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IN THE SUPREME COURT OF SOUTH AFRICA

(Transvaal Provincial Division).

CASE No. M. 1804/71.

PRETORIA,

25th February, 1972..

BEFORE THE HONOURABLE MR. JUSTICE MARAIS AND THE

HONOURABLE Mr. JUSTICE THERON.

In the matter between:

ISMAIL ESSOP

Applicant

and

THE COMMISSIONER OF THE SOUTH AFRICAN POLICE 1st Respondent

and

COLONEL GREYLING

2nd Respondent.

J U D G M E N T.

THERON, J: This is the extended return day of a rule nisi granted on the 29th of October, 1971 in the following terms:

"1. THAT a rule nisi do issue calling upon the respondents to appear and show cause, if any to this Court at 10 a.m. on the 7th December, 1971 why -

(a) they should not be interdicted and restrained for the duration of the detention under section 6 of the Terrorism Act No. 83 of 1967 from either directly or indirectly through their (10 own actions or those of any one under their command or one or other of them from

(i) assaulting the applicant's son MOHAMED SALIM ESSOP;

(ii) interrogating the applicant's son, MOHAMED SALIM ESSOP in any manner other than

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- prescribed or permitted by law;
- (iii) employing any undue or unlawful pressure on the applicant's son, the said MOHAMED SALIM ESSOP;
- (b) they should not pay the costs of this application.
2. THAT paragraph 1(a) supra operate as an interim interdict pending the return day;
 3. THAT the matron or the sister in charge of the Cassim Adam Ward at the H.F. Verwoerd Hospital appear on the return day to testify; (10)
 4. THAT leave be and is hereby granted to both parties to call such further evidence as they may wish to call provided that an affidavit setting out the substance of that evidence is filed at least three days before the witness is called;
 5. THAT a copy of this order be served by the sheriff on the detainee."

Upon the return day, or I should say the day following, namely the 8th of December, 1971, this rule was extended by the full Court to the 22nd of February, 1972 in terms of the following order. The order reads:

- "1. THAT the aforesaid rule nisi be and is hereby extended to the 22nd February, 1972, in order to obtain evidence from the following people -
- SISTER KOLAPEN;
SISTER RITA;
VALERIE MOHAMED;
SUE SOLOMON;
MATRON SIETSMAN;
AMANDA KHUMALO; (10)
YVONNE EARNEST;
DR. PADLAS;

DR. LAW."

(I draw attention to the fact that at this stage no mention is made of Dr. Kemp.) The order proceeds:

- "2. THAT leave be and is hereby granted to the applicant to issue subpoena's to these persons to ensure their presence on the return day;
3. Costs are reserved."

Pursuant thereto, when the matter came before us on the 22nd of February and the days following, both parties called certain witnesses to testify and certain documentary evidence⁽¹⁰⁾ was placed before this Court. We are now called upon to either confirm or discharge the provisional order granted. It is, therefore, necessary to analyse the affidavits and the evidence before us in detail, in order to determine whether, on the balance of probability, it has been shown that the applicant's son, MOHAMED SALIM ESSOP, to whom I shall refer as the detainee, was assaulted whilst being detained by and in the custody of the security police at John Vorster Square, Johannesburg. In this regard Mr. Eloff for the respondents in my view correctly contended that the onus rested upon⁽²⁰⁾ the applicant so to satisfy this Court.

The relief sought by the applicant is based upon the allegation that the detainee was assaulted whilst under detention by the security police. I should mention that the matter originally came before the Court on the 29th of October, 1971 by way of an urgent application. The application with supporting affidavits was filed and served in the late afternoon of the 28th of October, 1971, and set down for hearing on the morning of the 29th of October. That left the respondents with very little time for reply, and⁽³⁰⁾ we are informed that the replying affidavits were drawn under pressure during the night of the 28th and the early

hours of the morning of the 29th of October. On the 29th of October HARGO, J. granted a provisional order, to which I have already referred, for reasons which he then gave. I will briefly refer to some of the reasons. On page 46 of the papers the learned Judge said:

"I must deal with the question whether a prima facie case has been made out, and then with the question of balance of convenience, but I wish to emphasize at the outset that at this stage of the matter it is impossible to make any determinations of fact. There are conflicting affidavits. It cannot be finally determined from these affidavits alone whether or not there is any substance in the allegations or fears of the applicant. Moreover, it is undesirable, in view of the fact that I propose to make an order which will give both sides the opportunity of a fuller investigation, that I should comment on the evidence at this stage other than to say what it is and what prima facie inferences may be drawn from it."

