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IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1982-06-04

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

DATE 7.6.1982

SIGNATURE

DELETE WHICHEVER IS INAPPLICABLE

In the matter between:

MINISTER OF LAW AND ORDER	First Applicant
SOUTH AFRICAN TRANSPORT SERVICES	Second Applicant
STEPHAN PETER WHITEHEAD	Third Applicant
WALTER MacPERSON	Fourth Applicant
JAMES ANDREW VAN SCHALKWYK	Fifth Applicant (10)
MAGEZI EDDIE CHAUKE	Sixth Applicant
and	
PETRUS ARNOLDUS JURGENS KOTZÉ N.O.	First Respondent
ATTORNEY-GENERAL OF TRANSVAAL	Second Respondent
JOHN AUBREY EDWARD AGGETT	Third Respondent

J U D G M E N T

ELOFF, J.: There is presently pending an inquest into the circumstances and cause of death of the late Neil Hudson Aggett (to whom I shall hereinafter refer as "the deceased). (20) It is being conducted by the first respondent in these proceedings in his capacity as the designated magistrate in terms of Section 6 of the Inquests Act 58 of 1959.

The inquest proceedings were preceded by an investigation conducted by a certain Captain C.J.A. Victor. The documentation obtained in the course of Captain Victor's investigation together with other documents was submitted to the Chief Public Prosecutor of Pretoria, who in turn placed it before first respondent in terms of Section 5 (30)

of/...

of the Act. Included in that documentation was an affidavit which purports to have been made by the deceased, which bears the date 4 February 1982, and to which I shall hereinafter refer as "the deceased's affidavit".

At the commencement of the inquest proceedings the first, second, third, fourth, fifth and sixth applicants, who are respectively the Minister of Law and Order, the South African Transport Services and four members of the Security Police, were represented by counsel.

A Deputy Attorney-General and a member of the office (10) of his staff, led the evidence, and the father of the deceased (who is third respondent in these proceedings) were represented by counsel.

The enquiry commenced on 13 April 1982. One of the first witnesses called was Dr V.D. Kemp, a district surgeon of Johannesburg. He gave evidence concerning a medico-legal post-mortem examination which he conducted on the body of the deceased on 5 February 1982. At the conclusion of the evidence-in-chief counsel for first respondent, Adv. G. Bizos, was invited to cross-examine Dr Kemp, and he opened(20) as follows:

"CROSS-EXAMINATION BY MR BIZOS: Dr Kemp, before asking you any questions on your report, I would like to read to you a statement made by the late Dr Neil Aggett some 14 hours before his death, to Sergeant Blom, appearing on page 158 of the papers before Your Worship. Having done that, I would like to ask you questions in relation to the consistency of the injuries that are described by Dr Aggett in his statement and ask about their consistency or otherwise. I think that I (30)

detect/...

detect that my Learned Friend wanted to address Your Worship."

Counsel for the appellants thereupon intervened and objected to Mr Bizos "referring or quoting from the statement". Argument on behalf of applicants and the third respondent was thereupon presented, at the conclusion of which the first respondent is recorded to have stated the following:

"COURT: It seems that I will be called upon to make certain rulings during the proceedings. I do not intend to give reasons on every occasion. Should I consider it necessary and more convenient, I will give reasons for my ruling at a later stage. At this moment I am called upon to decide whether a question should be allowed. I have listened to the arguments advanced and my ruling on this particular point is as follows - the question asked by Mr Bizos should be allowed. I am also of the opinion, and that is my ruling, that he should be allowed to refer to the statement referred to." (10) (20)

The next step was that counsel for the applicants moved for an adjournment of the inquest proceedings to enable them to take first respondent's ruling on review to the Supreme Court. Notwithstanding opposition, the first respondent adjourned the inquest proceedings and in due course the present proceedings were launched. In the notice of motion the first respondent was called upon to despatch the record of the inquest together with all statements, documents and information submitted to him in terms of Section 5 of the Act, to the Registrar of this Court. In a short affidavit the first respondent confirmed that he had given (30)

the ruling referred to, and stated:

> "Dit is my oorwoë mening dat 'n vraag van die aard en die antwoord daarop in die omstandighede van die geval van wesenlike belang by 'n ondersoek na die omstandighede en oorsaak van die sterfte is."

He also said that he would abide by the decision of the Court.

In a subsequent affidavit he stated that the deceased's affidavit had up to then not been included in the record of the inquest proceedings, but on further consideration he (10) came to the conclusion that the affidavit should form part thereof, and it was duly annexed. I should at once say that we think that it is very proper for him to have done so. In addition copies of all other documents submitted to the first respondent were annexed.

