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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NOMSA SISTER NKAYI ..... FIRST APPELLANT

JIM MSIZI ..... SECOND APPELLANT

and

THE HEAD OF THE SECURITY BRANCH OF
THE S A P, PRETORIA.....FIRST RESPONDENT

THE DIVISIONAL COMMANDER OF THE
SECURITY BRANCH OF THE S A P
(EASTERN CAPE DIVISION) _____..... SECOND RESPONDENT

MINISTER OF LAW AND ORDER ..... THIRD RESPONDENT

CORAM : CORBETT CJ, BOTHA, NESTADT, KUMLEBEN et
GOLDSTONE JJA

HEARD : 19 NOVEMBER 1992

DELIVERED : 16 FEBRUARY 1993

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

The first appellant is the mother of Nopinki Nkayi, a daughter, who was 16 years old at the start of these proceedings. The second appellant is the father of Kwanele Msizi, a minor son apparently 20 years old at that time. Early in January 1991 both children and others were arrested and detained in terms of s 29(1) of the Internal Security Act, no 74 of 1982 (the "Act") at the Louis Le Grange Square, a police station in Port Elizabeth.

On learning of their detention the appellants consulted the Legal Resources Centre in Port Elizabeth. One of its attorneys acted throughout for these two detainees and others. From 11 January 1991 until 13 February 1991 there was extensive correspondence between appellants' attorneys and the police at Louis Le Grange Square, the third respondent (the Minister of Law and Order) and certain health

authorities. The main requests in the letters from the Legal Resources Centre were that the parents and legal representatives of the detainees, all of whom were minors, be allowed to consult with them; that all existing and future records in the possession of the Chief District Surgeon, Port Elizabeth, "pertaining to the health" of the detainees be made available to the Legal Resources Centre "to assess the lawfulness of the detention and/or to monitor our clients' condition on an ongoing basis"; and that the magistrate visiting the detainees pursuant to s 29(9)(a) of the Act enquire whether the detainees had been assaulted, and if so, that details be furnished. In the first response dealing with the requests - earlier ones explained that the matter was receiving attention - a magistrate in Port Elizabeth said in a letter dated 29 January 1991 that reports on visits to detainees in terms of s 29 were sent to the

Commissioner of the South African Police in Pretoria and that the request for such reports should be addressed to him or the third respondent. On 4 February 1991 the Commissioner wrote, stating that the medical records of the detainees would not be released. This prompted a formal demand which in the first place drew attention to the fact that on evidence of eye-witnesses the detainees had been assaulted. The letter went on to demand the production of medical reports and records arising out of visits of a magistrate and district surgeon pursuant to s 29(9) of the Act. It also called for an undertaking that assaults cease forthwith. The failure to respond to or comply with this letter of demand led to an urgent application in the South Eastern Cape Local Division of the Supreme Court in which inter alia the following order was sought:

"2. A rule nisi calling upon the Respondents to show cause on such date as this Honourable Court might determine why an order should not be made,

(a) interdicting the South African Police from assaulting or threatening assault upon the persons listed in ANNEXURE A; [which included the two detainees]

(b) directing the Respondents to remit to the Applicants' Attorneys all District Surgeon's medical reports and records in their possession and arising out of any examination or visit under s29(9)(b) of the Internal Security Act No. 74 of 1982 and relating to the persons listed in ANNEXURE A;

(c) directing the Respondents to remit to the Applicants' Attorneys all Magistrate's reports and records in their possession and arising out of any examination or visit under s29(9)(a) of the Internal Security Act No. 74 of 1982 and relating to the persons listed in ANNEXURE A;

(d) ....."

A prayer for the assault restraint to operate as an interim interdict pending the final determination of the application and one for costs follow in the notice

of motion.

