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N v H

WESSEL MARAIS NO AND **ELIZABETH TILEY**

SMALBERGER, JA -

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WESSEL MARAIS N O — Appellant

and

ELIZABETH TILEY — Respondent

CORAM: JOUBERT, HEFER, SMALBERGER, MILNE, JJA, et GOLDSTONE, AJA

HEARD: 8 MARCH 1990

DELIVERED: 30 MARCH 1990

J U D G M E N T

SMALBERGER, JA:-

The appellant is an additional magistrate in Cape Town. In his capacity as such he presided over an inquest into the death of the late George William De'Ath ("the deceased"). The deceased died on 14 June

1986 in consequence of injuries inflicted upon him on 10 June 1986 when he was attacked by a group of men while filming events taking place in the then strife torn area of Crossroads near Cape Town. The present appeal lies against the judgment of the Cape of Good Hope Provincial Division (VAN DEN HEEVER and BERMAN, JJ) setting aside, on review, the decision of the appellant dispensing with oral testimony at the inquest into the deceased's death, leave to appeal having been granted by the court a quo. The judgment of that court is reported as De'Ath (Substituted by Tiley) v Additional Magistrate, Cape Town 1988(4) SA 769 (C).

The relevant facts surrounding the deceased's death, and the circumstances giving rise to the review application, appear from the judgment of the court a quo (at 770 B - 775 E). They need not be repeated

herein. The issue on appeal relates to the manner in which the inquest into the deceased's death was held. Stated more broadly, was the court a quo entitled to interfere on review with the exercise of the appellant's discretion to hold a non-public inquest into the deceased's death based solely on affidavits and without recourse to oral evidence.

An inquest is an official investigation into a death occuring otherwise than from natural causes, which has not been the subject of a criminal prosecution. Inquest proceedings are governed by the provisions of the Inquests Act 58 of 1959 ("the Act"). The function of an inquest is to determine the identity of the deceased person; the cause or likely cause of death; the date of death; and whether the death was brought about by any act or omission involving or amounting to an offence on the part of any person (s

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16(2)). (The latter determination would include, in so far as this is possible, a finding as to who the responsible offender is or offenders are.) The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice. In this respect I am in full agreement with the views expressed by CILLIé, JP and MARAIS, J in Timol and Another v Magistrate, Johannesburg and Another 1972(2) SA 281 (T) at 287 H to 288 A that:

> "For the administration of justice to be complete and to instil confidence, it is necessary that, amongst other things, there should be an official investigation in every case where a person has died of unnatural causes, and the result of such investigation

> should be made known. Therefore the Inquests Act provides that, if there is reason to believe that a death has occurred, that such death was not due to natural causes and that it was not followed by the institution of criminal proceedings, there shall be an inquest as to the circumstances of the death"

and further (at 292 A - B) that:

> "the inquest must be so thorough that the public and the interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death".

To my mind it is axiomatic that public confidence and satisfaction would normally best be promoted by a full and fair investigation, publicly and openly held, giving interested parties an opportunity to assist the magistrate holding the inquest in determining not only the circumstances surrounding the death under consideration, but also whether any person was responsible for such death. A full and fair investigation presupposes adherence to basic principles

of procedure, and would in the normal course require the hearing of viva voce evidence. That justice must be seen to be done is no less a truism in the holding of inquests than it is in the hearing of trials.

The predecessors of the present Act were Act 12 of 1919 and (in the Cape Province) Cape Act 22 of 1875. In the course of its judgment the court a quo made brief reference to the provisions of those Acts (at 775 G - 776 B). It drew attention to the fact that under the Cape Act 22 of 1875 oral evidence was essential, whereas under Act 12 of 1919 oral evidence was the rule and could only be dispensed with in very limited circumstances. It then proceeded to contrast the Act with its predecessors, pointing out certain differences in pattern between them. It ultimately concluded, in relation to the Act:

> "But the intention of the Legislature remains that the primary procedure is by way of a

public inquiry on oral testimony"
(at 776 D).

With this conclusion I am, for reasons that follow, in full agreement.

Section 5 of the Act provides that where (after a police investigation into the death of any person) no criminal proceedings are instituted in connection with such death, the public prosecutor shall submit all relevant statements, documents and information gathered in the course of such investigation to a magistrate. Where it appears to the magistrate that such death was not due to natural causes he shall proceed, as required by s 5 (2) "to hold an inquest as to the circumstances and cause of the death". In terms of s 8(1) of the Act the inquest magistrate may cause to be subpoenaed any person to give evidence or to produce any document or thing at the inquest. Of vital importance is s 10 of the Act.

If one leaves aside the proviso thereto (which is not relevant to the present appeal), the section reads:

> "Unless the giving of oral evidence is dispensed with under this Act, an inquest shall be held in public".

