A MANSON

M.254/70. AD1901 53.1

IN THE SUPREME COURT OF SOUTH AFRICA

(Transvaal Provincial Division.)

20th January, 1970.

In the matter between -

IRIS NIKIWE XABA MADIKIZELA AND FOURTEEN OTHERS	First Applicant
and THE MINISTER OF JUSTICE	First Respondent
and THE MINISTER OF POLICE	Second Respondent

BEFORE: MR. JUSTICE THERON.

ON BEHALF OF APPLICANTS: ADV. S.W. KENTRIDGE, S.C., ADV. G. BIZOS and ADV. D. SOGGOT, instructed by MR. JOEL CARLSON, JOHANNESBURG.

ON BEHALF OF RESPONDENTS: ADV. D.J. CURLEWIS, S.C., and ADV. A.A. SCHREIBER, instructed by STATE ATTORNEY, PRETORIA.

CONTRACTORS: LUBBE RECORDINGS.

MR. KENTRIDGE ADDRESSES THE COURT:

My Lord, this is an application made as a matter of urgency for certain relief for the benefit of certain persons who are presently detained by the respondents in terms of the Terrorism Act 1967.

Basically the relief sought, apart from certain procedural relief, is an interdict restraining the servants of the respondents from assaulting these detained persons in making them stand for prolonged periods or performing any act calculated to induce fear or prolonged discomfort or any act calculated to degrade them.

As this matter is brought as an application of urgency and as the respondents have had no time to file any replying affidavits, obviously there is no relief which I can get at the moment other than interim relief. I understand from my Learned Friend that apart from any legal argument which he might put up, his clients would wish to file affidavits, so that all I wish to address Your Lordship on now is the question of the grant of an interim interdict on the balance of convenience and on the evidence before the Court. (Court intervenes.)

BY THE COURT: But how can there be a balance of convenience if I haven't heard the other side?

MR. KENTRIDGE: Well My Lord, that is the point. Even if Your Lordship assumes - and Your Lordship will assume - that these affidavits and allegations will be denied - and I don't know whether they will be or not - but if my Learned Friend tells Your Lordship that these allegations will be denied, then nonetheless Your Lordship on the balance of convenience would still on the authorities to which I shall refer Your Lordship, I submit, grant interim relief.

My Lord, if I may explain the other prayers in the

Notice/...

Notice of Motion. These men and women, as I have indicated, are detained under Section 6 of the Terrorism Act No. 83 of 1967. Under this section they may be detained for interrogation, and Sub-section 6 of Section 6 of the Act says that -

> "No person other than the Minister or an officer in the service of the State, acting in the performance of his official duty, shall have access to any detainee."

Now, what this means of course, is that no one of the applicants nor the applicants' attorney may approach these people who are under detention and obtain sworn affidavits. However, in a similar case which was heard in the Appellate Division it was suggested that although a person held under detention in communicado may not be brought to Court to give evidence, and although his attorney may not get an affidavit from him, that what the Court might well do is order a Magistrate or other suitable person to act as a Commissioner of the Court and to take an affidavit. Now, in due course that question may arise before Your Lordship, but at this stage what I wish to indicate to Your Lordship is simply that this is a proper case for interim relief even if Your Lordship takes into account that the allegations made here will be denied.

The first point which I want to draw to Your Lordship's attention is the nature of the allegations made. The persons who are concerned here were all held in detention under the Terrorism Act for several months in 1969. At the end of 1969 they were charged under the Suppression of Communism Act before His Lordship Mr. Justice Bekker. On the 16th February of this year the charges against them were withdrawn, they were therefore, found not guilty and discharged. But they

were/...

were all at once re-arrested and re-detained under the Terrorism Act.

Now, while they were awaiting trial and therefore, no longer in communicado, most of them made statements in their own handwriting to their attorney, Mr. Carlson, in which they stated that over a period they had been either assaulted directly in order to make them give statements, or alternatively they had been made to stand for protracted periods - to stand on a pile of bricks for example - and threatened with dire consequences if they fell off the pile of bricks, in order to induce them to make statements. These statements which are of course, not sworn, are all before Your Lordship; they are supported also by references to the record of the case before His Lordship Mr. Justice Bekker, in which the State witnesses whose names appear on page 16 of the record - and this is the record of the case before this Honourable Court - all these persons who were State witnesses in the course of the trial made allegations that they too were assaulted during interrogation by members of the Security Branch and were made to stand for protracted periods, to stand on bricks, and assaulted in other ways in order to make them give a statement.

The significance of this is the following: All those persons were State witnesses; they were brought to Court from detention under the Terrorism Act, and at the time when they gave their evidence they had not been able to communicate with anyone other than the police and the Prosecutor. In other words, they had had no contact with the defence attorneys or the accused themselves. They were held in solitary confinement and had not been able to communicate with anyone, and they also made these allegations.

Now, these allegations which refer directly to the

twenty-two persons who have been detained are not sworn - the statements which have been filed with Your Lordship are unsworn statements and in this regard I refer Your Lordship to the principle that in a matter of urgency the Court will grant interim relief on what may be strictly speaking hearsay evidence. In the decision of the full bench of the Cape Provincial Division in Mall Cape (Proprietary) Limited v. Merino Koöperasie Beperk, 1957, Volume 2, South African Law Reports, page 347, the full bench there said, and I read from the headnote - 10

> "The hearsay rule is sometimes relaxed in proceedings instituted by way of Notice of Motion, e.g. in matters of urgency statements of information or belief may be made provided the deponent's source of information or ground for belief is disclosed."