The learned Judge, in dealing with this question of prima facie case, as presented upon the papers before him, in my view drew attention to important aspects which were at that stage unexplained or not dealt with in the papers; aspects particularly concerning the respondents. No doubt being mindful of the circumstances under which the replying affidavits were prepared, the learned Judge concluded:

"I think that the respondents are entitled to be vindicated if the position is as contended for on their behalf, and that as a matter of public interest the fears of the applicant as a parent, in regard to his son, should be dispelled."

I cannot translate these words as a direction to the respondents

as to how to conduct their case as was submitted for by Mr. Eloff. The particular circumstances of this matter necessitated the hearing of oral evidence, in view of the conflict of facts on affidavit. In pointing out what aspects needed investigation and clarification by way of evidence, we do not think it can be concluded that the learned Judge was directing the conduct of the respondents' case.

That brings us to an assessment of the evidence as a whole. It would be convenient, first of all, to list some of the facts, which are either common cause or not (10 seriously in dispute. These are, and I repeat not all of them, a mere summary:

1. That while the detainee was in good health and with no apparent injuries on his face and body, he was arrested by the South African Police on the night of the 22nd of October, 1971.
2. At about 11 p.m. on the 22nd of October, 1971, Colonel Greyling, the commanding officer of the security police in Johannesburg, took over the detainee from the South African Police and detained him under (20 section 6 of the Terrorism Act No. 83 of 1963 for the purpose of interrogation. At that stage the detainee was normal and without any visible signs of physical injury.
3. That from time to time during the period of his arrest on the 22nd of October, 1971, and the morning of the 26th of October, 1971, the detainee was interrogated by Colonel Greyling and various members of the Security Police, including also a Major Fourie, who interrogated the detainee on Saturday the 23rd of (30 October, 1971.
4. That on the morning of the 26th of October, 1971, the

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detainee was removed on a stretcher from John Vorster Square to the Johannesburg General Hospital. Later the same day he was transferred again on this stretcher to room no. 8 of the Cassim Adam Ward of the Hendrik Verwoerd Hospital in Pretoria.

5. Throughout the detainee was under the constant guard of members of the security police.
6. In the afternoon of the 27th of October, 1971, the applicant approached members of the nursing staff of the H.F. Verwoerd Hospital, including the matron of the Cassim Adam Ward in order to ascertain whether the detainee was admitted to and being detained in the hospital. He was falsely told that his son was not admitted to this hospital. I am inclined to agree with Mr. Eloff on behalf of the respondents that this may well be explained by a mistaken appreciation on the part of those concerned of their duty in divulging or not divulging information concerning a security police detainee.

However, with that as the basic facts not seriously in dispute, we turn to the rest of the evidence. In his founding affidavit the applicant described how, in the company of his daughter and of the newspaper reporter, he discovered the detainee in room 8 of the Cassim Adam Ward of the Hendrik Verwoerd Hospital. He then stated in paragraph 21, after having set out how he came to be in the hospital and what occasion he saw of getting a vantage position of seeing his son, the following:

"21. At 3 p.m. I walked into the corridor of the Cassim Adam Ward and saw a bed in the corridor (30) blocking the entrance to room 8. I climbed on the bed and looked through the fan light above the door.

I saw my son lying naked on the far bed in the room. He looked terribly ill, he was hardly breathing and there were bruises and blood clots on his chest and he had a bandage on his stomach just below the naval. I climbed down and told Mr. Norton and my daughter what I had seen.

22. We left immediately thereafter to see our Attorneys and obtain assistance. " (10

And in his supplementary affidavit filed on the 28th of October, the following is contained:

"1. Since I made my main affidavit in this matter, I have received further information about my son. Most of the information has been communicated to me by persons of repute, some of whom wish to remain anonymous and some from whom affidavits could not be obtained within the period of time available to me.

2. I have been informed by persons employed in the Verwoerd Hospital, their names being unknown (20 to me that -
(a) My son has a serious head injury;
(b) my son has a serious injury to his chest;
(c) from time to time he was unconscious whilst in bed and from time to time he was in great pain and screamed because of it.

