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Case no 554/86
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LINDIWE MONICA NKWENTSHA

and

THE MINISTER OF LAW AND ORDER,
REPUBLIC OF SOUTH AFRICA

and

THE COMMISSIONER, SOUTH AFRICAN POLICE

VIVIER JA.

Case no 554/86

/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

LINDIWE MONICA NKWENTSHA Appellant

- and -

THE MINISTER OF LAW AND ORDER,
REPUBLIC OF SOUTH AFRICA First Respondent

and

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

Coram: RABIE ACJ et VAN HEERDEN, HEFER,
GROSSKOPF, VIVIER JJA.

Heard: 23 February 1988.

Delivered: 30 March 1988.

J U D G M E N T

VIVIER JA :-

This appeal raises the question of the Court's power to order that a person, detained under the emergency regulations, appear personally before it for the purpose of giving viva voce evidence. The emergency regulations were promulgated by Proc R109 in Government Gazette 10280 of 12 June 1986 in terms of sec 3(1)(a) of the Public Safety Act 3 of 1953.

The appellant applied in the Eastern Cape Division for an order for the release of her husband, Thozamile Winston Nkwentsha ("the detainee"), who had been arrested and detained in terms of reg 3 of the aforesaid regulations. She alleged that the arrest and detention were unlawful on the grounds

that /

that the detainee had been arrested in the Ciskei
which is outside the borders of the Republic of South
Africa, and furthermore that the arrest was not justified
in terms of reg 3(1). The application was opposed by
the respondents. Two entirely different versions as
to where and under what circumstances the detainee had
been arrested, emerged from the supporting and answering
affidavits. The version put forward
by the appellant was, briefly, that at about half past
eight on the morning of 1 July 1986 two members of the
Ciskeian Police, one Sofoyiya and one Mncono, arrested
the detainee at his home at Zwelitsha in the Ciskei.
They were accompanied at the time by two unknown men

who / ...

who were allegedly members of the South African Police.

The respondents' version was that Sofoyiya and Mncono

took the detainee from his home at Zwelitsha to the

local Police Station for questioning, after which they

told him that he was free to go. At his request they

gave him a lift to King William's Town where he was

arrested shortly after their arrival by warrant officer

Stander of the South African Security Police, who had

been looking for him. Stander dealt at length in

his affidavit with his reasons for arresting the

detainee. In reply the appellant filed an affidavit

deposed to by the detainee himself in which he confirmed

that he had been arrested at his home at Zwelitsha on

the / ...

the day in question by Sofoyiya and Mncono who were accompanied by two other men whom he believed to be members of the South African Police. After questioning him the four policemen took him to the police station at King William's Town where Mncono handed him over to Stander. The detainee denied that his arrest was justified by reg 3(1).

In view of the disputes of fact which had arisen, an order was made by consent at the hearing of the application, referring the application for oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court on the following issues: where and by whom the detainee had been arrested; whether the

member / ...

member of the force who arrested him held the requisite opinion in terms of reg 3(1) and whether or not the detention was lawful. The order provided for the parties to subpoena any person to give oral evidence at the hearing, and a subpoena, substantially in accordance with Form 16 in the First Schedule to the Rules, directing the detainee to attend in order to testify, was duly issued and served.

At the resumption of the hearing the detainee was not present as the first respondent, purporting to act in terms of reg 3(10), had refused permission for him to come to Court. A preliminary application by the appellant for an order in terms of Rule 6(5)(g)

that / ...

that the detainee be produced in Court so that he could testify, was refused with costs by EKSTEEN J, who granted leave to the appellant to appeal to this Court.

The first question for decision is accordingly whether there is anything in the provisions of reg 3(10) which precludes a Court from granting an order that a detainee be brought to Court to testify on the issue whether or not he was lawfully arrested or is being lawfully detained in terms of reg 3. Reg 3(10) reads as follows :-

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

the /.....

the service of the State -

- (a) shall have access to any person detained in terms of the provisions 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 information of whatever nature obtained from or in respect of such person."