Well, the source of information is of course, these unsworn but signed statements.

Then this was applied in a very similar matter which came before the Cape Provincial Division a few years ago - 20 the case of Gosschalk v. Rossouw, 1966, Volume 2 of the South African Law Reports, page 476 - a judgment of Mr. Justice Corbett and Mr. Justice Diemont. Now, what had happened there was that Gosschalk was a person who was detained in terms of Section 215 bis of the Criminal Procedure Act as amended; he was being interrogated; he had not been able to see a lawyer but his wife had seen him and she made a statement of what he had said to her, and she made an urgent application for a similar interdict based on his allegations of ill-treatment and as appears from page 477 of the record, Mr. Justice 30 Van Zijl issued a rule nisi operating as an interim interdict restraining the police in the interim from ill-treating the

applicant's/...

applicant's husband.

Now, this case is also important in the present context for these reasons: Here was this hearsay statement; it was supported only as in this case by the statement of other persons who had been detained saying that they had had similar treatment. Their allegations were strenuously denied in affidavits filed by members of the police. The Court found that this matter could not be finally decided until oral evidence had been heard, which could only naturally be heard when Gosschalk had been released from detention. But the Court, in dealing with the question of interim relief, at page 493 said this - the Court said -

> "It is clear that upon the allegations made by the applicant a good case is made out for the relief set forth in paragraph 1(b) of the rule, that is for an interdict..."

and the Learned Judge then dealt with the balance of convenience and he said -

> "Here I think the balance is clearly in the applicant's favour. If the respondent's denial of any mal-treatment or the use of unlawful pressures in the past or of the intention to resort to such action in the future is correct, then it is clear that respondent will suffer no inconvenience whatever by the grant of interim relief. He cannot be inconvenienced by being temporarily forbidden to do what he never has done and does not intend to do. On the other hand, if applicant's allegations are correct and the apprehensions as to the future treatment of the applicant are well founded, then the refusal of interim

relief/...

relief might well cause applicant considerable inconvenience and possibly irreparable harm."

Now, I was going to say to Your Lordship that this had been followed in an unreported case in the Transvaal, but that is not entirely correct. The procedure laid down in Gosschalk's case of granting interim relief on the balance of convenience without the Court making any findings on where the truth lay was followed by His Lordship Mr. Justice Bekker in this Court but it was done by consent. The order that was there made by consent is however, in my submission a very proper order in the circumstances. That case was the case of Gabriel Mbindi v. The Commissioner of Police, it was Case of Application No. M.1669/1967 in this Court, and on the 19th December, 1967, it came before His Lordship in very similar circumstances to this, as a matter of urgency, the respondent had had no time to file affidavits denying the hearsay allegations made concerning Mbindi but by consent the following order was made - (a) for a postponement, (b) that pending the hearing of the application the respondents without making any admissions affecting the merits of the application consent to an order in terms of prayer (c) of the Notice of Motion. That is for an interim interdict.

My Lord, here the respondents I am told, are not prepared to consent to an interim order but nonetheless I submit that it is a proper order to make.

There is another authority to which I should like to refer Your Lordship before going to the facts, and that is the case in the Appellate Division of Schirmbrocher v. Clint, N.O., 1965, Volume 4, South African Law Reports, page 606 in the Appellate Division. There a person was detained under Section 17 of Act 37 of 1963, which was very similar to the provisions of Section 6 of the Terrorism Act

in that/...

in that under this section a detained person was kept in communicado and no one had any right to have access to him. What happened there was that an application was made simply under Rule 9 to bring this man to Court to give oral evidence of ill-treatment while under detention. The Appellate Division by a majority of 3 to 2 held that he could not be brought to Court under Rule 9 because that would mean that people were having access to him other than officials. But what Mr. Justice Trollip said in a judgment concurred in by the Learned Chief Justice was this, and he said it at page 627 - he said that -

> "Although one can't use Rule 9, there was other relief which could be given. The Court might have ordered the detainee's evidence to be taken on affidavit if it had been asked, or on commission or by interrogatories, if necessary by the Magistrate who is entitled tovisit him, and if there was a conflict between his and the respondent's testimony, the Court might have granted the applicant appropriate interim relief pending the hearing of the matter after the detainee had been released from detention, which as Botha, J.A. points out, is only intended to be temporary. In the last resort the Court might even have been induced to grant such interim relief on hearsay evidence. The Court however, was not in this case asked to consider those or other similar steps."

Now My Lord, here we are asking for that relief, relying on Gosschalk's case, and what I should like to do now is to indicate to Your Lordship simply that if the allegations made here are true, then there would be a strong balance of

convenience/...

convenience in favour of granting the interdict.

If I can ask Your Lordship to refer to page 7 of the papers - this is an affidavit by the first applicant who is the sister of one N.W. Mandela, who is one of the persons detained, and she says that her sister was arrested, kept in solitary confinement until she was brought to Court, describes what happened till the trial took place, and then on page 8, in paragraph 6, describes the evidence of witnesses of the treatment meted out to them at police head-quarters. She says, this evidence described how day after day and night after night without sleep or rest they were made to stand and were harassed and threatened, and then she says -

"My sister advised me ...."

that is of course, while she was awaiting trial -

"... that she and her then co-accused also advised Attorney Carlson that a similar un-endurable scheme of enforced standing upon bricks was applied to the detainees and that some suffered grievous assaults when they fell off the bricks or ventured to step down."