I verily believe that this information is correct, because it is consistent with what I was able to observe through the fanlight as stated by me in my earlier affidavit." (30

And in regard to all the evidence concerning the injuries observed by medical practitioners, we are of the view that the

applicant's description of the injuries he is alleged to have seen and is alleged to have had described to him, is unrelated to the injuries found by the doctors and certainly exaggerated. We shall deal with this aspect again later when relating this evidence with the evidence of the various medical practitioners who examined the detainee. We now know as a fact, of which this Court was only informed on the 22nd of February, 1972, whilst Mr. Law was giving his evidence, that Dr. Kemp, the Chief District Surgeon of Johannesburg, was called to John Vorster Square at 8,45 a.m. (10 on the morning of the 26th of October, 1971, in order to examine the detainee, who was then in an apparent semi-conscious condition. After a cursory examination Dr. Kemp caused the removal of the detainee to the Johannesburg General Hospital and then enlisted the aid of a specialist neurosurgeon, Mr. Law, to examine the detainee. Dr. Kemp stated that he made notes of his findings upon his examination of the detainee, and on the 3rd of November he made an affidavit, which is Exhibit 16, setting out the nature of the injuries (20 found by him on the detainee. Some time thereafter (the date being given as the 13th of January, 1972) and at the request of the Deputy State Attorney, the doctor prepared a statement which was handed in as Exhibit 17. I think it is necessary for me to read these statements. In Exhibit 18, the affidavit, the district surgeon stated that:

"I am Chief District Surgeon of Johannesburg and Senior Lecturer in Forensic Medicine at the University of the Witwatersrand. I have been a District Surgeon since 1950.

(30

On the morning of the 26th of October, 1971 at 8,30/ a.m. I was called to examine a certain M. Essop at John Vorster Square.

He appeared to be in a semi-conscious state but further examination lead me to believe that he was in a state of severe hysteria. In order to rule out any possible organic disease I arranged for him to be seen by a Specialist Neuro-Surgeon - Dr. C.W. Lay.

This was done at the Non-European Hospital at about 11.15 a.m. on the same day.

On that day I arranged for X-rays and certain blood tests which subsequently proved to be negative.

At the time of the examination I noted various (10) injuries which I list below:-

1. Two small areas of bruising of the right forearm.
2. Areas of bruising, which showed yellow colour change, below both knees.
3. 2 cm. bruise just below the right eye.
4. 2½ cm. bruise of the lobe of the right ear.
5. 2 cm. bruise of the right lower lip.
6. 3,5 cm. bruise, showing yellow colour change, of the inner aspect of the left arm, just below the axilla.
7. There were superficial scratch marks on both anterior (20) chest walls.

All the injuries which were noted were of a minor nature and did not require any treatment.

I did not see M. Essop again as he was transferred to the H.F. Verwoerd Hospital in Pretoria."

I do not propose burdening this judgment by reading the total of the statement contained in Exhibit 17. I will confine myself to the doctor's exposition of the probable causes of these injuries, relating to those listed under paragraphs 3, 4 and 5 (30) of his affidavit. Concerning these injuries, the doctor stated:

"Ad (c): This bruise was situated over a bony part where a bruise would occur more readily than in the softer tissues

detainee's condition and what information he received about it. His recollection is, however, that he did ask whoever was present, and he was merely informed that the detainee was found in this condition or suddenly went into this state. However, he has a recollection of subsequently discussing matters with Colonel Grayling concerning the detainee.

Mr. Law confirmed that he was urgently called by Dr. Kemp to examine the detainee. His findings he recorded in a letter, Exhibit 13, addressed to Dr. Kemp, and in that document he subscribes generally to the findings, and supports the evidence, of Dr. Kemp in regard to the condition of the detainee. In this letter Mr. Law refers to Dr. Koch, who also examined the detainee at the General Hospital in Johannesburg. We now know that this person is Professor Koch, the Chief District Surgeon of Pretoria, whose affidavit was taken on the early morning of the 29th of October and filed with the papers. According to this affidavit, Professor Koch stated that on Tuesday the 26th of October he was asked by a Colonel Van Niekerk to examine the detainee. On the same day he proceeded to the General Hospital in Johannesburg, where he examined the detainee. In his affidavit the Professor described his findings and results of interviews concerning the detainee as follows:

"3. Sy voorkoms was stuporeus en hy het vir my siek gelyk. Ten einde 'n behoorlike diagnose te kan doen, het ek dit gerade geag om 'n neuro-chirurg in die geval te betrek, maar ek het verstaan dat die genoemde Essop, reeds deur Dr. C.W. Law, 'n neuro-chirurg te Johannesburg ondersoek is en dat hy 'n diagnose gedoen het in hierdie/ besondere geval. Volgens my inligting het Dr. Law gediagnoseer dat die genoemde Essop in 'n toestand van

histerie verkeer het. Ek mag sê dat hoewel dit buite my spesialiteit lê, sy voorkoms volkome ooreengestom het met dié van iemand wat in 'n toestand van histerie verkeer.