The main or dominant clause of s 10 contains the injunction that an inquest "shall be held in public". The remaining words of the section are subordinate to this clause. The requirement that an inquest shall be held in public clearly implies that oral testimony must be heard. It would be purposeless to hold an inquest in public if only affidavits are to be admitted (in terms of s 13(1)) and no viva voce evidence is to be led. That oral evidence and a public inquest go hand in glove is also apparent from the wording of s 10. Properly interpreted, in the context of the Act, s 10 in effect provides that as a rule there should be a public inquest with oral evidence. This will ensure

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as far as possible a full and fair inquiry. There can be no full and fair inquiry on inconclusive or conflicting affidavits as to relevant facts. A public inquiry with oral evidence is also more in keeping with an inquest being in the nature of a judicial investigation rather than a purely administrative procedure.

Section 13(1) vests a magistrate with a discretion to forego oral evidence. It provides:

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

In terms of s 13(2) a magistrate may cause any person who made such an affidavit to be subpoenaed to give oral evidence at the inquest, or may cause written interrogatories to be submitted to such person for

reply. The seemingly wide and unfettered discretion conferred upon a magistrate by s 13 is not an absolute or arbitrary one. It must be exercised not only judicially, but in conformity with the policy of the Act as encompassed in s 10. In other words, due regard must be had to the fact that a public inquest with oral evidence is the general rule. This rule may only be departed from by way of exception where circumstances exist entitling the inquest magistrate to accept all the affidavits submitted to him "in proof of the facts stated therein" in terms of s 13(1). No hard and fast rules can be laid down as to what circumstances would justify such a course being followed. In each case it is a matter for the proper exercise of his discretion by the inquest magistrate with due regard to all relevant considerations. Broadly speaking a departure from the general rule

would only be justified where the affidavits before the inquest magistrate do not raise relevant disputes of fact and, furthermore, are conclusive in respect of all relevant matters; or they point strongly to the death under consideration not having been caused by an act or omission constituting an offence on the part of some person e g where it is a clear case of suicide or accidental death. In relation to the exercise of such discretion no onus of proof rests upon a party seeking a public inquiry.

I agree with the finding of the court a quo (at 775 F) that the appellant, as appears from his opposing affidavit, "laboured under a misapprehension as to the foundation upon which his discretion in terms of s 13(2) of the Act rests". His affidavit shows no appreciation of the general rule with regard to the holding of inquests encompassed in s 10 of the Act.

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The appellant accordingly exercised his discretion on a wrong premise. By doing so he precluded himself from properly applying his mind to whether a public inquest with oral evidence should have been held. His decision not to hold a public inquest was therefore subject to review. (Shidiack v Union Government (Minister of the Interior) 1912 AD 642 at 651-2; Northwest Townships Ltd v The Administrator, Transvaal 1975(4) SA 1 (T) at 8 G). The court a quo was accordingly entitled to set aside the appellant's decision and, for reasons that follow, to make the orders it did.

The only known or available eye-witness to the assault upon the deceased was his sound engineer at the time, Mr A A Fosi ("Fosi"). He was with the deceased when he was assaulted. It is apparent from Fosi's affidavit, which forms part of the inquest

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record, that he would be able to positively identify three of the deceased's assailants if he saw them again. The opportunities he had to observe them, and the conditions prevailing at the time, were such as to make for reliable identification. As the appellant was required by s 16(2)(d) of the Act to record a finding on whether the deceased's death "was brought about by any act or omission involving or amounting to an offence on the part of any person", it was a matter of considerable importance to establish as far as possible the identity of the deceased's assailants. In this regard the appellant said the following in his opposing affidavit:

> "Met die oorweging van Applikant se aansoek het ek die mening gevorm dat die vraag aangaande die identiteit van die oorledene se aanvallers nie by wyse van die aanhoor van mondelinge getuienis oor die aangeleenthede waarna Applikant in sy aansoek verwys het, opgeklaar sou kon word nie. Die enigste

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> bekende ooggetuie, ANDILE ANDREW FOSI ("FOSI") verklaar dat hy seker is dat hy 'n totaal van drie uit die altesame 20 of meer persone wat hom en die oorledene aangeval het, kan identifiseer. Daar is egter geen suggestie dat hy die name van hierdie drie persone ken nie. Wat hy duidelik bedoel is dat as hy hierdie drie persone weer sou sien, soos byvoorbeeld op 'n foto, hy sou kon bevestig dat dit hulle is wat by die aanval betrokke was."

It is not fully apparent what the appellant had in mind when he said that "(d)aar is egter geen suggestie dat hy die name van hierdie drie persone ken nie". The words suggest that he was of the view that if the names of the deceased's assailants were not known, it would not be possible to identify them. His failure to call Fosi as a witness is inexplicable on any other basis. If he did hold such view he clearly erred, as the deceased's assailants could have been identified other than by their names, e g by reference to their presence on photographs or video recordings. In this respect

the appellant obviously misjudged the position concerning the means available to assist Fosi in identifying the deceased's assailants. It is common cause that the tape in the deceased's video camera, with which he filmed right up to the time of the attack upon him, was subsequently tampered with. There is some dispute as to what remains on the tape. According to the affidavit of Detective Warrant Officer Carstens, the investigating officer into the circumstances surrounding the deceased's death:

> "Foto's wat berei is vanaf die video-opname deur die oorledene opgeneem in die laaste sekondes voor die aanval op hom, toon twee persone, vermoedelik lede van die witdoeke wie moontlik lig op die saak kan werp. Hierdie foto's is so onduidelik dat geen positiewe identifikasie gedoen kon word nie."