And she says in paragraph 8 -

"They have again been detained for further investigations so they are again at the mercy of the interrogators and will again be interrogated in the manner described in their statements to the attorney..."

and she says her apprehensions have been strengthened by her belief that the cruelty meted out to detainees constitutes an integral part of an interrogational method adopted by certain members of the Security Police under the direction of Major T.J. Swanepoel.

And then she states that it is common knowledge that a

number of people have died while under detention in terms of this Act and she says that she ... (Court intervenes.)

BY THE COURT: What is the relevance of that?

MR. KENTRIDGE: Well My Lord, it is a question of the apprehension of the consequences of ill-treatment...

BY THE COURT: But didn't they die of natural causes? I don't know.

MR. KENTRIDGE: They may have, yes. They may have committed suicide.

BY THE COURT: Yes, but now, how is it relevant to the allegations made by her in regard to the present detainees?

MR. KENTRIDGE: Well My Lord, she is explaining her fear. But whether it is a question of death or merely ill-treatment, the point is in paragraph 9 she says there are strong grounds for the belief that the detainees are now in peril and that a renewed subjection to harassment and suffering may have certain effects on them.

The next affidavit by Mr. Carlson, after setting out that he is the attorney, on page 11 in paragraph 5, he speaks of the State witnesses who gave evidence under oath of the treatment meted out to them by members of the Security Police, and as appears from the portions of the record of that case before Mr. Justice Bekker, these State witnesses described how they and others were compelled by threats of serious harm to stand for inordinately long periods of time until they had become exhausted, and special reference is made to the evidence of Golding where he describes the manner in which he was assaulted and thus compelled to make a statement. I repeat that these allegations were made by State witnesses to whom no one but the police had had any access whatsoever.

Then Mr. Carlson says in paragraph 6 that he requested his clients each to write out a statement saying whether or not

they had made a statement to the Security Police during their detention, and if so the circumstances under which the statements were made. He says in each case the accused wrote his number or name on the top of the written statements made by him and in some cases the statements were signed, they were not taken on oath as it was not at that stage considered necessary. Then he goes on to describe how the charge after all those months was withdrawn but they were immediately re-detained and he indicates that, in paragraph 11 on page 13, that the relatives and friends who had come to attend the trial showed concern for the safety and fate of the accused and told him that they had been informed by these clients of the manner in which they had been ill-treated and feared that they would be similarly ill-treated now that they were re-detained.

Now, it is not my intention to read to Your Lordship everyone of these statements, but one can read them almost at random. Your Lordship will see that they are in the words of the persons themselves - I think a fairly typical statement is that on page 72 by Rita Ndzanga, in which she explains how she was taken to Compol, and there is a detailed account of her interrogation. And if Your Lordship looks at page 74, there are allegations of assault and kicking, and then at the bottom of page 74 she says -

> "Major Swanepoel told me if I do not want to make a statement, I will stand on my feet until I decide to speak."

Then on page 75 -

> "I was standing on my feet all the time, the man who slapped me was in this team. The interrogation continued, I was stiff and could not walk properly."

And then if Your Lordship goes on to page 77, she says how she was hit and began to scream, and then in the second paragraph -

> "The Security Police produced three bricks and told me to take off my shoes and stand on the bricks. I refused to stand on the bricks...."

and she indicates what happened. She was pulled onto the bricks, she fell down and hit a gas pipe, her hair was pulled and eventually of course, she made a statement.

My Lord, this material is really so revolting that it would be unpleasant to read it out time and time again. But everyone of these statements given in the words of those persons themselves makes similar allegations.

If I can refer to the statements made before Mr. Justice Bekker by the State witnesses, they too speak of assault by the same team of interrogators, they speak of having to stand for protracted periods and I should add that at their trial in re-examination by the State, no attempt was made to have them declared hostile witnesses or to challenge anything which they had said in this regard. Consequently, if one goes back to the test stated by Mr. Justice Corbett and Mr. Justice Diemont in Gosschalk v. Rossouw, it is quite clear that even if one accepts that all this will be denied, on these allegations a good case is made out for interim relief - the balance of convenience must be in the favour of the applicants because if this has not been happening, then the respondents can suffer no inconvenience if they are restrained from doing what they are not entitled to do.

My Lord, I should submit also that the judgment of Mr. Justice Corbett is in accordance with the general practice with regard to interim relief as laid down by

Mr. Justice/...

Mr. Justice Clayden in Webster v. Mitchell, 1948(1), South African Law Reports, page 1186, in which the test was laid down that for a temporary interdict the applicant's right need not be shown by a balance of probabilities - it is sufficient if such right is prima facie established, though open to some doubt. The proper manner is to take the facts as set out by the applicant together with any facts set out by the respondent the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondents should then be considered and if serious doubt is thrown upon the case of the applicant he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted.

Now here obviously at this stage Your Lordship cannot hold that there is a clear right but there is a clear balance of convenience.

