IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DENIS THEODORE GOLDBERG
IAN DAVID KITSON
JOHN EDWARD MATTHEWS
ALEXANDER MOUMBARIS
RAYMOND SORREL SUTTNER
DAVID RABKIN
JEREMY PATRICK CRONIN
CHARLES ANTHONY DAVID HOLIDAY — Appellants

and

THE MINISTER OF PRISONS
THE COMMISSIONER OF PRISONS
THE OFFICER COMMANDING, PRETORIA PRISON — Respondents

Coram: Wessels, A.C.J., Trollip, Corbett, Hofmeyr et Joubert JJ.A.

Heard: 15 May 1978

Delivered: 26 September 1978

J U D G M E N T

WESSELS, A.C.J.:

Appellants are prisoners held in a special section of the Pretoria prison set aside for the detention

of...../2

of white prisoners convicted under various security laws, and they have no contact with any other category of prisoners. They were all convicted of contraventions of the General Law Amendment Act, 1964, the Suppression of Communism Act, 1950, and the Terrorism Act, 1967. The particular contraventions relating to each appellant are not detailed in the record. Appellants were sentenced to periods of imprisonment ranging from six years (in the case of eighth appellant) to imprisonment for life (in the case of first appellant).

The first respondent (the Minister) is responsible for the direction and control of second respondent (the Commissioner), who is, in terms of section 3 of the Prisons Act, No.8 of 1959 (the Act), in charge of the Prisons Department established by section 2(1) thereof. The Commissioner is a commissioned officer appointed by the State President in terms of section 4(1) of the Act. In terms of regulation 4(1) of the prison regulations made by the State President in terms of section 94 of the Act (which were promulgated by Government

Notice No. R2080 dated 31 December 1965) the Commissioner is responsible to the Minister for the effective performance of the functions of the Prisons Department as described in section 2 of the Act, the maintenance of discipline, efficient administration and the proper use and care of State property belonging to his Department. Third respondent (the Commanding Officer) is responsible to the Commissioner for the maintenance of efficient administration, discipline and proper use and care of State property at the Pretoria prison. The regulations have been amended from time to time. Where necessary, counsel referred this Court to the relevant amendments. In passing I might mention that the Act was recently amended by the Prisons Amendment Act, 1978 (No.58 of 1978). None of its provisions, however, appears to affect the issues which arise for determination in this appeal.

Appellants instituted motion proceedings in the Transvaal Provincial Division against respondents in which they claimed various declaratory orders, all of

which...../4

which were in substance aimed at securing for them a right of access to news of current events in the Republic and abroad. In their affirmations filed in support of the notice of motion, appellants stated inter alia that:

(a) they were not permitted radios nor were they able to listen to radio news services;

(b) they were not permitted to receive newspapers;

(c) they were not permitted to receive news magazines;

(d) periodicals which they were permitted to receive were censored by the excision of all matter relating to news of current events;

(e) letters which they were allowed to receive could only deal with domestic matters, and not with any other items of news; and

(f) their visitors could only speak of domestic matters, and were not permitted to refer to or discuss any news other than that of a domestic nature.

It is...../5

It is stated in first appellant's founding affirmation that -

> "the conduct complained of constitutes cruel, inhuman and unnecessarily harsh punishment and double deprivation adding excessively to the loss of liberty inherent in imprisonment, and is tantamount to psychological mistreatment of the Applicants, producing as it does an effect of alienation and disorientation in regard to the world outside of prison."

In regard to the exercise of the power of censorship, it is stated that -

> "such censorship is of such an arbitrary and grossly unreasonable, petty and irrational nature that those responsible therefor could not have applied their minds in good faith to the exercise of their powers."

In conclusion, it is stated in first appellant's affirmation that the matters complained of have been raised with successive Ministers of Justice, Commissioners of Prisons and Commanding Officers without, however, securing any relief.

The substance of the case which appellants sought to establish in the Court of first instance was, firstly, that in denying them any form of access to news

of current events, the Commissioner acted unlawfully and in breach of rights to which they are entitled in terms of the Act and the prison regulations. Alternatively, in so far as the grant of a right to have access to news is a matter within the Commissioner's discretion, the exercise of that discretion by him adversely to appellants was vitiated by mala fides.