In the affidavits filed on behalf of third respondent and applicants the question was dealt with whether this application should be entertained before completion of the inquest proceedings. When this matter was called, we invited counsel to deal with that issue firstly, and full (20) argument was presented thereon. This judgment deals solely with that question.

It is well established that the Supreme Court will exercise its powers of review in relation to interlocutory rulings given in the course of proceedings before lower tribunals only in rare cases where grave injustice might otherwise result and which might not by other means be attained. This was stated in numerous decisions, of which the VAHLHAUS decision is one. In that case which is reported as VAHLHAUS v ADDITIONAL MAGISTRATE, JOHANNESBURG 1959 (3) (30)

SA 113 (A) at 119 H to 120 E, OGILVIE-THOMPSON, J.A. said the following:

"It is true that by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review and edict mandamus - against a decision by a magistrate's court given before conviction. (See ELLIS v VISSER & ANOTHER 1952 (2) SA 117 (W) and R v MARAIS 1959 (1) SA 918 where most of the decisions are collated.)

This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power, for each case must depend upon its own circumstances. The learned authors of GARDINER AND LANSDOWN, 6th Edition, Volume I, p. 750 state:

'While a superior court, having jurisdiction in review or appeal, will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in the court below, it certainly has the power to do so and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be obtained. In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress will by means of review or appeal be ordinarily available.'

In my judgment that statement correctly reflects the

position in relation to unconcluded criminal proceedings in a magistrate's court. I would merely add two observations. The first is that while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the superior court from the necessity of deciding whether or not a particular case is an appropriate one for intervention. Secondly, the prejudice inherent in an accused being obliged to proceed to trial and possible conviction in a magistrate's court before he is accorded an opportunity of testing in a superior court the correctness of the magistrate's decision overruling a preliminary and perhaps fundamental contention raised by the accused, does not per se necessarily justify the superior court in granting relief before conviction. (See too the observations of MURRAY, J. at p. 123 - 124 of ELLIS's case supra.)

As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

That principle applies not only to proceedings in courts of law but to other statutory tribunals as well. (C.f. WESSELS v GENERAL COURT MARTIAL AND ANOTHER 1954 (1) SA 220 E at 221 H; and also TUESDAY INDUSTRIES v CONDOR INDUSTRIES AND ANOTHER 1978 (4) SA 379 (T) at 382 E.)

The need for continuity of proceedings which were started in lower tribunals is mentioned in most of the cases as one of the reasons for the principle, as also the consideration that non constat that the officer presiding over a lower

tribunal may have given a wrong ruling on an interlocutory matter, he may nevertheless at the end of the day possibly not reach a conclusion adverse to the person concerned.

We were referred to the decision in TIMOL AND ANOTHER v MAGISTRATE OF JOHANNESBURG 1972 (2) SA 281 (T) where this court did intervene in medias res in an inquest. There does not appear to have been any objection on behalf of the respondent in that case similar to that with which we are presently concerned, but the nature and the consequences of the ruling reviewed was such that irreparable harm would plainly have resulted had the Court not intervened. What happened was that the inquest magistrate refused to allow interested parties access to any of the documents placed before him under Section 5 - so that no meaningful inquest could be conducted at all in those circumstances.

In all other cases where the Courts have intervened in the middle of proceedings, similar considerations applied.

I turn then to the question whether there has been proof of real harm resulting from the first respondent's ruling.

It seems to me that the applicants, in dealing with the prejudice which they consider they will sustain should this Court not intervene at this stage, have to a large extent laboured under a misapprehension regarding the precise nature and scope of the ruling given by the first respondent.

In applicants' heads of argument it is contended that the necessary implication of first respondent's ruling is that in principle he accepted the deceased's statement under Section 13(1) of the Act. Section 13(1) provides:

"Upon production by any person any document

purporting to be an affidavit made by any person in connection with any death or alleged death in respect of which an inquest is held, shall, at the discretion of the magistrate holding the inquest be admissible in proof of the facts stated therein."

Whether it can ever be contended that the deceased's affidavit purports, within the meaning of the sub-section, to be "an affidavit made by any person in connection with any death or alleged death in respect of which an inquest is held" need not presently be considered. What needs to be stressed is that the first respondent did not rule that the affidavit was received under Section 13(1). He did no more than to allow Mr Bizos to question Dr Kemp concerning the consistency of the injuries mentioned in the deceased's affidavit with the witness's own findings.