Further I should like to refer Your Lordship to an unreported order made by Your Lordship in the case of Monagotla v.... (Court intervenes.)

BY THE COURT: That was also done by consent.

MR. KENTRIDGE: Was it done by consent?

BY THE COURT: Yes. Well, by agreement. The parties agreed that an interim interdict should be ...

MR. KENTRIDGE: Yes. Now there again My Lord, obviously in that case the police were going to deny strenuously as they did, that this assault had taken place. But I would submit that the authorities in that case, as in the Mbindi case, very

properly/...

properly recognised that as in Gosschalk's case, there is a clear balance of convenience in favour of an interim interdict.

The affidavits show that these statements were taken from a large number of the twenty-two accused; similar statements were made as I have said, by the State witnesses, and consequently I submit that if that did happen, there would then be a reasonable ground for apprehending that it would happen again. And for these reasons at this stage, I would ask Your Lordship, while making it clear that Your Lordship did not have the full facts before the Court, I would ask Your Lordship to grant interim relief in terms of the prayers (e) and (f) on page 3 of the Notice of Motion. That is directing the respondents to take adequate steps to protect these people and interdicting any of their servants from assaulting them or otherwise ill-treating them.

My Lord, I haven't quoted any authority on this point but there is very clear authority and that is to the effect that even though these people can be detained for interrogation, there is no right on the part of the police or anyone else to ill-treat them either by assaulting them or subjecting them to grim methods. If any authority is wanted for that, it is the case of ... (Court intervenes.)

BY THE COURT: I don't think the State will contend that they are entitled to ill-treat detainees.

MR. KENTRIDGE: No, I don't think so, My Lord.

MR. CURLEWIS ADDRESSES THE COURT:

My Lord, I should like to refer to the two cases that have been mentioned, both of which are unreported, presumably to shorten proceedings. The respondents agreed to consent to them by agreement. They are not prepared to do that any longer at all. The issues are, I understand my instructions are, completely misused, misquoted overseas and the impression

is/...

is created that the police in effect are agreeing, consenting to the order because they are tacitly agreeing to the assault. It is for that reason that we most strenuously oppose any interim relief whatsoever.

Now My Lord, as far as the urgency is concerned, we say there is no urgency, there is no certificate of Counsel here.. (Court intervenes.)

BY THE COURT: There is.

MR. CURLEWIS: Well, I haven't got one, perhaps my papers aren't ...

BY THE COURT: Apparently it is so urgent that you weren't given one.

MR. CURLEWIS: I wasn't. And we say that there is no reason why this matter should not take its proper course.

My Lord, it is one thing to come along as apparently was done in the Cape case, where at the first opportunity the wife of a detainee came to Court on hearing of assaults on her husband - immediately came to Court, complained. There were affidavits on both sides which enables the Judge at any rate to see whether there was anything to be said one way or the other. At least he had both cases before him and there he adopted the question of balance of convenience. It is our submission that those facts are far from the present case.

In the present case all the very quick glance I have been able to give to these unsworn statements such as they are, which were taken apparently by the attorney during the course of the trial, they all refer to assaults or alleged assaults in May and June of last year. It is surprising, if there was any foundation in those allegations last year, why no application was then made for an interdict restraining the detainees from being assaulted. But they all refer - and I say all, I am speaking now very generally - I have had a look

at/...

at page 32, page 33, 49, 52, 66 and 68. I think though, in a quick glance, they all refer to the time when they were arrested and the assaults that took place in May and June, those alleged assaults. There is nothing in those statements to suggest - in effect we can assume the assaults, if they ever took place, certainly never continued. There is nothing on these papers to suggest that there is any apprehension that assaults now will start. The blithe way in which it is set out at page 8, paragraph 8 -

> "As a result of their re-arrest in terms of the Terrorism Act they are again at the mercy of their interrogators...."

A highly emotionally charged statement which seems to be completely out of place. But there is nothing to suggest that they are going to be re-interrogated which it is apparently alleged that these interrogations bring with it assaults - nothing at all. No suggestion was made at the trial that they were being interrogated then and there is nothing before you from which you would even assume or infer that they are going to be interrogated. And again you will find at page 15 Mr. Carlson saying -

> "In the light of the aforegoing, that is that General Joubert said that further charges are being investigated, there is a grave likelihood that the detainees are in imminent danger of having to submit to a systematic course or process of prolonged unlawful interrogation."

With the greatest respect, there is absolutely no foundation for such a statement. They have - if we accept for a moment as a matter or argument - they have been interrogated in May and June of last year. I certainly don't accept that they were assaulted - that hardly goes without saying, it goes

without saying. But if they were interrogated then, statements were given and that was the end of it. Nothing further happened thereafter, and I say with respect, that to come with a mass of papers, all of which is not on affidavit, is hearsay, and ask for interim relief without showing really that as of now or during the course of the trial before His Lordship Mr. Justice Bekker there were reasons for suspecting that they would be subject to assaults, it would be a travesty of justice to issue a rule nisi, an interim interdict basing it upon the principles of convenience. As a matter of fact, it is not only the fact that we have had no opportunity whatsoever even to consider the allegations, but Your Lordship will ask yourself what specific allegations are made. None that they are being assaulted now, none that they were being assaulted subsequent to May/June/July of 1969.