It is unnecessary to set out in detail the relief originally claimed in the notice of motion. At the hearing of the appeal before this Court, appellants' counsel intimated that the relief claimed was restricted to an order in the following terms, namely,

(a) a declaration that appellants are entitled to receive books and periodicals of their choice, subject to any rules and conditions which may be prescribed under regulation 109(4) of the prison regulations; and

(b) a declaration that respondents are not entitled to apply a general policy depriving appellants of all access to news.

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The respondents' defence is set out in an affidavit deposed to by Brigadier G.N. du Plessis, who was duly authorised by them to make the affidavit. The grounds of the opposition to the grant of relief claimed by the appellants may be summarised as follows:

1. A distinction is to be drawn between those facilities to which a prisoner is entitled as a matter of right, on the one hand, and privileges which may be granted him, on the other hand.

2. Whilst not claiming the list to be exhaustive, it is alleged that a prisoner's rights embrace the provision of (a) proper housing and clothing, (b) adequate food and medical care and (c) protection against assault.

3. The relief claimed by appellants relates not to rights but to privileges, the grant of which is wholly within the discretion of the Commissioner.

4. The Court has no power to make any order relating to the future grant of privileges to the appellants, which is a matter within the Commissioner's discretion.

5. The...../8

5. The appellants lack locus standi to bring the application.

6. It is stated that the background, trials and other information relating to the appellants have been carefully studied and that the "Prison Authorities" are of the opinion that, notwithstanding their imprisonment, appellants are all capable of acts which could constitute breaches of prison and national security discipline and are, furthermore, persons who would readily attempt to escape.

7. In regard to the censorship of letters and conversations between appellants and visitors, it is stated that the practice, as applied in prisons generally, and more particularly in the case of appellants, "is one adapted to the requirements of security and to the known or suspected propensities of a prisoner."

8. As to the censorship of permitted magazines, it is stated that this is done with particular reference to particular prisoners "depending on their potential as

security...../9

security risks" and with due regard to the following considerations:

> "(i) avoiding sexually stimulating matter;
> (ii) avoiding inflammatory and seditious matter;
> (iii) avoiding matter which advocates or propagates unlawful ideology; and
> (iv) avoiding matter which could advance or assist any breach of security."

9. It is, further, stated that prisoners, including appellants, are permitted and encouraged to study for Bachelor degrees through the University of South Africa, and are normally permitted to receive the prescribed works in connection with their studies. The pursuit of these studies provides intellectual stimulus for prisoners should they choose to take advantage of the privilege to study. Apart from that, appellants may receive and read a wide variety of books which do not violate the aforementioned principles.

10. It is denied that the conduct complained of is unlawful, unauthorised or contrary to the provisions of the Act.

11. It is furthermore, stated that:

> "the treatment of the Applicants has been prescribed by the Second Respondent in terms of the powers he has under the Act and more

particularly Section 77 thereof. The magazines, and the censorship thereof, which the Applicants receive, are those prescribed by the Second Respondent."

12. It is denied that the conduct complained of "constitutes cruel, inhuman and unnecessarily harsh punishment" or that it is "tantamount to psychological mistreatment of the Applicants" as is alleged in first appellant's affirmation. In this connection reference is made to the affidavit of Dr. H. H. Brandt, who stated:

> "Ek besoek die afdeling van Pretoria-gevangenis waarin die genoemde Denis Theodore Goldberg en ander aangehou word op gereelde grondslag. Volgens my waarneming toon geeneen van die persone psigiese afwykings nie."

That was not denied by the appellants in their answering affidavits; in effect, they admitted that they were not suffering from any psychological deviations and were not mentally ill. Their complaint was that, by being deprived of news and reading matter, they were being subjected to psychological stress and anxiety.

CURLEWIS, J., who heard the matter, dis-

missed...../10a

missed the application with costs. He held, firstly, that appellants had not established that they were entitled as a matter of right to have access to news in the manner claimed by them. Secondly, in so far as it was within the Commissioner's discretion to grant an indulgence or privilege to appellants to have access to news, the exercise of that discretion adversely to appellants was not shown to have been improper. Moreover, the Commissioner's discretion

was...../11

was of an administrative nature, and the exercise thereof was not subject to review by a court of law. By consent of all the parties, appellants noted an appeal direct to this Court. I might mention that when the proceedings were instituted, John William Hosey joined therein as an applicant. However, he subsequently withdrew his application.