When the matter came before Ludorf J, the parties were agreed that the interim relief in terms of paragraph 2(a) of the notice of motion should be granted; that the question whether the detainees were entitled to a final interdict should be decided on the return day; and that for this purpose viva voce evidence was necessary. In the result the relief claimed in paragraph 2(b) and (c) of the notice, relating to the said reports, was the remaining issue which the parties decided to have determined at the first hearing. There was no objection on the part of the respondents on the ground that it was premature or otherwise inappropriate to do so. This involved a decision on the meaning to be attached to s 29(7)(b) of the Act. After hearing argument on this issue the court held that the relief sought could not be granted and the application for an order in terms of paragraph

(and for certain ancillary relief based upon such orders) was dismissed with costs. It followed that no part of the contents of such reports, which admittedly existed, would be available to the appellants for the further hearing. As it happened we were informed from the Bar during argument that the application for the permanent interdict is not proceeding. However, this appeal was not discontinued since its purpose was to obtain a decision from this court on the question decided in the court a quo, and no doubt a question of costs was also involved.

Before turning to the main issue, three preliminary matters, which are to an extent interrelated, are to be considered: whether the relief sought as regards the reports was ancillary to the claim for an interdict restraining assaults; whether an application for an order for such relief is essentially a procedural matter; and finally whether

the order sought in itself justified the order of the court a quo which ought therefore not to be disturbed on appeal.

As regards the first question, Ludorf J, after referring to certain decisions of our courts cm the meaning of s 29(7) and after pointing out that they were concerned with the question in a procedural context, said:

> "In the present matter however, the relief sought in parr. 2(b),2(c) and 2(d) of the notice of motion is not procedural. It is not the Applicants' case that the material sought is required for purposes of running, pending or proposed litigation. The relief is sought independently from the relief sought in par. 2(a) and there is no suggestion in the papers that it is sought for the purposes of any other litigation. In fact, it seems that the information is sought by the parents of the detainees simply by way of understandable interest in, and concern for, the well-being of their children. That being so, I am of the view that the present matter is fundamentally distinct from the other cases to which I have referred."

8. This statement is true inasmuch as there is no indication that the reports were required for any other litigation. I, however, cannot agree that they were not required for pursuing what may justifiably be regarded as the main claim, that is, an interdict restraining assaults. Precision and careful draftsmanship are not the hallmark of the appellants' notice of motion and affidavits: they are not as explicit as they might have been. There is no allegation pertinently stating that the reports are needed for the hearing on the return day. But as the correspondence to which I have referred shows particularly the final demand - the request for such records is related to the interdict sought: were they to disclose evidence of an assault, there can be no doubting their relevance for that purpose. A general concern on the part of a parent for the well-being of his or her child - as expressed in the correspondence -

9/...

may no doubt in any event have prompted such request. But one may safely infer that the alleged assaults, and the need for an interdict to prevent them, was the reason, or at least a substantial reason, for the reports being requested. Mr de Bruyn, who appeared for the respondents, conceded that it is in this context that paragraphs 2(b) and 2(c) are to be viewed.

As the quoted passage from the judgment shows, the finding that access to the reports was unrelated to the interdict proceedings led the court to conclude that the relief claimed was substantive and not procedural. Were that the case, a court's competence to make such an order, would have been open to question. Mr de Bruyn in this regard too, in the light of the conclusion in the previous paragraph, conceded that the issue relating to the reports was a procedural one. (Cf Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986(2) SA 734 (A) 754

J.)

The relief claimed in paragraphs 2(b) and 2(c) is widely cast. The order sought is that all the reports of the district surgeon and magistrate, whatever their content, be remitted to the appellants' attorney without restricting the purpose in handing them over to the envisaged interdict proceedings. In the court a. quo the approach was an all or nothing one. The appellants, on the one hand, did not ask in the alternative, or at all, for a modified or qualified order. The respondents, on the other hand, contended that in no circumstances could any part of such reports be placed in the hands of the appellants or their legal representatives. Both contentions depended on the interpretation of s 29(7) which, as I have indicated, was the main issue argued in the court a. quo and decided by it. However, before us on appeal Mr Chetty, who appeared on behalf of the appellants, was