My Learned Friend says that State witnesses gave evidence. I fail to see the relevance. We have had cases, many in these Courts, where witnesses have said over the years that they had been assaulted - those matters have been investigated, some have been found true and others untrue. But I fail to see how the fact that a State witness or State witnesses say that they have been assaulted, we don't know when, what time that allegation is meant to refer to, how that had any bearing upon the detainees who I presume it is on behalf of them that this application is made, I fail to see.

You will observe My Lord, that if you regard the two affidavits - there are only two really which are before you - "My sister..." she said this at page 8, Madikizela. It is curious here that she doesn't say that her sister told her that she, her sister, was assaulted - I notice that. She uses very vague terms. But all this I say, if I am not overstating it, and my Learned Friend can correct me, he has the papers,

all/...

all refers to the time some time in May and June last year. (Court intervenes.)

BY THE COURT: At page 8, paragraph 6, there is an allegation of assault, but it doesn't seem to refer to her sister.

MR. CURLEWIS: No, it doesn't. No, this is State witnesses. It just refers to detainees. I must confess it is in the most vague terms. It doesn't say that she was one of the persons assaulted.

But the point is My Lord, as I say, if you look at the statements you will find that whatever is alleged to have occurred, reprehensible certainly, that it would be if it were found to be true, occurred in May/June of last year. And you are now asked My Lord, that simply because they have been re-arrested that there is a genuine fear or real fear that this will happen. One asks oneself on probabilities if in fact they were assaulted, if in fact all that could be got out of them was got out of them in the way of statements, if any of that were true. As a matter of probability what was the purpose of assaulting them again?

MR. KENTRIDGE: What would be the purpose of arresting them again?

MR. CURLEWIS: My Lord, my Learned Friend says, what is the purpose of arresting them again. Presumably to charge them with different offences, I don't know. I have no possible means of knowing at this stage why they were arrested again - it is not for me to enquire nor for my Learned Friend to enquire. But certainly what we are concerned with here is whether there is a real likelihood or a possibility... (Court intervenes.)

BY THE COURT: There is no allegation of an unlawful arrest at the present stage.

MR. CURLEWIS: No.

BY THE COURT: Well, I am only concerned with this fear of injury.

MR. CURLEWIS: Yes, naturally, as my Learned Friend has said, that is the only thing that you really need concern yourself with at the moment, My Lord. And I must say with great respect, it is a great injustice to the police here to come within a space of a few minutes to get interim relief on a balance of convenience... (Court intervenes.)

BY THE COURT: Well, assuming the police come back and say it is true that in 1969 some members of our force did do this sort of thing, we have investigated it, found out and it won't happen again and it hasn't happened again?

MR. CURLEWIS: Well they certainly make no allegation that it happened subsequently.

I must say My Lord, that no one doubts for a moment that the accused who are in detention should be treated properly, should not be assaulted and that authority is required for that obviously. But to throw a mass of hearsay, third hand evidence, referring to a period of about nine months ago, and to ask on a balance of convenience that it should be said that there is such a possibility without even the police being given an opportunity of putting anything before Your Lordship, it would be in my submission most unfair to the police and the.., well, the respondents naturally, the Minister of Justice and the Minister of Police.

As I say, I find it difficult to believe why, if these assaults had taken place, there was no application last year, no application during the trial for His Lordship Mr. Justice Bekker to enquire into these, no enquiry into them. If there were no allegations then made that they were being assaulted during the trial, if there were any assaults they have ceased. I am certain that had there been allegations of assault

continuing/...

continuing after May, June or July, whenever it was, of last year, continuing up to the trial and thereafter, certain of those matters would have been placed before the Judge. They were after all then still in detention. Nothing of that was done. We must assume therefore, in fact that they ceased when I say they did.

And My Lord, in regard to the question of hearsay evidence, it is perfectly true in matters of urgency the Court does accept in certain circumstances evidence third hand as it were, hearsay, as long as the source of information is given. But that has no application here because the reference itself is to hearsay, to unsworn statements of witnesses, all of which, it is no use, one must bear in mind, were accused and certainly would have an axe to grind - there is no question about it. So what value can really be attached to such statements as those, My Lord? And again one has to ask oneself, if there were serious allegations of this nature, certainly they could have brought action and certainly then the evidence, the statements would have been sworn to.

It is our submission that whatever, as I have said in the Cape case, happened, there is insufficient before Your Lordship here upon which you can find as you must find, that there is a well grounded apprehension of immediate harm - I think that is the phrase used in some cases - and that this matter should be simply, in my submission, struck from the roll with costs and they should be ordered to take the normal course and procedure to debate these allegations. It is clear after all - I understand from the evidence that was given and from the Act, that these detainees are visited by Magistrates every week or two, and it is inconceivable in our submission that had there been now - I am not talking about in May - any apprehension, this would have been put forward and

seen/...

seen by the Magistrates.

BY THE COURT: Yes, Mr. Kentridge?

MR. KENTRIDGE ADDRESSES THE COURT:

My Lord, with regard to the dates of the assault, my Learned Friend is right on the dates. But with great respect, he has missed the significance of it. These people were detained under the Terrorism Act in May, 1969. My Learned Friend is absolutely right in saying that the assaults which they allege took place shortly after their detention and that thereafter, right until they came to trial in December, 1969, the assaults were not repeated. But the reason is this, what they all say is this, that when they were detained they were then assaulted in order to induce them to make a statement. By reason of the assault they all made statements, and then of course, the assaults ceased.