According to reg 1 "Minister" means the Minister of Law and Order. The proper approach to the interpretation of a statutory provision such as reg 3(10), i e one which interferes with the rights of the individual but which, at the same time, is designed for the protection of the public in an emergency situation, was laid down by this Court in Rossouw v Sachs 1964(2) SA 551(A) and followed

in /

in Schermbucker v Klindt NO 1965(4) SA 606(A) at

617E - 618C, 620G-H and State President and Others v

Tsenoli; Kerchhoff and Another v Minister of Law and

Order and Others 1986(4) SA 1150 at 1175 A-I.

Dealing with sec 17 of the General Law Amendment Act

37 of 1963, OGILVIE THOMPSON JA said the following

in Rossouw's case at 563 in fine to 564 A :-

"I accordingly conclude that in interpreting sec 17 this 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 / ...

(The decisions referred to are: Dadoo Ltd and Others

v Krugersdorp Municipal Council 1920 AD 530 and

Liversidge v Anderson and Another (1941) 3 All ER 338

(HL)).

In determining the meaning of reg 3(10) it must be emphasised, at the outset, that the Court's jurisdiction to order the release of a detainee who has been unlawfully arrested or is being unlawfully detained, remains unimpaired by the emergency regulations. The ouster provision in reg 16(3) relates only to steps taken "under these regulations" and does not preclude the Court from enquiring into the question whether or not the arrest or detention is unlawful.

(Cf / ...

(Cf Schermbucker v Klindt NO, supra at 613 E-F,

618 C-D, 623 F-G and Minister of Law and order v

Hurley and Another 1986(3) SA 568(A) at 583H - 586I).

The Court a quo in effect held that it was precluded by the decision in Schermbucker's case from granting the order sought, and it is therefore necessary to look more closely at the grounds for that decision. The question for decision there was whether the Court's power in terms of Rule 9(a) of the Transvaal Rules of Court to order that a witness appear personally before it to give viva voce evidence in motion proceedings, could be exercised in respect of a person who was being detained under the provisions of sec 17 of the General

Law Amendment Act 37 of 1963. It was common cause between the parties that the detention of the said person was lawful. The main relief claimed was for an interdict restraining members of the South African Police from continuing with an alleged unlawful method of interrogating the detainee. The Minister had refused permission for the detainee to come to Court to give viva voce evidence. Sec 17(1) of that Act provided for the detention of not more than 90 days on any particular occasion for interrogation at a place determined by the police, of anyone suspected of or thought to know about the commission of certain specified offences. Sec 17(2), which was the counterpart

of / ...

of reg 3(10)(a) now under consideration, provided

that "no person shall, except with the consent of the

Minister of Justice or a commissioned officer as

aforesaid, have access to any person detained", but

required a weekly visit in private by a magistrate.

There was no provision in sec 17 similar to that found

in reg 3(10)(b). Sec 17(3) contained similar pro=

visions to those in reg 16(3) and 3(6) of the present

regulations by providing that no Court would have

jurisdiction to order the release of a "person so

detained" but empowering the Minister to do so at any

time. This Court decided by a majority of three to

two that the Court did not have the power to grant an

order / ...

order that the detainee be brought before it to

testify. BOTHA JA, with whom STEYN CJ and

TROLLIP AJA agreed, pointed out in his judgment (at

618 E-G) that although the Court certainly had

jurisdiction to grant the order sought, the consent

of the Minister or an officer was required in terms of

the Act to enable the detainee to be brought to Court.

This finding was based on the kind of detention pre-

scribed by sec 17 and the purpose of that section, i e

to induce the detainee to speak (at 619 B).