obliged to concede that the relief as claimed could not be granted even on an interpretation of s 29(7)(b)

most favourable to his case. Mr de Bruyn, for his part, did not contend that the form of the order sought was, or ought to be, a bar to a consideration by this court of this question of interpretation, particularly in the light of conflicting decisions in this regard. He conceded that the parties were before court essentially for the determination of this question -as was the case in the court a_ quo. Thus we are asked to make, subject to an appropriate costs order, what amounts to a declaratory order with reference to s 29(7)(b) on the extent, if any, to which reports made by a magistrate or district surgeon, pursuant to a visit in terms of s 29(9), can be made available to be used for the purposes of a pending court case. This is far removed, one must readily admit, from the form of the order sought. But, on the principle that the

includes the lesser, and since the parties wish this course to be followed, there appears to be no reason why this appeal should not be dealt with on that basis.

The provisions of s 29 relevant to this enquiry are the following:

> "(1) Notwithstanding anything to the contrary in any law or the common law contained . . . any commissioned officer as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), of or above the rank of lieutenant-colonel may, if he has reason to believe that any person who happens to be at any place in the Republic -
>
> (1) has committed or intends or intended to commit an offence referred to in section 54(1), (2) or (4) ...
>
> (2) is withholding from the South African Police any information relating to the commission of an offence referred to in paragraph (a) or relating to an intended commission of such offence or relating to any person who has committed or who intends to commit such offence,

without warrant arrest such person or cause him to be arrested and detain such person or cause him to be detained for interrogation in accordance with such directions as the Commissioner may, subject to the directions of the Minister, from time to time issue, until -

(i) the Commissioner orders his release when satisfied that the said person has satisfactorily replied to all questions at the interrogation or that no useful purpose will be served by his further detention in terms of the provisions of this section: .....

(7) No person other than the Minister or a person acting by virtue of his office in the service of the State-

(3) shall have access to any person detained in terms of the provisions of this section, except with the consent of and subject to such conditions as may be determined by the Minister or the Commissioner; or

(4) shall be entitled to any official information relating to or obtained from such person.

(9) Any person, detained in terms of the provisions of this section shall ... be not less than once a fortnight -

(a) visited in private by a magistrate;

(b) visited in private by a district surgeon."

Directions relating to the detention of persons are to be found in Notice 877 of 1982, published in Government Gazette No 8467 of 3 December 1982. In terms of paragraph 34 of these directions a magistrate or district surgeon visiting a detainee is obliged to compile a report on such visit and submit it to the office of the Director of Security Legislation and to the divisional commissioner. This instruction confirms that for every visit by such persons there is to be a written report. It would in the nature of things contain information foreshadowed in s 29(7)(b), that is, information "obtained from" a detainee as a result of what was observed, found as a result of an examination or told to the magistrate or district surgeon by the detainee; and perhaps information "relating to" a detainee obtained from some other

source.

There is nothing in the Act to indicate, or even suggest, that the purpose of any such visit is for any reason other than to report, in the interests of a detainee, on his physical and mental health and well-being. (Paragraphs 15 and 33 to 37 of the Directions in the Government Notice, in so far as may be necessary, confirm this.) Information of such nature contained in a report I shall for convenience refer to as "personal information". On the other hand, it is as plain that the purpose of the detention - to quote from the long title of the Act - is "to provide for the security of the State and the maintenance of law and order". More particularly - as appears from s 29(1) -its purpose is for the detention of persons suspected of having committed, or of planning to commit, certain offences and for the interrogation of persons suspected of withholding information relating to the

of such offences. (Cf Schermbrucker v Klindt, N.O., 1965(4) SA 606(A) 612C - 613D, commenting on the purpose of s 17 of Act 37 of 1963, which was replaced by s 29 of the Act.) Information relating to such matters, which I shall for convenience label "security information", may conceivably also be included in a report of a magistrate or district surgeon.