Now, that is exactly the apprehension here. They have now been detained again under Section 6, which provides specifically for detention for interrogation. In other words, they are now going to be interrogated again.

My Lord, no application could be made in May, 1969 ...

(Court intervenes.)

BY THE COURT: But where do I find the indication that they are being detained under Section 6? I understood the affidavit of Mr. Carlson or the newspaper report is that they are being detained for investigation ...

MR. KENTRIDGE: Page 13, My Lord.

My Lord, if they weren't detained under the Terrorism Act of course, the attorney could go and see them, but he can't. Paragraph 9 on page 13.

BY THE COURT: Yes.

MR. KENTRIDGE: The point is that if they weren't detained under the Terrorism Act, of course they could come to Court,

but/...

but they can't come to Court. So they are detained for further interrogation.

Now, with regard to the timetable, they were detained last May; no one could see them until December when they were put on trial..., I am sorry, October, 1969, when they were put on trial. At that stage they were simply lodged in prison ; they had made statements; there was no question of being assaulted again by the Security Branch; they weren't in the hands of the Security Branch. It is not correct that this matter was not raised before Mr. Justice Bekker. When.
(Court intervenes.)

BY THE COURT: The point made by Mr. Curlewis was that no application was made for an interdict. The matter was raised before him because the evidence discloses it.

MR. KENTRIDGE: Yes, that is right.

My Lord, no application was made for an interdict because there was no point in an interdict - they were then on trial, they were seeing their own attorney and Counsel, they weren't, if I may use this emotional phrase referred to by my Learned Friend, they weren't at the mercy of the Security Police - they went to Court every day, they saw their own attorneys. Now they are in exactly the same position that they were in in May, 1969.

If there is any point in bringing an application it must surely be brought now as a matter of urgency. If they are assaulted and they make a statement, well then, that will be the end of it. What we want to stop is that we want to stop them being assaulted in order to make another statement.

My Lord, my Learned Friend says they don't allege they are being assaulted now or since May, 1969, but how can they? We can't get to them to get an affidavit. If they are being assaulted now or if they are going to be assaulted next

Monday,/...

Monday, then an order of Your Lordship may stop it. If this matter is left to be dealt with in the ordinary way, it will be quite pointless.

Now, my Learned Friend said that in this case he definitely was not going to.., he has had instructions to consent to nothing, and my Learned Friend has carried out his instructions and nothing I have to say is any criticism of him at all. But what he said was that the reasonwhy there was no consent here, was that in Mbindi's case people overseas misused the fact that an interim interdict had been consented to. My Lord, I would have said, I would have submitted that what had been said or thought overseas was irrelevant. If my Learned Friend is correct and it is relevant, and what people think overseas is important, then I would submit that it is a very much better thing if the Court steps in immediately as it did in Gosschalk's case, rather than have a situation where the respondents take the attitude that this isn't a matter of urgency, it is merely hearsay evidence, that even if it has been done in the past it may not be done again in the future, and that one should give three weeks' notice of it. One wonders which procedure would be better for the country, if one has any regard to what people think overseas.

My Lord, my Learned Friend says that Gosschalk's case was different, that an order wasn't given there until all the affidavits were before the Court. I repeat again, as appears from page 477 of the report, that -

> On an urgent ex parte application to the Court, Mr. Justice Van Zijl issued a rule nisi and an interim interdict.

Now, my Learned Friend says this might have been done but who is to say that it is going to be done again. My Lord, if what they say is true, it means not only that there were

individual assaults, but that there were systematic assaults as a procedure for extracting statements from these detainees. My Learned Friend says what happened to other people is not relevant. The Appellate Division in the case of S. v. Letsoko, 1964, Volume 4 of the South African Law Reports, page 768, in a judgment which was quoted and applied by Mr. Justice Corbett in Gosschalk's case, 1966, Volume 2, at page 483, held that -

> "If there is evidence which on the face of it suggests a concerted modus operandi on the part of the police Sabotage Squad and investigational system which included assaults, then evidence of assaults on other persons is relevant and admissible ."

My Lord, while I respect my Learned Friend's attitude in following his instructions, I do submit that if the applicants do not get this relief now, there is no relief which they can get. Under the Police Act actions for damages prescribe in six months and in any event, no one wants an action for damages. All they ask is that they should not be treated again as they say they were treated previously, and I again submit that as Mr. Justice Corbett said, the obvious thing is to grant interim relief because then there can be no inconvenience to the respondents and on the other hand, if the applicants turn out to be right, these persons could suffer irreparable harm.

What I submit further is, however people may use it elsewhere and one hopes it won't be misused, it is perfectly possible for Your Lordship to do as Mr. Justice Bekker did, and as no doubt Mr. Justice Van Zijl did in the Cape, to grant the interim relief, making it clear that there is no adverse finding of fact and that this is granted as a matter of convenience./...

convenience.

My Lord, with regard to the statements made by the State witnesses, they are of record in this Honourable Court, and we did not want to burden the papers further with putting in the volumes, but I do have the extracts here ... (Court intervenes.)

BY THE COURT: You may place them on the table.

MR. KENTRIDGE: May I place them on the table?