At the hearing of the appeal, respondents' counsel intimated that the defence based on appellants' alleged lack of locus standi was no longer being persisted in. No more need, therefore, be said about that issue, save to state that, in my opinion, counsel acted correctly in deciding not to pursue the matter in argument before this Court.

During the course of argument, appellants' counsel conceded with reference to the amended orders (a) and (b) now asked for and set out above, that a prisoner was not entitled as of right under the common law to receive books and periodicals of ~~their~~ his choice or any news of current events, and that such rights, if any, had to be sought in the Act and prison regulations. As to (a) - books and

periodicals...../12

periodicals - it was contended that such a right is to be found in regulation 109(4) read with the Act. As to (b) - news - counsel further conceded that on the information conveyed in the papers before the Court, it could not be contended that appellants had established that they were entitled, as a matter of right, to have access to sources of news of current events in the Republic and abroad, such as newspapers, news magazines and similar publications, radio broadcasts, letters from correspondents and communications from visitors. As will appear from what is stated later in this judgment, I am of the opinion that counsel acted correctly in making this concession. In view of the above concessions, I do not think that prisoners can be regarded as being entitled to current news or books and periodicals as "basic rights" - a matter to which reference will be made later on in this judgment.

It was, however, contended in regard to both (a) and (b) that, in so far as the providing of books, periodicals and news to appellants was an indulgence or

privilege...../12a

privilege, it was a matter committed to the discretion of the Commissioner under the Act and prison regulations which was justiciable on review by a court of law and that the right to the relief asked for in orders (a) and (b) had been made out on the papers. Respondents' counsel joined issue on these submissions.

Before...../13

Before dealing with the arguments of counsel, it is necessary to refer to two matters. Firstly, at the hearing of the appeal before this Court, appellants sought leave to file two affidavits dealing, inter alia, (1) with a relaxation in the practice of denying appellants access to news, and (2) with certain restrictions which were introduced in regard to the pursuit of academic studies by the appellants. Counsel for the appellants accepted that an appeal must ordinarily be decided on the facts as they were proved to be at the date of the judgment of the court of first instance (see, e.g. Goodrick v. Botha & Others, 1954 (2) S.A.540 (A.D.) at p.546 A - C), but stated that it is is being sought to bring alterations in the conditions of imprisonment to the attention of this Court "by reason of the light which they may throw upon the attitude taken up by the respondents in their affidavits in the Court below." Counsel for the respondents objected to the handing in of the two affidavits in question. In my opinion, appellants have not shown any good grounds entitling them to introduce further evidence in these proceedings. In any event, the contents of the affidavits refer to conduct which is

consistent with the attitude taken up by the respondents, i.e. that the grant of access to sources of news and the facility to pursue academic studies are matters within the discretion of the Commissioner, and that the exercise of that discretion is not subject to review by a court of law, and has, in any event, not been shown to have been exercised in any unlawful manner. The application is, therefore, dismissed with costs.

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The second matter relates to a statement in the affidavit of Brigadier Du Plessis to the effect that the treatment complained of by the appellants is in accordance with what has been lawfully "prescribed" by the Commissioner. As to this, the appellants filed a notice in terms of rule 35(12) of the Uniform Rules of Court calling upon respondents to produce the rules allegedly "prescribed" by the Commissioner. There was a dispute between the parties before the Court a quo as to whether or not the notice had been duly complied with. However that may be, no order was apparently asked for, nor issued, compelling production of the rules in question. The learned Judge a quo held that this was a matter where "convenience takes precedence over the strict rules of evidence" and that it was sufficient for respondents to have stated on oath that the treatment of the appellants was in accordance with the manner prescribed by the Commissioner. It was submitted on appellants' behalf that the learned Judge a quo erred in law in accepting what was the ipse dixit of Brigadier Du Plessis as to the justification for the treatment

complained...../15

complained of. The fact of the matter is, however, that the conditions and rules relied upon, whether they were "prescribed" orally or in writing, were not before the Court a quo which was, consequently, disabled from ascertaining for itself whether or not the treatment was in conformity to this matter.

Notwithstanding the concession made by appellants' counsel, referred to earlier on in this judgment, it is necessary to deal briefly with the question concerning a convicted prisoner's rights while he is lawfully detained in custody and serving a sentence of imprisonment in a prison established in terms of section 20(1) of the Act. I use the term "rights" in the sense of rights which are enforceable by a prisoner in proceedings instituted in a court of law.