4. Ek het die genoemde Essop by hierdie geleentheid deeglik ondersoek en het geen tekens hoogenaamd gevind van knepsings of bloedklonte aan sy borskas nie en het geen beserings aan sy maag gevind of 'n verbindsel aan sy maag gevind nie. Wat ek wel gemerk het, was 'n paar baie oppervlakkige krapmerke aan genoemde Essop (10) se ribbes aan die voorkant van sy liggaam. Hierdie merke kon dalk deur 'n persoon se naels veroorsaak gewees het. Dit is moontlik dat 'n persoon wat in 'n toestand van histerie verkeer, daartoe kan oorgaan om homself te krap.

5. Ek het verneem dat die genoemde Essop daarna oorgeplaas is na die H.F. Verwoerd Hospitaal te Pretoria. Hierdie oorplassing het ekself gereël. Te gelykertyd het ek gereël dat die genoemde Essop deur Dr. J.M. Combrink, 'n spesialis internis van Pretoria, ondersoek(2) word en sodanige ondersoek het inderdaad plaasgevind op dieselfde dag. Van Dr. Combrink het ek verneem dat hy dit gerade gesag het om 'n Neuroloog te betrek om ook genoemde Essop te ondersoek en vervolgens aan Dr. W.M. Gùldenpfennig opgedra om voormelde Essop te ondersoek.

6. Hierna het beide Drs. Combrink en Gùldenpfennig aan my berig gedoen en wel tot dien effekte dat genoemde Essop waarskynlik in 'n toestand van histerie verkeer en dat Dr. Lav se diagnose korrek is." (30)

At this stage we underline Professor Koch's statement contained in the last paragraph I have read, and we shall refer to

that at a later stage when dealing with the question of probability, and the passage there specially emphasized is that other doctors confirmed that the probability was that the detainee suffered from hysteria.

Dr. Gildenpfennig, a specialist neurologist, stated that he examined the detainee at 6.45 p.m. on the 26th of October, 1971, in the Hendrik Verwoerd Hospital. Upon examination the doctor concluded "Daar was geen organiese neurologiese letsels nie en dat sy toestand óf as histerie óf as simulacie beskou moet word." In paragraph 4 of his affidavit this (10 witness stated the following:-

"4. My aandag is gevestig op die inhoud van paragraaf 21 bls. 6 van die applikant se eedsverklaring, asook paragraaf 2 bls. 2 van die applikant se aanvullende verklaring. Wat dit aanbetref, kan ek sê dat ten tye van my eerste ondersoek die voorgeselde Essop geklee was in 'n pajama-broek en -baadjie; dat hy rustig asem gehaal het. Hy het nou en dan as deel van sy histerie of simulacie toestand en nie as gevolg van pyn geskreeu nie. Daar was geen kneusings of bloedklente aan sy borskas aanwesig nie en daar was geen verband om sy maag nie. Daar was 'n paar oppervlakkige merkies op die voorkant van sy borskas teenwoordig. Ek het spesiaal gekyk na die bors van genoemde Essop en dit is aan my berig dat 'n X-foto van sy bors geneem is en dat dit geen afwykings toon nie. Ek kon ook geen afwyking in die asemhaling van genoemde Essop bespeur nie."

