CIV/APN/107/83
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IN THE HIGH COURT OF LESOTHO

In the Applications of :

MASEBITSA MOLISE — Applicant

v

COMMISSIONER OF POLICE
OFFICER COMMANDING
MINISTER IN CHARGE OF POLICE
SOLICITOR GENERAL
— Respondents

and

MAMOKHELE MOHATLA — Applicant

v

COMMISSIONER OF POLICE
OFFICER COMMANDING
MINISTER IN CHARGE OF POLICE
SOLICITOR GENERAL
— Respondents

RULING ON COSTS

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 28th day of June 1983

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These were two separate applications in the nature of habeas corpus, wherein applicants, the close relatives of two persons detained under the Internal Security(General) Act 1982 sought rules nisi calling upon the respondents to produce the bodies of the detainees and justify their detention in terms of the Act.

By agreement of both counsel one Judgment will be delivered since the facts are the same.

The urgent applications were filed at the Registrar's office at about 4 p.m. of 31st May 1983, and the rules nisi were

/granted

granted at 10 a.m. on 1st June 1983. The return date was fixed for Monday 6th June 1983 for both applications.

On that date two affidavits were on file from a police officer who averred that he had acquainted himself with the papers but was unable to produce the bodies of the detainees because they had been released on the 1st June 1983.

The questions of costs was contested.

Costs are of course within the discretion of the Court but the normal practice is that costs follow the event so that if the rule was discharged on the application of the party that urgently moved the Court, costs ought to be awarded to respondents. The normal practice however is not rigid and we have in this court from time to time, especially in cases of alleged unlawful detentions, reversed the rule of practice or refused to make any order as to costs. Each case depended on its own facts but on the 6th June 1983 the facts had not been verified by Mr. Gwentshe or Miss Fanana. The matter was adjourned for them to investigate what happened and then to address me.

It is now common cause that :

1. The service of the papers was effected on the Solicitor General's office at about 4 p.m. of the 1st June. The service of the papers on the Solicitor General was in accordance with normal practice where the main respondent is a Government department in this case the Commissioner of Police.
2. The date of service on the other respondents was not established with certainty. If there was service at all it was after 4 p.m. on 1st June or on the following day.
3. One of the Crown Counsel in the Solicitor General's office however apprised the respondents of the rules nisi. Whether this occurred soon after 4 p.m. of 1st June or on the following day is not clear, but Miss Fanana says she was told that the two detainees have in fact been released on 1st June before the Order of the Court came to their notice.
4. The officer did not, in his affidavit, specify the time of the release but one of the detainees in a replying affidavit averred it was 2.59 p.m. on 1st June i.e. before the service of the papers on the Solicitor General or the respondent Commissioner of Police.

/Mr. Gwentshe

Mr. Gwentshe submitted on behalf of the applicants that he was entitled to costs in both applications because :

1. The respondents must be presumed to have got wind of the proposed applications when the papers were filed in the afternoon of the 31st May 1983.

2. The officer having not referred to the lawfulness of the detention the Court ought to presume that the respondents had not complied with the relevant provisions of the Act.

3. That the applicants have expended funds on the launching of the applications, which were necessary to assert the right of their detained relatives, and to test the validity of the detention by the respondents.

4. That the costs were not incurred by the detainees themselves so that they cannot, if they decide to sue for damages for wrongful detention and succeed, recover items relating to costs incurred by a third party.

Miss Fanana submitted that there can be no presumption of unlawfulness on the principle that prima facie a public official acts lawfully until the contrary is proved.

This is the first case before me on detentions under the new Act. It is clear, when compared with the Internal Security (General) Act 1967, that quite apart from the initial periods of detention allowed (reduced from 60 days to 14 days) the detainee is entitled, in addition to his common law rights, to distinct rights expressly provided for under the terms of the new Act. The legality of the detention today must therefore be gauged with reference to the intention of the legislature which was clearly aimed at curing the abuse which sometimes occurred under the former Act of which we have had some examples in Judgments delivered on the subject in the course of the last three or four years of which only a few are yet reported.

The Court in this instance has affidavits from two applicants who were anxious about their relatives, but their allegations of non compliance with the provisions of the Act have been advanced, not on personal knowledge, but on general complaints relating to visits by a doctor, a priest, personal hardship, lack of access refusal of food, vegetables, and bibles etc. It is true that they allege contraventions of a number

of sections of the Act but these are by and large hearsay. The only point that could have clinched the matter in applicant's favour on costs was whether the detainee had to be released after a certain specified period. Mr. Gwentshe says they have been detained for 57 days, but in fact it was 48 days from 13th April 1983 to 1st June. I see no express limit of 42 days maximum in any section of the Act but the submission was that the days counted arose by implication of other sections of the Act notably ss 32 to 35. It was pointed out that advisors had not been appointed until 19th April 1983 (vide LN 35 of 1983 Gazette No.20) and in the absence of a further temporary detention in terms of s.33 the term has expired so the applications were justified on this ground. I am not able with respect to follow that argument. In this application it is not possible to get into the merits more especially because one of the detainees who filed an affidavit in support of the applicant relative after his release referred to none of the complaints made by Mr. Gwentshe. He simply averred that he "read" the affidavit and confirms he was released at a time, when it was common cause, the papers had not been served even on the Solicitor General so he did not enlighten me any more than the detaining officer, who averred more or less the same except that he used the words "acquainted".

I agree that in response to Orders of this nature the detaining authority should make an averment denying non compliance with the provisions of the Act. If not they might find difficulty in an ensuing action for damages for wrongful imprisonment. I do not think it will be justifiable on the papers as they stand to jump into a conclusion that the detention was illegal since this might, according to Mr. Gwentshe, come before the High Court by way of action. He has created sufficient displeasure however to order each party to bear his or her costs.

Lastly a word of warning to the detaining authorities. They must acquaint themselves thoroughly with this new Act. It has got safeguards to the detainee that were not available under the former Act and trifling with those safeguards might end up in their having to pay substantial damages. A copy of this Judgment is to be sent to Commissioner of Police who should pass it on to his subordinates.

CHIEF JUSTICE
28th June, 1983

For Applicants : Mr. Gwentshe
For Respondents: Miss Fanana