CIV/APN/282/83

IN THE HIGH COURT OF LESOTHO

In the matter of :

MARIA KHELELI - Applicant

v

THE SOLICITOR-GENERAL - 1st Respondent
THE COMMISSIONER OF POLICE - 2nd Respondent
THE OFFICER COMMANDING (MAFETENG) - 3rd Respondent

J U D G M E N T

Delivered by Hon. Mr. Justice M. P. Mofokeng
on the 14th day of December, 1983

This is an ex parte application in which the applicant seeks an order:

1. That a Rule Nisi do issue upon the respondents returnable at 9.30 a.m. or as soon thereafter as counsel or attorney may be heard on this 12th day of December, 1983, calling upon the respondents to show cause why:-

   (a) The second and third respondents shall not produce the body of THABO KHELELI before this Honourable Court:

2. The second and third respondents shall be directed to release THABO KHELELI from custody;

3. The second and third respondents shall not be restrained from assaulting, torturing or any way threatening or psychological violence;

4. The second and third respondents shall not be directed

/to allow ...

to allow THABO KHELELI access to an medical examination;

5. The second and third respondents shall not be directed to pay the costs of this application;

6. The applicant shall not be granted further and/or alternative relief.

In the supporting affidavit of Maria Khelelı, who describes Thabo Khelelı (hereinafter referred to as a Detainee) as her son, states that the detainee, who is a miner in the Republı of South Africa, had paid her a visit as he was on leave. On the 9th November 1983 he was arrested by the National Security Services Police and she has not seen him since. She believes that his detention is unlawful for the following reasons:

(a) The Commissioner of Police had no reasonable suspicion that the detainee was involved in activities prejudicial to the security of the State nor did the Commissioner of Police have reasonable suspicion that the said detainee had information relating to such activities.

(b) That the said detainee is being subjected to physical and psychological torture. This information she received from an unnamed police officer whose name cannot be divulged because of fear. She has learned from this unnamed officer that the detainee's hands and feet are bound and that he cannot eat. Her fear is also strengthened by the fact that the police refuse to allow the detainee to exchange dirty linen for fresh one.

(c) The period of detention has exceeded the fourteen (14) days allowed and that there is no indication

that his further detention has been ordered and also whether the Advisory Commission has been appointed and met and advised the Minister to further detain the detainee. (I have been unable to find provision for the establishment of the Advisory Commission referred to here.)

It is finally alleged that the detainee is suffering from ulcers and his condition will deteriorate as a result of not eating properly.

The principles applicable to applications of this nature were set out in the case of Collier & Yeats (Pty) Ltd & Others v Solicitor General of Lesotho, CIV/APN/262/77 p.5 a judgment dated 16th September 1977. They are once more repeated here as they tend to be overlooked and these are them:

" 1. That the applicant should not succeed unless the Court is satisfied that on the balance of probabilities the right which the applicant intends to protect is at least "apparent" as stated in van der Linden Judicieel Practijcq, 2.19.1 or is at least prima facie proof of such right. The fact that the applicant has a reasonable prospect of success in the main action will be regarded as prima facie proof.

2. Even if an applicant should produce prima facie proof or show that he has a reasonable prospect of success in the main action, it still does not necessarily follow that he must succeed in obtaining an interdict.

3. If an applicant should satisfy the Court on the above-mentioned minimum requirement in regard to the evidence, the Court can still refuse the interim relief if the balance of convenience favours respondent. The Court should consider the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to

/be ...

> be right, and that which the applicant, on the other hand might sustain if the application is refused and he should ultimately turn out to be right. The Court must be satisfied on the evidence that the granting of the interdict is justified. (underline mine)
>
> 4. The Court must consider, whether the interim relief is granted or refused, if any conditions, which appear to be reasonable, should not be attached to the order."

I shall proceed to deal with each order as sought by the applicant from this Court. I must state from the onset that I am mindful of the fact that the liberty of the subject is at stake and that the security of the State is also involved.