Against this background the meaning of the prohibition in s 29(7)(b) is to be determined. There appear to be two possible interpretations - no other was advanced in argument - of the words "any official information": (a) that the injunction applies to information of any nature - personal, security or miscellaneous - obtained by an official from a detainee or relating to him or (b) that the term "official information" refers to security information only. In

whether the determining factor is the official context in which the information is obtained and the report submitted; or the nature of such information and hence the content of such report.

Support for both views is to be found in our case law.

In Cooper and Others v Minister of Police and Others 1977(2) SA 209 (T) the parents and fiancee of certain detainees applied to court for an interdict restraining the respondents from assaulting them and an order that the evidence of the detainee in this regard be taken by means of interrogatories or on commission by persons appointed by the court from those authorised in terms of the Terrorism Act, no 83 of 1967, to have access to detainees. The court held that no prima facie case for the main relief had been made out. It nevertheless considered the ancillary relief

requested in the light of s 6(6) of the Terrorism Act, now replaced by s 29(7) of the Act. The former subsection read as follows:

> "No person, other than the Minister or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee, or shall be entitled to any official information relating to or obtained from any detainee."

The question which would have called for decision but for the conclusion on the merits, was whether statements taken from a detainee in any of the proposed ways by a magistrate having access to them would fall within the ambit of the words "official information". Trengove J held that they would:

> "It seems to me to be clear from this section that an 'officer of the State' is entitled to have access to the detainee, only if he does so 'in the performance of his official duties'. And, in my view, it follows from this that if an officer of the State were to approach a detainee, in the

> performance of his official duties, in order to obtain information from such detainee, the information so obtained would be regarded, for the purposes of sec. 6(6), as official information, to which no person, also the applicants and the Court, would be entitled." (212A - B).

In Nxasana v Minister of Justice and Another 1976(3) SA 745(D) the opposite view was taken. This case too was concerned with s 6(6) of the Terrorism Act in reference to similar relief sought. The wife of a detainee applied for an order directing a magistrate to obtain and file with the court an affidavit deposed to by her husband, the detainee, in which he testified about the state of his health and whether it had been impaired in any way, with a view to such evidence being used in a further application for substantive relief for the protection of her husband. The court (Didcott J) saw no difficulty in principle in making such an order or one in a modified form (750G - H) but held that no case had been made out to merit the grant of

20. such an

order. He nevertheless differed from the conclusion in Cooper's case on whether evidence could be obtained in the proposed manner and placed before court. This is not the issue before us since there is no request for evidence on commission or by way of interrogatories or on affidavit from the detainees. But the comments of Didcott J on the meaning of "official information" are pertinent. He found himself unable to subscribe, even at the strictly linguistic level, to the interpretation placed on this phrase by Trengove J and commented that:

> "It may well be that information is 'official' only if it is in official hands or has come from or passed through them. But it surely does not follow that all information, whatever its intrinsic character or its content, is necessarily 'official' once it has undergone that experience. I would have thought that the information's nature and substance was at least as relevant to the question whether it amounted to 'official information' as the circumstances of and the parties to its ascertainment, exchange or

21/...

> dissemination. Otherwise the information that a detainee had not paid his rent would be 'official information' merely because, when visited by a magistrate under sec. 6(7) and asked whether he had any requests, he had mentioned his default and besought the magistrate to tell his wife to remedy it. On that hypothesis his wife would not be entitled to receive the message and, in the event of subsequent litigation between him and his landlord in which the rent's payment was in issue, the Court would not be entitled to hear proof of his admission to the magistrate. That sounds absurd." (755F - H)

In Mkhize v Minister of Law and Order and Another 1985 (4) SA 147 (N) the Full Court in Natal endorsed the interpretation of Didcott J in a case dealing with the words "official information" in s 29 of the Act. The order sought was that a district surgeon visit and examine the detainee and report on his condition and that a magistrate visit him and obtain from him on oath details of any assault upon him. The report and affidavit were to be lodged with the registrar of the court, from whom the applicant's

attorneys could obtain copies. Plainly such an order could not be granted if the information in these documents were inevitably destined to contain "official" information within the meaning of the word in s 29(7)(b). Thus the question whether the information would be "official" arose. Counsel for the respondent did not rely on Cooper's case and the court therefore did not have the benefit of argument in support of the conclusion in that decision. The matter was argued for the respondent along another line that was rejected. The court endorsed the interpretation in Nxasana's case saying (per Wilson J):