BOTHA JA concluded that if a detainee were brought

to Court the manner of the detention prescribed

by / ...

by sec 17 would be interfered with and the purpose of the section defeated (at 619 D to the foot of the page). According to BOTHA JA it was, therefore, not the detainee's viva voce evidence as such, but the inevitable practical consequences of bringing him to Court, which would lead to a conflict with sec 17 and be likely to defeat the purpose of that section. Cf Nxasana v Minister of Justice and Another 1976(3) SA 745 (D & CLD) at 752 G-H. TROLLIP AJA, in a separate judgment with which STEYN CJ also agreed, said that in view of the conceded fact in that case that the detainee had been lawfully arrested and was being lawfully detained, the detainee was not a free agent,

so / ...

so that the ordinary process of subpoenaing him, not being directed at his custodian, was ineffective (at 624 F to the foot of the page). What was required in such a case was a writ of habeas corpus ad testificandum.

TROLLIP JA went on to say that although our Courts may have the power - whether it be inherent, implied or at common law - to issue such a writ, calling upon the detainee's custodian to produce him in Court so that he could testify, such power had not been invoked by the appellants (at 625 D-F). The learned Judge concluded by saying (at 626 in fine to 627 C) that in a case where the legality of the arrest or detention was in issue, the arrest or detention could not be relied upon by the detaining authority, so that it may be that in such a

case the Court could order that the detainee be brought up to testify and that he could not be prevented by the detaining authority from coming to Court.

To hold that the moment the legality of the arrest or detention is put in issue, those facts (i.e. the arrest or detention) can no longer be relied upon by the detaining authority in contesting that issue, would mean, it seems to me, that reg 3(10) has no application until such time as the Court has ruled on the issue of legality and, taken to its logical conclusion, would also mean that the detainee must be released until the Court has held his arrest and detention to be valid. This can clearly not be correct. In my view the detention order applies and must be obeyed until the Court has ruled otherwise.

Returning to Schermbucker's case, supra,

RUMPFF JA, who wrote one of the minority judgments,

also emphasised (at 613 E-F) that the Court's juris=

diction to determine the legality of the detention

was not affected by sec 17, and went on to say the

following (at 613 G-H) :-

"Indien aanvaar word dat die Wetgewer die bedoeling gehad het om die jurisdiksie van die hof in stand te hou, wanneer dit gaan om die vraag of die bepalings van die artikel regmatiglik toegepas word, kan m i onmoontlik in dieselfde asem aanvaar word dat sub-art (2) so vertolk moet word dat die Wetgewer ooit die bedoeling kon gehad het om die jurisdiksie van die hof wat hy nie wou wegneem nie steriel te maak in n saak waarin dit gaan oor die wettige toepassing van die artikel en nog wel deur n bepaling soos die bevat in art 17(2)".

RUMPFF JA further said (at 615 D-F) that if sec 17(2)

were / ...

were held to prevent a detainee from testifying, it would mean that the Legislature intended that whenever the Police contravened sec 17(1), they could none the less arbitrarily prevent the detainee from testifying in order for the Court to correct an injustice. In view of the acknowledged right of every person to testify, the learned Judge said, he could not find such an intention in sec 17. After quoting an extract from Wigmore on Evidence 3rd ed, vol 8, pp 66-7, para 2192, dealing with "society's right to our testimony", RUMPF JA, referring to that right, continued as follows (at 615 in fine - 616 A) :-

"Hierdie reg, hoe belangrik ook al, kan natuurlik deur die Wetgewer weggeneem of tydelik opgeskort word. Met art. 17 is die reg, in die algemeen gesproke, in

bepaalde omstandighede tydelik opgeskort.
 Daar sal egter altyd n vermoede wees dat
 die Wetgewer so n reg weggeneem of opgeskort
 het alleen vir sover die uitdruklike taal van
 die Wetgewer dit regverdig of vir sover dit n
 noodwendige afleiding van die bewoording van
 die Wetgewer is."

WILLIAMSON JA, who wrote the other minority judgment,
 was the only one of the Judges in Scherمبرucker's case
 to deal expressly with the meaning of the words "no
 person shall have access to any person
 detained" in sec 17(2). He held that neither the Court,
 nor any person leading his evidence or cross-examining
 him, would be having "access" to a detainee in the sense
 in which the word is used in the section. The learned Judge
 expressed himself thus in this regard (at 622 B-D):-

"If /...