It is usual for our Courts to grant the Rule Nisi in the form in which it is phrased in 1(a). The substance of the order requires the respondents to produce Thabo Kheleli or if that is physically impossible, to explain where he is. (Muriel Modisane v Commissioner of Police & Another, 1980(1) L.L.R. 149 at 150).

The Rule Nisi contained in order 2 above challenges the very basis of the detainee's dentention, namely the lawfulness of it or its legality. The present Act (Internal Security (General)) Act 6 of 1982(hereinafter referred to as the Act)under which the detainee is detained does not, in my view, preclude the challenge of the legality of the detention. If the provisions of the Act are not strictly complied with the detention thereunder will be invalid. (Mahase v Commissioner of Police & Another, CIV/APN/282/82 dated 22nd February 1983).

/as ...

As it was said in the case of Sello v Commissioner of Police & Another, 1980(1) L.L.R. 158 at 172:

> " It is the essence of this Act that the detainee shall be prevented from having access with the outside world during his interrogation but a detainee shall certainly not be assaulted or have his health or resistance impaired by inadequate food or living conditions or being interrogated by the use of any third degree methods. (See Schermbrucker v Klindt, N.O. (supra) at 612 F-G, Rossouw v. Sachs (supra) 561 D-F). It was not the intention of parliament that these things should be done for, if it were, it would have clearly and explicitly said so."

Those words still hold good even in the present Act. A mere detention under the detention Act does not deprive a citizen of every right he has unless the legislature has specifically decreed so.

The applicant asks for an order that the second and third respondents be directed to allow the detainee access to medical examination. Section 40(4) of the Act stipulates that the detainee shall be subject to the provisions of the Prison Rules 1957 relating to untried prisoners (subject to any directions by the Minister). Moreover, the Minister may order that a detainee be given medical attention at any hospital or place of medical treatment in which event he will still be deemed to be still in custody despite such a removal. This later portion only emphasises the fact that the detainee is held in Communicado. According to section 14 of the Interpretation Act 19 of 1977 the word "shall" shall be construed as imperative and the word "may" as permissive and empowering. It seems to me therefore wherever a detainee is detained he is subject to provisions of the Prison Rules 1957 relating to untried prisoners. However, the Minister

/has ...

has a descretion to order that the detainee should receive medical treatment at a hospital or any other place where he could be medically treated e.g. a nursing home (in the proper sense). However, in all these cases the detainee will be deemed to be still detained. What is clear is that a detainee, wherever he may be detained, shall be subject to the provisions of the Prison Rules 1957 relating to untried prisoners. It seems contradictory to me that the Minister can, in the face of such an obligation as envisaged by sec. 40(4) give a contrary direction.

Part B Division 1 relates specifically to untried prisoners. It makes provision for a variety of matters. Section 98 provides for change of clothing from time to time; Section 100 makes provision for the untried prisoner to make an application to be attended to by a registered medical practitioner or a dentist at his, the prisoner's, expense. Section 106 also provides that for the purposes of his defence, an untried prisoner may receive a visit from a registered medical practitioner selected by him or by his friends or legal adviser under the same conditions as apply to a visit by his legal adviser. According to the Act the detainee shall be subject to the provisions of the Prison Rules 1957 relating to untried prisoners.

In the premises the applicant has established a prima facie proof that she is entitled to the relief sought and there is a reasonable prospect of success at the trial. I do not think any question of her locus standi can be questioned (See Sello v Commissioner of Police (supra) p. 167)

Again without having gone into too much details into the matter and on the principles referred to above,

/ I ...

I exercise my discretion in favour of granting the applicant the Rule Nisi as prayed, returnable on 21st December 1983 at 9.30 in the forenoon or so soon thereafter as the Counsel may be heard.

J U D G E
14th December, 1983

For the Applicant : Adv. Mphutlane