The torture consisted in giving him electric shocks.

This is a much-abbreviated summary of the considerably longer and more circumstantial account of what happened, as alleged in the founding affidavit.

The applicant stated further that the assaults

upon him committed by the police were unlawful and that he intended to institute legal proceedings against the respondents for damages. He also intended to claim damages for unlawful detention if an investigation by his attorneys showed his detention to have been unlawful.

A supporting affidavit by the applicant's brother, Desmond Jafta, who was also in custody at the Kliprivier police station over approximately the same period as the applicant, provided material corroboration of applicant's allegations of torture and assault.

In par 20 of his affidavit the applicant stated:

> "20 Proof of the presence in the court building, of the apparatus or object which the police used to shock me will, I am advised, be material and indeed decisive in the above legal proceedings. My own testimony and that of my brother, Desmond Jafta, will provide further relevant evidence. I am concerned, and

> I am advised that such concern is fully justified, that my own testimony, even to the extent that it is corroborated by the circumstantial evidence of my brother, will be insufficient to outweigh that of a number of policemen who may be called to contradict what I have to say.
>
> There are no marks on my body to show that I was assaulted in the manner in which I have described above. I consequently respectfully state that it will only be by obtaining photographs of the equipment which was used to shock me that I will be able to support my version of the events. No other direct evidence is available to me."

Applicant went on to express the fear that if apprised of his intentions the police would attempt to conceal or destroy the apparatus used to shock him in order to frustrate his claim against the respondents; and to aver that the order sought by the notice of motion was the only

practical means of preserving evidence relating to the presence in the court building of the apparatus in question. For these reasons he asked that the application be heard in camera and without prior service of the papers on the respondents. He further asked that the matter be heard as an urgent application.

The application was accompanied by a certificate signed by applicant's counsel, Mr L Bowman SC and Mr B du Plessis, certifying that they had read the application and were of the view that the matter ought to be heard in camera and that the usual forms, procedures and services should be dispensed with and that it was an appropriate matter in which to claim the relief set forth in the notice of motion ex parte and without notice to the respondents.

The case came before Streicher J on 25 September 1990. The learned judge granted the relief asked for in pars 1.1, 1.2 and 1.3 of the notice of motion and proceeded

to hear argument in camera, ex parte and without notice to the respondents. At the conclusion of the argument he dismissed the application on the ground that he was precluded by the decision of the full court of the Transvaal Provincial Division in the case of Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149 (T) from granting the remainder of the relief claimed. Thereafter and on application by the applicant he granted leave to appeal to this Division and ordered that the proceedings should not be made public pending the appeal.

Applicant's attorneys timeously noted an appeal to this Court, but did not lodge notices of appeal with the respondents or their attorneys. In addition they filed a petition addressed to this Court in which the applicant, as petitioner, prayed for an order -

(a) Directing that this application and the appeal in the matter between your

Petitioner and the Minister of Law and Order, the Commissioner of the South African Police and the Divisional Commissioner of the South African Police - Witwatersrand be heard in camera.

(b) Excusing your Petitioner, the Appellant, from compliance with Rule 5(1) of the Rules of this Honourable Court insofar as your Petitioner, the Appellant, failed to lodge notices of appeal in this matter with the Respondents or their attorney.

(c) Excusing your Petitioner, the Appellant, from compliance with Rule 5(4) of the Rules of this Honourable Court in that your Petitioner, the Appellant, failed to deliver copies of the record in this matter to the Respondents.

(d) Excusing your Petitioner, the Appellant, from compliance with Rule 8 of the Rules of this Honourable Court in that your Petitioner, the Appellant, failed to deliver heads of argument in this matter

to the Respondents.

(e) Dispensing with the requirement that your Petitioner, the Appellant, serve a copy of this application on the Respondents.

(f) Directing that the present proceedings and the proceedings in the appeal not be made public until this Honourable Court gives its judgment in the appeal and, in the event of this Honourable Court granting the Petitioner, the Appellant, the relief sought in paragraph 2 of its Notice of Motion in the application in the Court a quo, until the execution of the order granted in terms of that paragraph."