On the other hand the deponent Mr I Robbie, a cameraman with Independent Television News, said the following of the same tape:

> "The ..... tape revealed a group of people gathered together. One person who appeared to be a leader was talking through a megaphone. The entire tape consisted of a 'freeze frame' or 'still shot' of the group and the man with the megaphone".

Obviously valuable material has been erased from the tape. That this was done, or allowed to happen, is deserving of the severest stricture. However, some portion of the tape may still be available to show to Fosi. The tape is apparently in London at present, but there is no reason to believe that it cannot be obtained and produced, if required.

With regard to other available video material the respondent's attorney, Mr G I Rushton, said the following in his affidavit in support of the respondent's review application:

> "In addition , there are two television networks (WTN and CBS) which have television footage relevant to the events in Crossroads immediately before and immediately after De'Ath's death, but these networks will only

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> make the said material available to the inquest if they are subpoenaed to do so by the Court. I have been informed that it is the policy of these networks to make such footage available only if they are subpoenaed to do so, and I verily believe this to be true."

Mr Rushton's affidavit stands uncontradicted on this point. Fosi confirms in his affidavit the presence of other members of the "press" (which, I presume, would include camera crews) in the vicinity of where the events leading to the fatal attack on the deceased occurred.

It may well be that, if he gave evidence, Fosi would be able to point out, with reference to available video material, one or more of the three persons he claims he will be able to identify as being amongst the deceased's assailants. The possibility of this happening is a reasonable one. It is certainly not so remote that it need not be explored. The court

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a quo correctly recognised this to be so, and was fully justified in making the order which it did.

As appears from the record and the judgment of the court a quo, the turmoil in Crossroads over the relevant period was due in the main to open hostilities between two warring factions identified as the "comrades" and the "witdoeke" (or "vigilantes"). There is a dispute on affidavit as to whether the comrades or the witdoeke were responsible for the attack on the deceased. Furthermore, various deponents on behalf of the respondent accused the police of openly siding with the witdoeke in their conflict with the comrades, an accusation which the police deny. It was argued on the respondent's behalf that the order of the court a quo should also have provided for oral evidence to be led in relation to these disputes. Despite the absence of a cross-

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appeal, the appellant was not averse to the point being argued.

The requirement in s 5(a) of the Act that an inquest must be held into "the circumstances and cause of the death" necessitates consideration only of such circumstances as will enable the inquest magistrate to make such findings as he is enjoined by s 16(2) to record. Only evidence relevant to such findings would be admissible, and only disputes relevant to such findings need to be resolved by oral evidence. Neither of the disputed issues appear to have any bearing on the findings that need to be made in terms of s 16(2). To determine whether the persons who assaulted the deceased were members of the comrades or the witdoeke will probably not bring one any closer to fixing legal responsibility for the deceased's death. The members of neither group were known to Fosi, so

that knowledge of what group was involved is unlikely to assist him in making a positive identification. Neither group per se could have been held criminally responsible for the deceased's death. Only such members of the group involved whose conduct in relation to the deceased render them liable for his death could be held responsible. It would therefore seem to be irrelevant to the findings the appellant is required to make to determine what group's members in general were responsible for the attack on the deceased. To the extent that the appellant may, after hearing Fosi's evidence, consider a determination in this regard to be relevant, the order of the court a quo is wide enough to permit him to hear such further oral evidence as he deems necessary.

As far as alleged police involvement on the side of the witdoeke or vigilantes is concerned, even

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if the respondent's allegations could be established, there exists no causal connection between such conduct and the death of the deceased. As found by the court a quo (at 777 E) "there is no suggestion that police activity or inactivity triggered the attack upon the deceased on the 10th. Had the death being inquired into been that of a comrade instead of a news reporter different considerations would obviously have applied". While it is undoubtedly a matter of grave concern if the police sided with the witdoeke, it is not a matter which properly falls to be investigated at an inquest into the death of the deceased, not being relevant to the findings that need to be made. In this respect I agree with the court a quo (at 778 B-C) "that it fell outside the scope of the magistrate's function to inquire into possible police misconduct during the clashes between the vigilantes and the

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comrades not suggested by the facts alleged by any deponent to have been causally related to deceased's injuries".

In the result there are no grounds for interfering with the order of the court a quo. The appeal is accordingly dismissed, with costs, such costs to include the costs of two counsel.

J W SMALBERGER
JUDGE OF APPEAL

JOUBERT, JA)
HEFER, JA) CONCUR
MILNE, JA)
GOLDSTONE, AJA)