> "I have no difficulty in understanding the prohibition in s 29(7) (b) if the concept of 'official information' is confined to matters, directly or indirectly, relating to the reasons for, or the purposes of, the detention. Information of this kind is clearly of an official nature and one can understand why it might be contended that its disclosure would run counter to the purposes of the Act. Information relating to

> the detainee's health and his treatment whilst in detention is clearly of a different nature. In the absence of very special circumstances such information could not, in any way, adversely affect the reason for, or the purposes of, the detention." (151J - 152B).

As these three decisions tend to confirm, "official information" is susceptible to the two suggested meanings and may justifiably be regarded as ambiguous. But in any event, as was pointed out in S v Radebe 1988(1) SA 772(A) 778 F - G:

> "[W]ords which prima facie are clear and unambiguous may require to be read in the light of their context, ie in the light of the subject-matter with which the provision in question is concerned, or the mischief at which it is aimed, in order to arrive at the true intention of the Legislature. (Cf University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914D.)"

The passage referred to in the University of Cape Town case (per Rabie CJ) is the following:

> "I am of the opinion that the words of s 3 (2) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature."

The significance of the subject-matter with which we are concerned is of paramount importance. The sole purpose of s 29(7)(b) is to prevent information being disclosed without the stipulated consent, which -as I have said - may prove prejudicial to State security generally and more specifically to crime detection, crime prevention or to the interrogation process. For this reason security information is to remain secret. But by contrast there can be no sound reason why access to personal information should be banned and counsel in argument could suggest none. The Legislature did not intend that evidence of unlawful conduct on the part of custodians or interrogators

should be suppressed. Paragraph 15 of the directions reflects the attitude of the Legislature in this regard. It states that:

> "A detainee shall at all times be treated in a humane manner with proper regard to the rules of decency and shall not in any way be assaulted or otherwise ill-treated or subjected to any form of torture or inhuman or degrading treatment."

Appropriate access to personal information arising from visits by a magistrate or district surgeon provides the most effective assurance that this instruction is obeyed. It is primarily for this reason, one may readily assume, that provision is made in s 29(9) for such visits to take place. But there are other reasons why such information ought not to, and need not, be included in the embargo. Apart from any question of assault or other unlawful conduct, illustrations of unnecessary hardship readily come to mind. One is given in the above-quoted passage from Nxasana's case.

Another would be a situation in which a detainee to the knowledge of a district surgeon is required to have special medical treatment, but this is withheld from him as an inducement for him to disclose certain information. In such a case it is inconceivable that the district surgeon would not be entitled to make an appropriate and effective disclosure of this fact. (Cf Rossouw v Sachs 1964(2) SA 551 (A) 564 G - H: a decision concerned with s 17 of Act no 37 of 1963.)

Mr de Bruyn in the course of his argument relied upon the well-known passage in Rossouw's case at 563 H - 564 A that:

> "[T]his Court should accord preference neither to the 'strict construction' in favour of the individual indicated in Dadoo's case, supra, nor to the 'strained construction' in favour of the Executive referred to by Lord Atkin in Liversidge's case, supra, but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its

general policy and object."

The interpretation favoured in the Natal decisions satisfactorily avoids both a strict and strained construction. It protects State interests but without any infringement of an elementary right of the individual not to be unnecessarily restricted in the procurement of evidence for a court case.