In Schirmbrocher's case in the Appellate Division, in Gosschalk's case and the other cases, and in Rossouw and Sacks, it has been made clear that a person who alleges that he is assaulted and produces at least prima facie evidence of it, is not without a remedy, and the only remedy I submit at this stage, can be this interim relief. And I do submit that if this is not granted it would mean in effect that persons in this situation are helpless, they are at the mercy of their interrogators because if this application on this evidence does not qualify for interim relief, it is impossible to conceive of any circumstances in which interim relief could be granted. The evidence is certainly much stronger than it was in Gosschalk's case, and I do submit that if one is going to say that these people cannot get even interim relief unless they produce proper affidavits and adhere to the rules of Court, then the respondents are saying they have no rights in a Court of law, because no one is ...

MR. CURLEWIS OBJECTS: This is ridiculous. I must object to these comments made about the respondents. We don't take that attitude. You know that, My Lord. It is ridiculous for my Learned Friend to make that sort of comment.

MR. KENTRIDGE: That is what it amounts to, My Lord. If these people on these papers can't get interim relief.. (Court intervenes.)

BY THE/...

BY THE COURT: No but Mr. Kentridge, Mr. Curlewis' first submission was that the matter isn't of such urgency that the ordinary course shouldn't be followed.

MR. KENTRIDGE: Yes well, that's exactly it.

My Lord, consider the situation in May, 1969. Supposing in May, 1969, someone had been able to come to Court and say, I have got hearsay evidence that these people are being assaulted and the respondents' attitude is, well this isn't a matter of urgency, you must give us three weeks' notice...

BY THE COURT: No, but Mr. Curlewis' submission is, the situation is no longer as in May, 1969. There is no allegation of an assault actually committed - it is a fear of an assault.

MR. KENTRIDGE: Exactly, and that is why one needs an interdict. And what gives rise to the fear of an assault? The fact that last time they were detained for interrogation, they were assaulted in order to have statements taken. Now they are detained by exactly the same people for exactly the same purposes and if that doesn't give rise to a reasonable apprehension, it is difficult to think of anything which does give rise to such an apprehension. And therefore, My Lord, I ask for the interim relief in terms of the prayer as I have indicated.

BY THE COURT: I will give my ruling in this matter at ten o'clock on Monday morning.

COURT ADJOURNS.

CERTIFICATE:

I, the undersigned, hereby certify that the foregoing is a true and exact transcript of the original arguments recorded by means of a mechanical recording device in the matter between:

IRIS NIKIWE XABA MADIKIZELA AND FOURTEEN OTHERS	First Applicant
and	
THE MINISTER OF JUSTICE	First Respondent
and	
THE MINISTER OF POLICE	Second Respondent

TRANSCRIBER.

LUBBE RECORDINGS.

M.254/70.

IN THE SUPREME COURT OF SOUTH AFRICA

(Transvaal Provincial Division.)

26th February, 1970.

In the matter between -

IRIS NIKIWE XABA MADIKIZELA AND FOURTEEN OTHERS		First Applicant
and	THE MINISTER OF JUSTICE	First Respondent
and	THE MINISTER OF POLICE	Second Respondent

BEFORE: MR. JUSTICE THERON.

ON BEHALF OF APPLICANTS: ADV. G. BIZOS, instructed by MR. JOEL CARLSON, JOHANNESBURG.

ON BEHALF OF RESPONDENTS: ADV. D.J. CURLEWIS, S.C., and ADV. A.A. SCHREIBER, instructed by STATE ATTORNEY, PRETORIA.

CONTRACTORS: LUBBE RECORDINGS.

MR. BIZOS ADDRESSES THE COURT:

Your Lordship will recall that this application for leave to appeal stood down in order to enable Counsel to interview His Lordship the Judge President to ascertain whether an early date could be fixed for the hearing of the appeal. I am informed that no satisfactory arrangements could be made for the hearing of an appeal on an early date, and it would therefore, be ..., no useful purpose would be served in persisting in the application for leave to appeal.

There is however, just one other matter. I am mindful of the fact that Your Lordship has already made an order in the matter as to the manner in which the application is to be dealt with. But in my submission, what I am about to ask Your Lordship for is merely to supplement the order already made, and that in this respect, My Lord.

Firstly, to recommend to the Registrar to find the earliest possible date for the hearing of the application. Secondly, Your Lordship having granted the applicants leave to supplement, that they be ordered to supplement their papers by not later than four o'clock on Monday, and that the respondents be ordered to answer by not later than four o'clock on the following Monday, that is March the 9th, and that the applicants themselves be put on terms that any reply that there may be by not later than Thursday, the 12th of March - that is three days later.

In my submission Your Lordship has the power to make the supplementary orders. I do not want to address Your Lordship on the question of urgency or the importance of the matter again, other than to submit that there are apprehensions on the part of the applicants and that there can be no possible prejudice to the respondents if the course which I have suggested for Your Lordship's consideration is

followed./...

followed.

MR. CURLEWIS ADDRESSES THE COURT:

My Lord, I am sorry I was not able to introduce myself earlier as appearing for the respondents.

I did not know when I came here exactly what the purpose was of bringing Your Lordship to Court, except that I postulated that it was for the purpose of leave to appeal, and I would ask Your Lordship formally to dismiss that leave to appeal with costs.