I have quoted in some detail from the findings made by Professor Koch and Dr. Gildenpfennig, as set out in their affidavits, concerning the injuries observed by them on (30 the detainee. It is to be observed that nowhere in any of these affidavits was any reference made to the bruising.

however slight it might have been, to the detainee's lip on the right side, below his right eye and in his right ear, as described by Dr. Kemp. However, Mr. Eloff on behalf of the respondents, submitted that no adverse inference could be drawn from the apparent omission in this regard, since the two deponents were specifically replying to allegations made in the founding application, and were not called upon to describe abrasions unrelated to that. In addition, regard must also be had, he said, to the circumstances already referred to under which the affidavits were drawn. (10

On behalf of the respondents Dr. Gldenpfennig was called as a witness but not Professor Koch. In evidence the doctor described the injuries in cross-examination, confirming the testimony of Dr. Kemp. Dr. Gldenpfennig says he conceded that these injuries could have been caused by an assault. This view was also expressed by Dr. Kemp and went somewhat further, expressing the view that they probably were caused as the result of an assault; although both witnesses at some early stage in their evidence expressed the view that there are (20 various other likely manners in which these injuries could have been sustained; for instance an accidental fall by the detainee against an object (both of them mentioned a blunt object). However, at the stage when the affidavits were prepared, it seems to me that it must have been abundantly clear to all concerned that the allegation made by the applicant was that his detainee son was assaulted by the security police. In cases of assault the presence or absence of injuries of any nature or kind is of vital importance, and it seems to me to be elementary to make mention of all the injuries found. (20 However, this is but one of the many matters for comment in this case, and we do not over-emphasize this paucity of

information. But this aspect becomes magnified by the unexplained silence on the part of the respondents' witnesses in regard to the fact that Dr. Kemp was the first medical man to examine the detainee and what his finding in regard to the injuries were. In this regard we refer in particular to the affidavit and the evidence of the second respondent, Colonel Greyling. In Court he was at pains to describe to us his comforting method of approach to gain the confidence of those detainees interrogated by him. In this particular instance he stated that he received the detainee from the South African Police; he interrogated him from time to time and he frequently saw the detainee in the offices at John Vorster Square. According to his evidence, on each and every occasion he asked the detainee whether he had any complaints, and each time he received a negative reply. At the time of the detention of the detainee, he observed no tension or nervousness at all, nor had the detainee any visible injuries. The first intermittent interrogation lasted from 3 p.m. to 6 a.m. on the 24th of October. At 6 a.m. he handed the detainee over to sergeant Louw, and thereafter he merely visited the detainee at least twice a day. On Saturday and Sunday the witness noticed that the detainee had not eaten his food. This was explained that the detainee was on a religious fast, but otherwise had no complaints. The witness further stated that on Monday morning he again visited the detainee and found him lying on his mattress, pretending to be asleep. On Monday evening he paid another visit and received no complaints from the detainee, who appeared then to be normal and was speaking normal. The next thing that happened was on Tuesday morning the 26th of October. He received a report from a Major Viviers of his staff. He then called in Dr. Kemp to immediately examine the detainee.

According to his evidence he took no further interest in the matter; he did not personally go into the room to view the detainee or to determine whether the detainee was in a semi-conscious state or not. Nor apparently did he make any enquiries from those officers present with the detainee, as to when he reached this condition. He only, according to his evidence, saw the detainee as he was being carried away on a stretcher after Dr. Kemp had examined him. In cross-examination Colonel Greyling stated that the report he received from Major Viviers was to the effect that the detainee (10) appeared to be ill, and asked whether he questioned Viviers about the patient's condition, he said he did not as he suspected that the patient was simulating an illness. He furthermore stated that he did not ask Dr. Kemp about his findings although he spoke to Dr. Kemp after his cursory examination, and that Dr. Kemp suggested that the patient should be removed to the General Hospital for better and more thorough examination. He stated that it was only after the hearing of the application on the 29th that the witness phoned Dr. Kemp to enquire about the nature of the injuries found on the detainee. Then he (20) stated Dr. Kemp described all the injuries observed by him, including the bruises of the lip, below the right eye and the right ear. This, he says, caused him a great shock. It seems to us that if this statement is true, the shock mentioned could only have been induced by his immediate realisation at that stage that these injuries could possibly be related to the assault allegations made by the applicant as adumbrated in the Court that day. Nonetheless, if I understood his evidence correctly, he made no immediate enquiries in order to ascertain from members of his staff as to who was present when the (30) apparent illness set in, nor as to who the member or members of his staff were who last interrogated the detainee. In spite

of speaking to Dr. Kemp immediately after the cursory medical examination in the office at John Vorster Square, he did not even ask the doctor what he thought was wrong with the patient. That at least one would have expected him to do, as he preliminarily entertained the impression that the illness might be simulated. When asked why Dr. Kemp's name was not mentioned in connection with the medical examination of the detainee, we received a somewhat surprising reply from the witness - "I don't know." In a comparatively brief replying affidavit the Colonel said the following: (10

"4. Tydens ondervraging het dit geblyk dat hy onder strekking of spanning verkeer. Hy het geheue en was sensweeaftig en dit het geblyk dat hy die erns van die klagte teen hom beseef het.