It appears from section 2(2) of the Act that the main functions of the Prisons Department, in order of importance, are the following:

"(a) to...../16

"(a) to ensure that every prisoner lawfully detained in any prison be kept therein in safe custody until lawfully discharged or removed therefrom; and

(b) as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of industry and labour."

Paragraph (b) may be regarded as declaratory of an enlightened policy to be pursued in the treatment of convicted prisoners. It is in the nature of a counsel of perfection. The Legislature recognised that although imprisonment is primarily imposed as punishment for criminal conduct, the public interest (and that of the prisoner) are best served by applying such treatment to prisoners as is calculated to result in their reformation and rehabilitation, so as to increase the likelihood that, upon their discharge, they will become useful and law-abiding members of the community. The misunderstanding of this important function of the Prisons Department not infrequently leads to an unjustified charge that the policy aims at converting prisons into "five star hotels". The details of this policy are spelt out in the regulations. A careful and critical survey

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of the regulations satisfies me that if the policy enshrined in the Act is constantly borne in mind, and the powers granted to the Commissioner and other members of the Prisons Department to implement that policy are conscientiously exercised, a reasonable measure of success could be achieved in regard to the reformation and rehabilitation of offenders.

Imprisonment necessarily results in a prisoner's loss of contact with the world outside of prison, save to the extent permitted by the Act and the prison regulations. It goes without saying that life within an institution must of necessity be regulated by rules. In the interest of security, discipline must at all times be maintained. In terms of section 94(1) of the Act, the State President is empowered to make regulations, not inconsistent with the Act, as to a wide variety of subjects. I refer to the following paragraphs of the subsection:

"(a) the duties and powers of members of the the Prisons Service;

(c) the...../18

(c) the general government and management of prisons, the maintenance of good order and discipline therein, and the acts or omissions which shall be deemed to be offences against discipline;

(h) the introduction into or conveyance out of any prison of any food, drink, bedding, clothing, books, newspapers, letters, documents or any other articles;

(cc) generally all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved."

Section 94(1) concludes as follows:

"and such regulations may prescribe the powers of the Commissioner to issue Prisons Service orders, which shall not be inconsistent with this Act and which shall be obeyed by all members of the Prisons Service and other persons in the service of the Prisons Department to whom such Prison Service Orders are applicable."

Section 94(3) of the Act is in the following terms:

"If, in the opinion of the Minister, any regulation is not suited to the circumstances of any particular prison, the Minister may apply in respect of that prison such modification of the regulation as he may think fit."

Chapter I of the prison regulations prescribe in detail the conditions of service and duties of prison personnel.

Chapter II contains regulations which are, in terms of

regulation 88...../19

regulation 88, applicable to all prisoners, "unless inconsistent with any special provisions applicable to a particular category of prisoners". These regulations deal in detail with every aspect of a prisoner's detention from the time of his reception at a prison until his discharge therefrom after serving his sentence. In terms of section 77 of the Act, a prisoner sentenced to imprisonment and detained in a prison shall, subject to the provisions of the Act (which by definition includes the regulations), "be employed, trained and treated in such manner as the Commissioner may determine." A prisoner is required "at all times (to) perform such labour, tasks and other duties as may be assigned to him for the purpose of such employment, training or treatment or for any other purpose connected with such prison, by any member of the Prisons Service." In the main, the regulations are concerned with the employment ("besighouding", in the Afrikaans version of the section), training and treatment of prisoners, and the powers and duties of the Commissioner and other personnel are prescribed in detail.

Provision...../20

Provision is made for the furnishing of many and diverse facilities to prisoners in connection with their employment, training and treatment. Virtually every facet of life within an institution such as a prison is regulated.

In Rossouw v. Sachs, 1964(2) S.A.551 (A.D.), it was stated (at p. 562A) that it was questionable whether prison regulations confer legal rights on prisoners, and at p. 564H a distinction is drawn between the furnishing of necessities, on the one hand, and comforts, on the other hand. See also, Hassim & Another v. Officer Commanding, Prison Command, Robben Island and Another, 1973(3) S.A. 462 (C) at p. 472 H - 473 A. In Arbon v. Anderson and Others, (1943) 1 All E.R. 154, the Court was concerned, inter alia, with the question whether prison rules, made in terms of section 2 of the English Prison Act, 1898, for the "government" of prisons, confer rights upon prisoners which can be enforced by action in a court of law. The Court (GODDARD, L.J.) answered the question in the negative. He held (at p. 156B) that the question whether a breach of a

duty imposed by statute confers a right of action on an individual depends upon the scope and language of the Act which creates the obligation and on considerations of policy and convenience. At p. 156 in fine it is stated:

> "It would be fatal to all discipline in prisons if governors and warders had to perform their duties always with the fear of action before their eyes if they in any way deviated from the rules."