Insofar as these ancillaries are concerned, it seems to me with respect, that Your Lordship need not be troubled with them. The Registrar will no doubt, upon the proper approach being made, find a date which will be convenient and suitable, in the light of all the circumstances of the case, and other relevant matters. It does not require Your Lordship to make any order. (Court intervenes.)

BY THE COURT: No, but normally speaking, in terms of the rule, a certain period of time must be allowed to the respondent.

MR. CURLEWIS: Yes, I am coming to the second point now. It is just on the aspect of recommending to the Registrar.

The other aspect is this. The applicant has asked that he himself be put on terms in regard to filing the supplementary affidavits. We have nothing to do with that and it doesn't seem to me that that is of any bearing at all. If the applicant wants to ask Your Lordship to put him on terms he can do so.

My Lord, I have had the opportunity of obtaining from the Registrar the order that you made and an order after a considered judgment, and I understand the order was that the usual forms of service must be complied with. Consequently it is not proper nor competent for Your Lordship at this stage

to/...

to vary that order. It does not fall within Rule 42 which deals with the variation of decisions or orders as Your Lordship is aware, and an attempt is made to bring it under that.

My Lord, it seems to me with great respect, that Your Lordship having considered the matter and having given a judgment on the matter and given an order, that the usual forms must be complied with, that order stands. And let me mention one matter of some significance. It would appear that the applicants and their legal advisers claim some sort of monopoly in right and justice. It is very clear that I, representing the respondents, am anxious that the merits of the matter be debated and thrashed out - we stand back for no one in that regard and I least of all. But one thing is of significance. If the applicants were so anxious that the merits should be debated, one wonders why even now to this very day, they have not served upon us the papers in the proper fashion. They could have done so on Friday last, at the same time bringing an urgent application; they could have done so on Monday when Your Lordship refused to make the order, with respect, and with great respect, most correctly. They could have done so at any stage up to now . There is an old English saying, My Lord, the proof of the pudding is in the eating, and if one has to test their bona fides to come to grips with the matter, by what they have done or failed to do, it seems to me that they are little anxious to come to grips with the merits. In my submission there is absolutely no ground under which you could in fact change your order, an order after considered judgment. You will observe that the dates given which we would have to file by, that is the 9th March, from today, barely gives us the fourteen days in any event which we would require.

Your/...

Your Lordship has seen the papers, you have seen what is involved - it traverses history of what took place something like a year ago; there are a mass of documents which we would have to study; a mass of allegations relating to different types of persons which we will have to answer. These cannot be done in any proper haste, My Lord. The matter must be put before you as it is Your Lordship who will eventually hear the matter, in a proper form, and with great respect, there is nothing either in law or in equity which requires Your Lordship to in any sense alter the order that you gave after a considered judgment. And I submit that to the extent that this is an application, it should be dismissed with costs.

My Lord, I have one aspect which I must raise as I am on my feet. I understand that Your Lordship ordered the applicants to pay the costs of the hearing on Monday. Your Lordship was not addressed and did not necessarily at that stage make an order in regard to the costs of two Counsel. I am obliged, as Your Lordship is aware in terms of the rules, that if the costs of two Counsel are to be taxed, Your Lordship's consent and permission is required. It is our submission that Your Lordship will order the costs of two Counsel be allowed in that matter. It was a matter of substantial importance, a matter of urgency, the papers are very heavy, and I need hardly say that the applicants saw fit to engage Senior Counsel and two Junior Counsel in bringing the application, and I submit therefore, that I ask you to order that the costs include the costs of two Counsel.

MR. BIZOS ADDRESSES THE COURT:

My Lord, I have three submissions to make. Firstly, that there is nothing in Your Lordship's order made on Monday which would be inconsistent in my submission, with what I am

asking/...

asking Your Lordship to do now. Secondly, although the Deputy Sheriff himself, as one is expected to do, has not himself given two copies to the respondents, the two copies of the papers, one served by the attorney, I am instructed, and I think one by the Deputy Sheriff, have been in the possession of the respondents since last Friday, and I think that they ... (Court intervenes.)

BY THE COURT: Well, I have no form of service before me at all and I am not required to investigate that aspect.

MR. BIZOS: Yes, My Lord, except that my Learned Friend's presence on Friday of last week is in my submission sufficient proof that the papers were handed over to the State Attorney on whom papers, where Ministers are respondents, have to be served. So that the respondents have had two sets of papers now for almost a week.

Secondly, as far as having taken any further steps, in my submission the applicants' representatives have done whatever they could to bring this matter to Court as soon as they possibly could and that our behaviour, despite the fact that my Learned Friend's submission..., has been consistent with a feeling that the matter is one of urgency. And if there is anything in the application, in my submission, its purpose is going to be frustrated if the matter comes up some time in May or June if the ordinary periods are allowed, and that this is why it is my submission that prejudice has been shown by the respondents if the period is reduced.

Finally, I want to assure my Learned Friend that I did not intend any disrespect by not giving him an opportunity to announce his appearance to Your Lordship at the outset.

CERTIFICATE:

I, the undersigned, hereby certify that the foregoing is a true and exact transcript of the original arguments recorded by means of a mechanical recording device in the matter between:

IRIS NIKIWE XABA MADIKIZELA AND FOURTEEN OTHERS	First Applicant
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