5. Ek ontken dat hy ter eniger tyd aangerand was.

Alhoewel ek nie deurentyd by hom was nie, het ek hom periodiek en gereeld besoek. Tydens hierdie besoeke het ek ook van hom verneem of hy enige klages het. Hy het geen klages gehad nie en ek kon geen uitwendige tekens sien dat hy aangerand was nie. (20

6. Tydens my besoek aan ESSOP het ek op twee geleenthede gemerk dat hy nie sy kos ge-eet het nie. Ek het hom daarna uitgevra en hy het my meegegee dat hy om godsdiensstige redes besig was om te was.

7. Op Dinsdag, 26 Oktober 1971, het ek vasgestel dat ESSOP ongesteld was. Ek het pelas dat hy geneeskundig ondersoek word en in die resultaat het Professor Koch vir ESSOP te sien gekry."

We pause to analyse this paragraph I have just read. First (10 of all it was stated "Ek het vasgestel dat Essop ongesteld was." This does not seem to correspond with his evidence in Court. Here he stated that when he received Viviers's report, he

dismissed it as a simulated indisposition. If thereafter he ascertained - using the word "vasgestel" - that the detainee was indisposed, he could only have ascertained this from Dr. Kemp. Yet in evidence he stated he made no enquiries from Dr. Kemp as to his findings concerning the condition of the detainee.

The second observation we wish to make in this regard is in relation to the words "Ek het gelas dat hy geneeskundig ondersoek word en in die resultaat het Professor Koch vir ESSOP te siene gekry." I do not say that there is a deliberate avoidance of the name of Dr. Kemp, but it certainly is a peculiar manner of setting out the facts of the matter, when in fact it was known to the Colonel that he was the person responsible for calling in Dr. Kemp and that Dr. Kemp was indeed the first person who examined the detainee; that Dr. Koch, the district surgeon of Pretoria, came to Johannesburg at a subsequent stage. It is observed that again no mention is made of Dr. Kemp's examination - as I have said before, indeed the first medical examination of the detainee on the morning of the 26th of October. The Colonel was unable, or perhaps unwilling, to take the Court into his confidence and give the true reason for this. Instead he dismissed the question with the answer "I don't know." In the light of what we have said, how can any Court accept the Colonel's evidence on the aspects dealt with. When Essop was fit and well enough to be interrogated, the witness showed particular concern about his welfare and frequently asked him whether he had any complaints. When in fact Essop is found in a stupor and semi-conscious state while under his charge, the witness showed a singular lack of any concern about his condition. He did not, as could reasonably have been expected of him, go personally to see the man to satisfy himself at least that it

was or was not a simulated illness, even though he be a layman. He had in his custody, what we consider on the facts, either an important suspect or an important witness, who was kept under constant guard in view of past experience with similar detainees, as mentioned by the witness in his evidence. Yet he does not take the trouble to interrogate members of his staff as to who were present when and under what circumstances the indisposition occurred. Then, to crown it all, when Dr. Kemp had examined the patient, the Colonel could reasonably have expected to gain some information from Dr. Kemp of his prognosis at that time of a man whom he, the witness, had just seen being carried away on a stretcher. Yet, according to his evidence, he did not show that much interest to ask Dr. Kemp about the patient's condition. On the balance of probability this cannot be true.

To this very moment no mention has been made in the papers of the name of the security officer who must have been present with the detainee, either as an interrogator or a guard, when he became semi-conscious. No acceptable explanation has been given why such person could not be traced and an affidavit obtained from him. On the papers and evidence before us it cannot be accepted that the detainee was left unguarded or unattended at this crucial moment. We find this significant since MARGO, J. in his reasons for judgment commented on this gap evident in the respondents' affidavit. But of course we know that Colonel Greyling stated in evidence that in spite of the fact that he was the second respondent and had a vital interest in this matter, he did not ever take the trouble to read the judgment given. The first insight he had thereto was during cross-examination when a copy was placed before the witness and he was asked to read it. If his evidence in this regard is true, his attitude seems rather contemptuous. If