Reference is made to safeguards provided for in the Act - e.g., appeals to the governor. In Becker v. Home Office, (1972) 2 Q.B.407, it was held that prison rules are regulatory directions only, and that a breach thereof does not per se create any civil liability. In Craies on Statute Law (7th Ed.) the learned author states (at p. 234):

> "It is always necessary on application for a mandamus, to ascertain whether the legislature has in the statute involved given a command to which it is the business of the courts to enforce obedience, or simply a direction, discretion or counsel of perfection, with which no judicial interference is permissible."

See also in this regard, Patz v. Greene, 1907 T.S.427 and Ellis v. Vickerman, 1954(3) S.A.1001(C). In the latter

case...../22

case it is stated (at p. 1005A) that the legislation in question must be scrutinised to determine whether the provisions which create a duty for which a criminal sanction is expressly provided, in addition confer the right to a civil remedy. I.e., the intention of the legislature is to be ascertained by applying the accepted canons of construction.

In this appeal the Court is not concerned with the wider question whether or not the Act and the regulations generally confer any rights upon prisoners which are enforceable by proceedings instituted in a court of law. In legislation of the kind here under consideration, however, it is conceivable that its terms might provide for the creation of particular rights of that kind which are unqualified and not made dependent upon the exercise of a discretionary power by the Commissioner or a member of the Prisons Service. The only question would then be whether the enactment itself also provides a remedy for the enforcement of that right. If no specific remedy is provided for, the inference is that the ordinary civil remedy for enforcing rights should be available to an aggrieved prisoner. The enactment could also provide for the creation of a right by the

exercise of a discretionary power vested in the Commissioner. On the other hand, the Act or the regulations may simply grant certain powers to the Commissioner and members of the Prisons Service to be exercised by them in connection with the performance of the functions of the Prisons Department, without intending to create any rights enforceable by an aggrieved prisoner by means of proceedings in a court of law. Virtually every exercise of power or the carrying out of a duty requires the exercise of some measure of discretion. Some regulations are no more than counsels of perfection intended to furnish guide lines in connection with the employment, training and treatment of prisoners. Though they aim, inter alia, at benefitting prisoners, it clearly was not intended to create rights in favour of prisoners of a kind enforceable by proceedings in a court of law. Typical examples of this type of regulation are those dealing with general principles applicable to maintaining discipline and order (regulation 98), the duties of the head of a prison in regard to complaints and requests of a prisoner (regulation 103) and the preservation of a family relationship (regulation 110).

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The Act and the regulations provide for a substantial measure of internal control over the exercise of discretionary powers and the performance of their duties by the Commissioner and other members of the Prisons Service. In terms of section 3 of the Act, the Commissioner carries out his duties "under the direction and control of the Minister" who, it must be remembered, may be called to account to Parliament in connection with the carrying out of its functions by the Prisons Department. Chapter V of the Act provides for the trial and punishment of members of the Prisons Service and temporary warders for a contravention of or failure to comply with any provision of the Act. In so far as it is material hereto, regulation 71(1) provides as follows:

> "A member or special warder who contravenes or fails to comply with any provision of the Act or these regulations (other than a contravention or non-compliance which is expressly declared to be an offence under the Act or these regulations) or who -
>
> (bb) fails to comply with any Prisons Service Order or other order issued by authority of the Commissioner or other commissioned officer, or
>
> (cc) disobeys, disregards or wilfully fails to carry out any lawful order given to him by a

member or any other person having authority to do so or displays insubordination by word or conduct," shall be guilty of an offence."

In terms of regulation 148, the Commissioner is empowered to "issue, amend or rescind Prison Service Orders not inconsistent with the Act and regulations" on a variety of matters, and members of the Prisons Service, special warders "and other persons in the service of the Prisons Department" are commanded to obey such orders. Regulation 103 affords every prisoner the opportunity of submitting complaints or requests to the head of a prison, and of requesting an interview with, inter alia, the Commissioner or the Chairman of the Prison Board (a board appointed by the Minister in terms of section 5 of the Act). In terms of regulation 104 judges of the Supreme Court and magistrates "shall at all times be afforded admission to a prison, as well as access to any section thereof." They may "interview any prisoner and may report to the Commissioner in respect of any matter which they consider should be brought to the Commissioner's notice". In passing, I am of the opinion that regular visits to prisons by judges and magistrates would tend to

serve the interests not only of prisoners but of the Prisons Department as well. Personal experience leads me to believe that such visits are welcomed by the Department.