Throughout the argument on behalf of the respondents the public interest was rightly stressed, but is to be viewed in proper perspective when construing an enactment of this kind. As Wigmore Evidence 3rd ed para 2378(a) in a spirited pronouncement points out:

> "It is urged, to be sure (as in Beatson v. Skene), that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As if the denial of justice to a single

> suitor were not as much a public injury as is the disclosure of any official recordl When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity' as Joshua Evans said, 'is always a suspicious argument, and never wanting in the worst of causes'."

(See too Schermbrucker's case (supra) 615F - 616A; and Conway v Rimmer and Another [1968] AC 910 at 940 and 954G - 955D.)

In terms of s 29(7) (a) the Minister or a person acting by virtue of his office in the service of the State is entitled as of right to have access to a detainee. But this subsection - in contrast to s 6(6) of the Terrorism Act - also envisages that, with the necessary permission, other persons (for instance, a Minister of Religion, the detainee's financial adviser or a bereaved child who needs to be consoled by his father, the detainee) are entitled to access. In such a case the person concerned would not interview or

visit the detainee - to use the language of Cooper's case at 212B - "in the performance of his official duties", or necessarily "to obtain information from such detainee". On the reasoning in that judgment, any information so obtained would not be regarded as official information. But the outcome of such a construction may well result in security information not being classified as "official information" and the person possessing it would be free to divulge it to anyone he pleases. If, however, the content of the information is the determining factor, security information would fall within the prohibition no matter to whom it was disclosed by the detainee. This would, to my mind, be far more in accordance with what the Legislature intended.

Reverting to the wording of the section itself, the fact that "official" qualifies

"information" is of some significance: it describes the kind of information to which access is restricted. A reference to "information officially obtained" would more closely conform to the meaning relied upon by the respondents. As a matter of fact on such interpretation there appears to be no need for "official" or "officially" to feature at all in the subsection.

Should the acceptance of the meaning of s 29(7) reflected in the Natal decisions erode its efficacy or give rise to problems in the implementation of the prohibition, this would cast a doubt on the correctness of such construction. Two possible difficulties were raised in the course of argument. It was suggested that it might prove difficult to decide whether material in a report is to be classified as security information or as personal information. This

appear to me to be an obstacle. In the first place both the magistrate and the district surgeon, in the realisation of the true purpose of their visits, are most unlikely to record information not of a personal nature. But in any event, should they do so, the distinction between personal information (that is relating to the health and well-being of the detainee) and any other information (which may obviously or possibly be security information) is not an obscure or an umbrageous one. In this connection the question arises: who would be the person to decide this issue in regard to a particular report, should the nature of its contents be disputed, without the process itself violating the prohibition? This was the second possible difficulty put forward. But, in so far as this may be a concern, such a report would be on the same footing as any other document in respect of which

privilege is claimed and disputed. It would be for the judge at the appropriate time to examine the document in private and decide whether it, or part of it, ought to be protected from disclosure in terms of s 29(7) on the ground that it contains or might contain security information. This is an accepted procedure when privilege is claimed in reference to a document. (Cf

Van der Linde v Calitz 1967(2) SA 239(A)

262D - 263D.) There can be no objection to such an enquiry on the part of the judge. In this regard in Conway v Rimmer and Another (supra) Lord Upjohn commented as follows at 995F - 996B:

> "There is only one other matter to which I want to refer; it is the question whether there is any objection to the private inspection by the judge himself of a document for which privilege is claimed. My Lords, in a number of the leading cases, such as Beatson v. Skene and Cammell, Laird

> itself, it has been held that there is some objection to the judge looking at the document in private, as being contrary to the broad rules of justice as we understand it, where all the documents must be open to both sides. I do not understand this objection. There is a lis between A & B; the Crown may be A or B or, as in this case, a third party, for both A & B in this case want to see the documents. But when the judge demands to see the documents for which privilege is claimed he is not considering that lis but quite a different lis, that is whether the public interest in withholding the document outweighs the public interest that all relevant documents not otherwise privileged should be disclosed in litigation. The judge's duty is to decide that lis; if he decides it in favour of disclosure, cadit quaestio; if he decides it in favour of nondisclosure he banishes its contents from his mind for the purposes of the main lis. There is nothing unusual about this; judges and juries have to do it every day."