he had read the judgment and appreciated the implications. the lack of information in this regard, at this very late stage, assumes an even more serious proportion, and allied with the unexplained silence about Dr. Kemp's examination and the results thereof, in our view justifies an inference adverse to the respondents. More particularly is this the case when we have regard to the evidence of Major Fourie, no doubt tendered on behalf of the respondents in order to lay the foundation for the submission that a possible cause of the injuries found by Dr. Kemp was that the detainee (10) accidentally fell and bumped his face, ear and head against a safe and a large fan. Of course Major Fourie's evidence relates to events on the Saturday prior to the Tuesday when the detainee became ill, and according to the Major's evidence he escorted the detainee to the bathroom shortly after he had fallen, where he was ordered to wash his face and pull himself together. Thereafter he had a close look at the detainee and found that he had no visible injuries, nor did he complain of any injuries. We also know that Colonel Greyling claims to have seen the detainee on the Sunday (20) and on the Monday following these events, and he observed no bruises on his face, nor did the detainee complain to him of injuries. Having seen fit to call Major Fourie for this purpose, we are at a loss to understand why those security officers who were with the detainee at the time of Viviers's report to Colonel Greyling were not called and, as I said before, this gap in the respondents' case still remains unexplained.

We know from the medical evidence that when Dr. Kemp saw the detainee at 8.45 a.m. on the 26th of October, the latter was apparently in a semi-conscious state and ill. Mr. Law stated that he was urgently called by Dr. Kemp to do a

neurological examination while the detainee was still in the same condition. Dr. Koch described his condition as "Hy was stuporeus en hy het vir my siek gelyk. Ek mag sê dat hoewel dit buite my spesialiteit lê, sy voorkoms volkome ooreenstem met dié van iemand wat in 'n toestand van histerie verkeer." Later in his affidavit Professor Koch stated "Hierna het beide Drs. Combrink en Gùldenpfennig aan my berispedoen en wel tot dien effekte dat die genoemde Essop waarskynlik in 'n toestand van histerie verkeer en dat Dr. Law se diagnose korrek is." This totality of evidence of eminent medical men seems a far cry from the suggestion of a simulation deposed to by the respondents' psychiatrist, Dr. Van Wyk. However, we have been told by the medical witnesses that hysteria may be caused among other causes by fear, anxiety, trauma which includes, of course, an assault. No doubt being a detainee in the circumstances that he found himself, and being interrogated by several security police officers, would cause the detainee to suffer anxiety. And of course if during such detention the detainee is assaulted in any manner, it would probably cause the onset of hysteria. The wound found by Dr. Kemp, now confirmed by Mr. Law and Dr. Gùldenpfennig, are compatible with an assault upon the detainee, and in the view of Dr. Kemp very probable that such an assault took place. No matter what dimensions, such an assault in all the circumstances probably brought on the condition described as hysteria.

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Taking the history of his condition as deposed to by the medical witnesses, substantially supported by the evidence of the various nursing sisters who saw him on the 26th so ill as to require nasal feeding, we cannot but conclude that on the balance of probability the detainee suffered from the illness termed hysteria, and that this was induced by an assault upon

him while in the custody of the first respondent. 4

Consequently, in our view, therefore, the provisional order should be confirmed. However, Mr. Maisels has asked this court in the event of confirming the order, to make a special order in regard to costs. It was suggested that the Court should mark its disapproval of the conduct of the second respondent by making an award of costs to be paid on the attorney and client scale. It is an unusual order to be made. Although we have set out a criticism of the conduct of the second respondent, we find that the applicant (10 gave an exaggerated description of the injuries of his son and certainly, when analysed, a description which cannot be true on any basis. We doubt whether, from the distance of his view of his son, he could have seen any of the minor injuries we now know to have existed upon him. His conduct in the matter has not been blameless, making all due allowance for his anxiety in regard to his son. We have already referred to Mr. Eloff's submission in this respect in an attempted explanation of why Drs. Koch and Guldenspennig did not list all the injuries observed by them. There seems (20 to be some justification in concluding, with special reference to Dr. Koch's statement, that his attention was pertinently directed to the allegations contained in the application and he merely replied thereto. As I have said before, it cannot be said that the applicant's conduct in this matter is completely blameless.

That being so, we are of the view that this special order, which is an unusual one, should not be made.

In the result the rule is confirmed with costs. This is to include the costs occasioned by the employment of two (30 counsel and Dr. Wolfe's qualifying fees are allowed.

MARAS, J: I agree and it is so ordered.