In the petition the reasons for these prayers are set forth. They are broadly the same as the reasons advanced for asking in the Court a quo that the matter be heard in camera and without notice to the respondents, viz. that unless secrecy were preserved until the order was

executed there was a possibility that the real evidence consisting of the apparatus allegedly used to inflict electric shocks upon the applicant would be concealed or destroyed. The applicant added that he had no reason to believe that the apparatus was no longer in the court building.

The matter was heard by us out of term as a case of urgency. With regard to the practical difficulty relating to the hearing of that part of the application directed to an order that the application itself be heard in camera (see prayer (a) above), this Court ordered in limine that its doors be closed prior to the hearing of the application (cf. Cerebos Food Corporation case, supra, at 159 E-G and Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A), at 755 E). It did so partly on the strength of the certificate by counsel which was placed before the Court a quo and of a letter written by

applicant's attorneys to the Registrar of this Division again explaining the need for the preservation of secrecy concerning the application to this Court and the appeal. The reasons given in the letter are the same as were advanced to and accepted by the Court a quo in the proceedings before it. In future such an application to this Court should be accompanied by a fresh certificate by applicant's counsel expressing the view that it is in the interests of justice that the application be heard in camera and furnishing in brief the reasons therefor. It is to be understood that in so doing counsel expresses a professional opinion and is not merely making a submission on behalf of his client. (Cf the practice note issued by the Court of Appeal in England as published in [1982] 3 All ER 924.)

At the outset and in addition to directing that the application be heard in camera this Court made an order dispensing with the requirement that the applicant serve a

copy of the application on the respondents (see prayers (a) and (e)). For convenience and in order to obviate a further hearing we heard argument both on the application and on the merits of the appeal.

In the Cerebos Food Corporation case, supra, at 164 A - C it was stated that the order generally referred to under the name Anton Piller comprised, or could comprise, the following types of order:

(1) an order authorising the search for and attachment of property in the possession of the defendant where the plaintiff has a real or personal right to the property;

(2) an order for the disclosure of names of sources and retail outlets of the defendant as they enable the defendant to operate unlawfully, thus infringing the plaintiff's

rights;

(3) an order for the attachment of documents and other things to which no right is claimed except that they should be preserved for and produced as evidence in an intended court case between the parties; and

(4) an order for the production and handing over of a thing to which no right is claimed but as part of an interdict to make the interdict effective, for example the erasure of a trade mark from the defendant's goods.

The full court held that an order falling under par (1) above, which was supported by authority in our law, was not a true Anton Piller remedy. As regards the orders described in paras (2), (3) and (4), it was held that South African courts do not have the power or jurisdiction to

make them. It was stated, inter alia, (at p 173 F):

> "The South African Courts have therefore no jurisdiction to grant an order for the attachment of the property of another where no right of the applicant therein exists, merely for the purpose of its production as evidence."

Questions relating to the grant of Anton Piller orders were considered by this Court in Universal City Studios Inc and Others v Network Video (Pty) Ltd, supra. Reference was made to the inherent powers which the Supreme Court has to regulate its procedures in the interests of the proper administration of justice and, with reference to what was stated in the Cerebos Food Corporation case concerning the type of order described in par (3) above, this Court made the following obiter observation (at p 755 A - E):

> "In a case where the applicant can establish prima facie that he has a cause of

action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a non possumus attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the Court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by copying documents or photographing things or even by placing them temporarily, ie pendente lite, in the

> custody of a third party would not, in my view, be beyond the inherent powers of the Court. Nor do I perceive any difficulty in permitting such an order to be applied for ex parte and without notice and in camera, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application."

(I have corrected the misprints which appeared in the published version of the judgment.)

In the present case the applicant claimed from the Court a quo orders designed to give him and his attorneys access to the court building, the power to inspect portions of this building for the purpose of finding and identifying the alleged torture apparatus and the right to examine and photograph any such apparatus for the purpose of preserving evidence of it (par 2); as well as an order upon the station commander of the Kliprivier police station to

retain the apparatus until the Court otherwise orders (par 4). The draft order attached to the heads of argument presented to this Court is substantially in the same terms.