It is to be noted that submitting the report to scrutiny in private by a judge would not appear to conflict with the provisions of s29(7). In discharging this duty in his judicial capacity he would be "acting by virtue of his office in the service of the State."

This is confirmed by the wording in the preceding section of the Act, s 28, which reads as follows:

> "No person, other than the Minister, the Director, a judge of the Supreme Court of South Africa, a chairman of a board of review or any other person acting by virtue of his office in the service of the State-
>
> (5) shall have access to any person detained by virtue of the provisions of subsection (2), except with the consent of and subject to such conditions as may be determined by the Minister or the Commissioner; or
>
> (6) shall be entitled to any official information relating to or obtained from such person:"
>
> (Emphasis supplied)

Even if this conclusion were incorrect, if the true interpretation of s 29(7) involves on occasions drawing a distinction between security information and personal information to give effect to its provisions and to do justice to both the interests of the State and the Individual, this task ex necessitate would have to be

undertaken by the court.

In the result, for the reasons given, I am of the view that the interpretation placed upon s 29(7) in the Nxasana and Mkize decisions is the correct one and that no unique problems will arise should it become necessary to decide whether a report or a portion of a report is to be disclosed for the purposes of a pending law suit.

In the ordinary course, should such disclosure be contested, the issue could come before a judge in one of two ways. The Uniform Rules of Court make provision for discovery of documents, in special circumstances even at an early stage in any pending litigation (Rule 35(1)). (Rule 35(1) read with Rule 35(13): Saunders Valve Co Ltd v Insamcor (Pty) Ltd 1985(1) SA 146(T).) If privilege is claimed by an adversary in respect of a report in his possession, on

the strength of s 29(7) or for some other reason or on both grounds, the matter would be referred to the court for resolution in the manner described. Alternatively, the person in possession of the report could be subpoenaed duces tecum. An objection to the use of the report would then give rise to the same enquiry. Had this matter proceeded, the appellants would still have had to pursue one or other of these courses if the respondents had contended that the reports contained official information or were otherwise privileged.

It is important to stress that the conclusion reached in this appeal is confined to the question of the production for the purposes of a court case of reports submitted by a magistrate or a district surgeon as a result of visits made by him pursuant to s 29(7). Other questions which arose in certain decisions relating to applications for an order that these

officials visit a detainee to submit interrogatories to him or take evidence on commission were not argued before us and are left open. However, one need hardly add, the effect of the conclusion reached in this judgment is that s 29(7) does not prevent a magistrate or district surgeon from disclosing personal information relating to a detainee or from giving evidence in that regard in any court proceedings.

The question of costs remains. As I have indicated, the question for decision on appeal, which is to be decided in favour of the appellants, differs widely from the relief originally sought in the notice of motion. On the other hand, one may confidently assume that, had the appellants modified the order sought to conform to what has turned out to be the subject matter of this appeal, the respondents would not have acquiesced in it: for understandable

wished to have clarity on the interpretation to be placed on the words "official information" in s 29(7). It would, I consider, in the circumstances be somewhat arbitrary to penalise the appellants for persisting in claiming more than the relief to which they were entitled by depriving them of some of their costs in either court: the basic precept that costs follow the result should in my opinion apply.

In the result the question before us on appeal is to be answered in favour of the appellant, namely, that s 29(7) of Act No 74 of 1982 does not necessarily preclude the procurement of reports of a magistrate and district surgeon, arising out of visits made pursuant to s 29(9) of the said Act, for the purposes of instituted court proceedings. However, since in this case the interdict application is not

being pursued, there is no need for a formal declaratory order to this effect.

The appeal is allowed with costs and the appellant is awarded costs in the court a quo.

M E KUMLEBEN
JUDGE OF APPEAL

CORBETT CJ)
BOTHA JA) - Concur
NESTADT JA)
GOLDSTONE JA)