Mr Schabort who appeared for the applicants, in dealing with this aspect of the case, drew our attention to the fact that in meeting the objection raised before the first respondent, Mr Bizos inter alia relied on Section 13(1) and argued that the affidavit was receivable in terms thereof. It might be that that was the contention advanced, but the nature and scope of the ruling under consideration is not to be determined in the light of the argument which preceded it. And I think that the first respondent, according to the record of the proceedings, made it perfectly plain that he decided no more than that Mr Bizos's question is a proper one and that the deceased's affidavit had not at any stage yet been tendered in evidence. This view of the matter presents the answer, I think, to a great deal of the contentions of the applicants on the matter of prejudice, based

as they were on the assumption that the first respondent in effect admitted the deceased's affidavit, and by so doing received evidential material implicating some of the applicants and other persons and left them in the position where there was no possibility of cross-examining the deponent to the affidavit, and compelling them to testify in answer to the affidavit.

I should nevertheless, while on the last-mentioned point, deal with the contention of some of the applicants that if they have to testify in answer to the deceased's affidavit, they may have to divulge information concerning the methods of and techniques of the Security Police when interrogating detainees, and that that may be to the detriment of the State and the police. I assume that what is meant in this connection is that if those applicants have to testify and deal with the fact - as fact I believe it is - that the deceased did make a statement or statements while in detention, they may be called upon to account for the fact that he did so and to disclose what techniques were employed in persuading him to do so. It escapes me how this can be urged as a hardship of the sort that has to be established in casu. Apart from other considerations members of the Security Police have frequently (and that has been my experience in criminal trials) in the past been called upon to testify in cases where disputed confessions had to be considered and to give reasons why an arrested person was willing to confess.

It was also argued that if the deceased's affidavit were to be made public, it might reflect adversely on some of the applicants. Assuming that that might be so, the

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reality of the situation is that in consequence of the launching of these proceedings first respondent annexed the deceased's affidavit to the papers and in the result it in any event became public property. No order of this Court can reverse that position.

Mr Schabort contended that in any event even if the effect of first respondent's ruling is not that the deceased's affidavit is accepted, it was irregular for him to allow cross-examination to be conducted in relation to the deceased's affidavit, and that that was likely to cause serious, irreparable prejudice. While I should, for present purposes, assume in favour of the applicants that the statement would, if tendered, be inadmissible, it is necessary to set out why it is contended that it would be inadmissible. The contention is that the laws of evidence governing criminal trials is applicable to inquests. Reliance in this regard is placed on Section 8(2) of the Act, which provides:

> "Save as is otherwise provided in this Act, the laws governing criminal trials in magistrate's courts, shall mutatis mutandis apply to securing the attendance of witnesses at an inquest, the examination, the recording of evidence given by them, the payment of allowances to them and the production of documents and things."

Whether this sub-section has the effect contended for and whether it does not merely deal with procedural matters, leaving the magistrate with a discretion under Section 11(2) of the Act to allow such questions as he thinks reasonable and proper bearing in mind the findings he will have to

make under Section 16, is a matter on which I am not presently called to express an opinion. I have rather to address myself to the question whether if the first respondent irregularly allows cross-examination on an inadmissible affidavit, applicants will suffer grave and irreparable prejudice. I do not think so. All that will happen is that Dr Kemp may, on having the deceased's affidavit put to him, be placed in a position where he can deal more precisely with the suggestions which it seems will be made on behalf of the third respondent at the inquest, that the deceased was assaulted shortly before his death. And if that is prejudicial to the applicants, it is not the sort of prejudice that can found an application such as the present.

I do not think that by allowing the question under discussion the first respondent will in any manner be hindered from coming to a just decision as to whether any person is responsible for the death of the deceased. Nor do I think that the applicants will be deprived of the opportunity of putting their side of the matter fully and effectively.

It was pointed out on behalf of the applicants that there is no appeal from a decision of the first respondent. That appears to be so, but should, at the conclusion of the inquest proceedings, the applicants still think that the first respondent committed any irregularity, it will then still be open to them to bring an application for review. However, I do not think that there is any reason to interfere at this stage of the inquest proceedings.

Mr Bizos urged that we should direct the applicants, if unsuccessful, to pay the costs on the attorney and client scale. The basis of his claim was that the applicants

were warned even in argument before the first respondent that there was no likelihood that this Court would intervene *in medias res*, and he argued that they should have realised that the application had no prospect of success.

I am not persuaded, however, that applicants did not *bona fide* believe that they had an adequate prospect of success and costs will be on the party-party scale.

In the result the application is dismissed with costs, those costs to include the costs consequent on the employment of two counsel. (10)

GOLDSTONE, J.: I agree.

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AGGETT, Dr Neil, Inquest, 1982

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