It seems to me that the Judge a quo was correct in holding that he was precluded from granting these orders (and the ancillary orders contained in paras 3, 5, 6, 7 and 8 of the notice of motion) by what was held in the Cerebos Food Corporation case and that the above-quoted remarks in the Universal City Studios case, being obiter, did not result in the decision in the Cerebos Food Corporation case being overruled in this respect. For the applicant to succeed in this Court it would thus be necessary for us to translate this obiter dictum into a positive decision and to overrule pro tanto the judgment in the case of Cerebos Food Corporation.

There is some authority on this point: see Ex parte Matshini and Others 1986 (3) SA 605 (E) and Ex parte

Dyantyi and Another 1989 (4) SA 826 (CK). In each of these cases it was alleged that the applicants concerned had been unlawfully assaulted by the police by being subjected to electric shocks and Anton Piller-type orders were sought which aimed at a search for the torture apparatus at a police station and its preservation in order that it should be used as evidence in an intended action for damages. The applications were made and heard ex parte, in camera and without notice to the respondents.

In Matshini's case a full bench of the Eastern Cape Division expressly held that, contrary to what had been decided in the Cerebos Food Corporation case, supra, the court had the power to compel disclosure of a thing which was necessary for the purposes of an intended action, even if the applicant had no proprietary or other right or interest in the thing in question (see particularly p 611 E - H). The court went on, however, to hold that the test

was whether the administration of justice would (not might) be defeated unless an order was made for the production of the real evidence which was essential or absolutely necessary for the prosecution of the plaintiff's case (see p 613 A - B). Applying this test, the Court found that, inasmuch as there was the evidence of the applicants, supported by medical evidence, to establish that the assaults had taken place, the applicants had failed to show that real evidence of the existence of the torture apparatus was essential or absolutely necessary in order for them to prove their claims and that its non-availability would result in the administration of justice being defeated (see p 613 B - F). The application was accordingly dismissed.

In passing I would point out that Matshini's case was decided some months before delivery of judgment in the Universal City Studios case, supra, and it would seem that the full bench posed a rather more stringent test than that

suggested by this Court in the obiter dictum quoted above, which speaks of -

> "... vital evidence in substantiation of the applicant's cause of action...."

(see p 755 B). But for reasons which will later emerge it is not necessary to pursue the point.

In Dyantyi's case, supra, Heath J, sitting in the Ciskei General Division, also declined to follow the Cerebos Food Corporation case and granted an order in terms very similar to that applied for in the present case. The Court referred (at p 837 E - F) to the evidence in question, consisting of an instrument used to produce electric shocks, a T-shirt allegedly used to try to suffocate the applicants and a tube, as being objects which -

> ..... if they exist, and if they are available at the trial, are obviously of importance and can constitute deciding evidence on

> the question whether the applicants' version is true and whether on the probabilities they were in fact assaulted in the manner as alleged by them."

Thus, the Court does not appear to have applied as stringent a test as that formulated in Matshini's case.

In the course of the hearing before us counsel for the applicant were asked whether there were any statutory provisions which prevented an order being granted against one or more of the respondents ex parte and without notice; and in this connection reference was made to sec 35 of the General Law Amendment Act 62 of 1955 and to sec 32 of the Police Act 7 of 1958. As counsel had not previously considered this aspect of the matter, the Court when reserving judgment requested counsel to furnish additional heads of argument dealing with the possible applicability of these statutory provisions and any others which might be relevant. These heads of argument were subsequently filed.

In them counsel have referred, in addition to the above-mentioned statutory provisions, to sec 32 bis of the Police Act, sec 3 of the State Liability Act 20 of 1957, secs 34 and 34A of the Public Service Act 111 of 1984 and Rule 6(13) of the Uniform Rules of Court.

Of these sec 35 of Act 62 of 1955 appears, prima facie, to be the most pertinent. It provides as follows:

> "35. Notwithstanding anything to the contrary contained in any law, no court shall issue any rule nisi operating as an interim interdict against the Government of the Union including the South African Railways and Harbours Administration or the Administration of any Province, or any Minister, Administrator or other officer of the said Government or Administration in his capacity as such, unless notice of the intention to apply for such a rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the said

> Government, Administration, Minister, Administrator or officer at least seventy-two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application."