"If a Court considered it absolutely necessary in the interests of the administration of justice as soon as possible to hear the detainee in evidence and that to that end he should be produced to the Court, the Court would not be having access to the detainee in the sense in which that word is used in the section. Nor would any person leading his evidence or cross-examining him have access to him in the sense of breaching that isolation sought to be effected by the section."

The legislation which was considered in Schermbrucker's case, supra, differs in one important respect from that presently under consideration. As I have pointed out, the purpose of the detention under the former legislation was to induce the detainee to speak (Rossouw v Sachs, supra, at 561 A-B), and the

ratio / ...

ratio decidendi of the majority judgment of BOTHA JA

was that if the detainee were brought to Court to

testify, that purpose would be defeated. I cannot infer

such a purpose from the wording of the present regula=

tions and from the circumstances under which they were

enacted, nor from their general policy and object. Reg 3,

which provides for the arrest and detention of persons,

was designed to combat subversive activities of various

kinds which threaten the maintenance of public order

or the safety of the public or the safety of the

detainee himself. One of the methods or means employed

for the achievement of those purposes (cf Tsenoli's case,

supra, at 1182 C-E) is the complete isolation of the

detainee / ...

detainee from all contact with the outside world and

that, in my view, was what reg 3(10) was intended to

maintain. That subregulation was never intended to

deal with a situation where the detainee wanted to give

evidence in Court. Had it been intended to deprive

him of the right to testify, one would have expected

clear and unambiguous language to that effect. Instead

the phrase "no person shall have access to any

person detained" is used in reg 3(10)(a). In my view

it cannot be said that when a witness is produced in

Court and is then under the control of the presiding

Judge, the latter or any person leading his evidence

or cross-examining him would be having access to him

in /

in the sense in which that word is used in reg 3(10).

This was readily conceded by counsel for the respondents.

(Cf the above-quoted passage from the judgment of

WILLIAMSON JA in Schermbrucker's case, supra at 622 B-D

and S v Heyman and Another 1966(4) SA 598(A) at 605 in

fine to 606 B). Nor can it be said that unlawful access

by others will inevitably result, or that the purposes

of the regulations will be defeated if the detainee is

brought to Court to testify. I cannot conceive that the

security authorities would be unable to prevent any

unlawful access to the detainee or that they would not

be able to ensure his continued isolation when he is

brought to Court to testify. Reg 3(10)(b) does not

apply either. The "information" prohibited by that

subregulation / ...

subregulation does not, in my view, include a reference to evidence given in Court by the detainee. The prohibition is, furthermore, directed only against a person seeking to obtain the "information" and is not directed against the possessor of the information. (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 948 F-G and Mkhize v Minister of Law and Order and Another 1985(4) SA 147(N) at 151 I-J).

I am accordingly of the view that a detainee is not precluded by reg 3(10) from giving viva voce evidence in Court. I should point out that the question of the detainee's access to his legal advisers was not in issue in the present case. The appellant did not

ask the Court a quo to order that the detainee be allowed to consult with his legal advisers for the purpose of giving viva voce evidence, and at the hearing of the appeal counsel for the appellant conceded that reg 3(10) prohibited consultations with legal advisers save with the requisite consent.

This concession was, no doubt, made in view of the judgment of this Court in Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987(3) SA 859(A) where it was held (at 894G-895C) that reg 3(10)(a) applies to legal advisers.

I must finally deal with the issue raised by

TROLLIP JA in Scherbrucker's case, supra (at 624 E - 625 G) as to whether or not our Courts have the power to issue a writ of habeas corpus ad testificandum to produce a witness who is in custody to give evidence in a civil matter. TROLLIP JA referred in this regard to the practice in England and America where the matter is largely regulated by statute and to the absence of similar statutory provisions in our law. He expressed a doubt as to whether our Courts had the power to grant a writ of habeas corpus ad testificandum. In England the attendance of a prisoner to give evidence in Court is procured not only by a writ of habeas corpus ad testificandum but also by a warrant or order granted by a Judge.