It is evidently accepted by the applicant that the respondents in the present case fall under the categories of persons against whom, in terms of the section, a rule nisi operating as an interim interdict may not be issued without notice. The main arguments advanced in the additional heads as to why the section does not apply here are -

(a) that none of the orders sought amounts to an interdict;

(b) that in any event none of these orders is a rule nisi having interim effect; and

(c) that no substantive relief is sought against the respondents, the remedies being merely

procedural.

In support of the first argument it was submitted that the word "interdict" should bear its "ordinary English meaning", ie an order forbidding or restraining the doing of an act. I am by no means convinced that this is correct. The word "interdict" is a technical legal one and would seem to cover not only orders forbidding the doing of an act, styled "prohibitory interdicts", but also orders enjoining the doing of an act, known as "mandatory interdicts" (see LAWSA vol 11, par 310; Nathan, Interdicts, pp 1 - 4). I can discern no reason why the Legislature, in enacting sec 35, should have intended to include the one but not the other. Moreover, the distinction between prohibitory and mandatory orders is somewhat technical and one which it is not always easy to draw. Thus for example an order upon a gaoler to release a prisoner may be regarded both as a mandatory order to set him free and, in effect at any rate,

as a prohibitory order against continuing to hold him in custody (cf Allie v De Vries NO en 'n Ander 1982 (1) SA 774 (T), at 779 D - G). Nor do I think that the problem is avoided in the present case (as suggested by counsel) by the orders being so worded as to merely "authorize and instruct" the sheriff to enter the premises, inspect them, etc. The draft order, as framed, contains orders upon the station commander of the Kliprivier police station and others to permit the sheriff, the applicant, his attorney and Desmond Jafta to enter the court building, to allow them to inspect portions of the building and to allow them to examine and photograph any apparatus or object pointed out by the applicant or his brother. The station commander is also ordered to retain under his control any such apparatus, if found. These orders all require either forbearance or action on his part. Prima facie they seem to me to be interdictory in character.

The arguments listed under (b) and (c) above raise a number of problems, to which I shall allude briefly. While it is true that strictly the orders sought in this case do not take the form of a conventional rule nisi, they are also not final, in the sense that the respondents are given the right to move for them to be varied or set aside. On the other hand, of course, the order is executed before such variation or setting aside can take place. Nevertheless, there are certain anomalies in holding that while a rule nisi against, for example, a Minister of State cannot, in terms of sec 35, be obtained without notice, an order which has final effect, even though it may later be set aside, can. Furthermore, while there may be some cogency in the argument that sec 35 applies only to orders granting "substantive", as opposed to "procedural", relief, there is nothing in the express wording of the section to indicate this.

I do not propose to say anything about the other statutory provisions and the Rule of Court referred to by counsel other than that certain of them do also raise problems. Moreover, owing to the ex parte nature of these proceedings it is difficult for us to be sure that there are no other statutory bars to the relief being granted without notice.

I mention these problems without providing any positive answers to underscore how unwise it would be for this Court to decide these and the various other issues which may arise in this case without hearing argument from all the parties concerned. This is, after all, the final court of decision and it is of paramount importance that, as far as is humanly possible, its judgments should be correct. Experience has shown that under our adversarial system the risk of judicial error is best reduced by listening to argument from both sides. I fully appreciate that in the

instant case, and in cases like it, insistence upon hearing the other side may tend to defeat the object of the legal proceedings initiated by the applicant and I and the other members of this Court have considered possible ways of giving effect to the principle of audi alteram partem without forfeiting the confidentiality of the application. We have come to the conclusion that there is no satisfactory method whereby this can be achieved. Were the legal principles applicable in cases such as this well-settled and were there no complications arising from the possible applicability of statutory bars to the relief claimed being granted without notice, the position might well have been different. And I do not rule out the possibility of this Court granting on appeal an Anton Piller type of order in an appropriate case. But, in my view, for the reasons stated this is not such a case.

For these reasons we refrain at this stage from giving

any decision on the merits of the appeal. It is for the applicant to decide whether to prosecute the appeal in accordance with the normal rules of procedure.

Accordingly, save for the relief already granted, the application is dismissed.

M M CORBETT

HOEXTER, JA)
BOTHA, JA)
VAN HEERDEN, JA)
E M GROSSKOPF, JA)

CONCUR.