The / ...

The writ of habeas corpus ad testificandum to produce a prisoner to testify in a civil matter is granted by a Judge of the High Court under common law powers, and, for the purposes of trials in the High Court, under the Habeas Corpus Act 1804 (Jacob, The Supreme Court Practice, 1988, Vol 1 p 815). In Jenks v Ditton (1897) 76 LT 591, STIRLING J, however, held that a judge's order on the governor of the prison, and not a writ of habeas corpus ad testificandum, was the proper method of securing the attendance in Court of a prisoner detained under civil process. The same process (i e a judge's order instead of a writ) is authorised by the Criminal Procedure Act 1853 when the witness is in custody on a criminal charge

and / ...

and his evidence is required in a criminal or civil matter. For this purpose RSC Ord 54, r 9(2) expressly provides for "an application for an order to bring up a prisoner, otherwise than by writ of habeas corpus, to give evidence in any cause or matter, civil or criminal, before any Court, tribunal or justice, to be made on affidavit to a judge in chambers." See generally in regard to the practice in England: Taylor on Evidence, 12th ed, vol 2, para 1272-1277 and Phipson on Evidence, 13th ed at p 683, para 30-16. For the practice in America see Wigmore on Evidence (McNaughton rev 1961, vol 8, para 2199, p 121).

I should mention that although we have no legislative enactment similar to the Habeas Corpus Act

of /

of the English Law, the common law remedy known as the interdictum de libero homine exhibendo is well established in our law. The order or writ de libero homine exhibendo, which may be applied for whenever a person has been unlawfully deprived of his freedom, is directed at the custodian of the prisoner, and is analogous to the writ of habeas corpus ad subjiciendum (commonly known as habeas corpus) of the English law.

See D.43.29.1, 3 and 4; Voet 43.29; Wood and Others v Ondangwa Tribal Authority and Another 1975(2) SA 294(A) at 310 D and Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa 1987(1) SA 695(A) at 727 F.

To revert to the question of the Court's power to order the production of a detainee in order to

testify /

testify, our own Uniform Rules of Court, which are largely based on the English Rules, contain no express provision similar to those found in RSC ord 54, r 9 of the English Rules. Our own Rule 6(5)(g), which is of application in the present case, is, however, of wide import, and empowers the Court, whenever an application cannot properly be decided on affidavit, to "make such order as to it seems meet with a view to ensuring a just and expeditious decision". The Court is further empowered "in particular, but without affecting the generality of the foregoing", to direct that oral evidence be heard on specified issues, and to that end the Court "may order any deponent to appear personally or grant leave for him or any other person to be

subpoenaed" / ...

subpoenaed". In my view the power to grant an order

to produce a prisoner in Court to give viva voce

evidence, is impliedly contained in this sub-rule.

It is a purely procedural matter, and in view of the

aforegoing I would hold that such power is in any

event authorised under the Court's inherent jurisdic=

tion to regulate its procedure in the interests of

the proper administration of justice. (Cerebos Food

Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another

1984(4) SA 149(T) at 171A-173D and Universal City Studios

Inc and Others v Network Video (Pty) Ltd, 1986(2) SA

734(A) at 754 G-J). This was, in effect, the order

which was sought by the appellant in the Court a quo,

and for the reasons which I have given that Court

erred in not granting the order (cf Van Zyl, Judicial Practice, 269). It is accordingly not necessary to deal with the alternative argument advanced by counsel for the appellant that reg 3(10) is void for vagueness.

In the result the appeal succeeds with costs, including the costs of two counsel. The order of EKSTEEN J is altered to read : It is ordered that the detainee be brought to Court on a date to be fixed by the registrar to give viva voce evidence in the present proceedings. Respondents are ordered to pay the costs occasioned by the application.

W. VIVIER JA.

RABIE ACJ)
VAN HEERDEN JA)
HEFER JA)
GROSSKOPF JA)

Concur.