From what has been set out above, it appears that there are reasonably adequate safeguards against the development of any form of bureaucratic tyranny within the Prisons Department. Moreover, the Act and the regulations provide remedies for the enforcement of those provisions which aim at the proper carrying out of the functions of the Prisons Department referred to in section 2 of the Act and spelt out in detail in the prison regulations.

I have already indicated that this Court is not now concerned with the question whether or not the prison regulations generally confer on prisoners rights of the kind referred to above, i.e. (1) rights which are directly conferred, independently of the exercise of any discretionary power, and (2) rights which are created as a result of the exercise of that power.

In the Court a quo, and before us, the right to the relief claimed was founded upon the provisions of regulation 109(4),

which is contained in that part of the regulations dealing with "Discipline and Control" of prisoners under the cross-heading "Education and Library". Regulation 109, which was amended in 1973, reads as follows:

"Studies

109(1) If the Commissioner is of opinion that a prisoner's deficient or inadequate schooling or complete lack thereof could possibly be a factor in causing crime, such a prisoner shall at all times be encouraged to undertake an appropriate course of study in his free time, due regard being had to the period of his sentence and personal aptitude: Provided that the Commissioner may, in his discretion, allow any other prisoner to embark on a suitable course of study.

Compulsory Studies

(2) Compulsory studies, as well as the conditions under which such compulsory studies shall be pursued, may be prescribed for specific cases in certain categories of prisoners.

Establishment of Library

(3) A properly organised library containing literature of constructive and educational value shall, as far as possible, be established and maintained at a prison and may in the discretion of the Commissioner be placed at the disposal of all prisoners detained in such prison.

Books and Periodicals from Outside Sources

(4) Subject to any prescribed conditions and rules, a prisoner may receive books and periodicals from outside sources.

Forfeiture...../28

Forfeiture of Permission to Study

(5) If any prisoner who was granted permission to study abuses such permission or his study material in any way or uses it for purposes other than study, such a prisoner's study material and the permission to study may be temporarily or permanently withdrawn. If a prisoner's study material and the permission to study be so withdrawn and if he has incurred costs in connection with his studies, he shall not be entitled to recover such costs from the State. The study material remains the property of the prisoner and should be treated as his private property.

Study and Library Facilities not a Legal Right

(6) Permission to study or the utilisation of any library in terms of this regulation is subject to the discretion of the Commissioner and the provisions of the said regulation may in no way be so construed as implying that such permission and/or utilisation of any library allows any prisoner a right which he can legally claim".

It is of some interest to note that although section 94(1)(h) empowers the State President to make regulations as to the introduction of newspapers into a prison, we were not referred to any regulation dealing therewith. There is, moreover, no regulation dealing in general terms with the dissemination of news within a prison, whether

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by means of radio broadcasts, newspapers, news magazines or in any other manner. It appears, however, from first apellant's affirmation that certain prisoners do receive newspapers. Appellants receive a magazine which contains news of sporting events and a publication devoted to chess, which presumably contains news items relating to that game. Appellants are permitted to receive news of a personal or domestic nature. There is reference in first appellant's affirmation to a so-called "Prisoner's Handbook" (a copy of which is annexed to the affirmation of appellants' attorney, Mr. R. J. Tucker). In an introduction to the handbook, it is stated that it contains a resumé "of the more important requirements" of the "rules and regulations" applicable to prisoners. Section 85 of the Act provides that the provisions of the Act and the regulations "relating to the treatment and conduct of prisoners" shall be made available to every prisoner immediately after his admission to a prison. I take it that the handbook in question is furnished to prisoners in compliance with the provisions of section 85 of the Act. Paragraph 20(e) of the handbook, reads as follows:-

"A prisoner 30

> "A prisoner may receive approved books, magazines and newspapers direct from a bookseller or publisher".

Paragraph 20 deals generally with the "Despatch and Receipt of Parcels and Goods". Paragraph 21, under the heading "Purchases", in so far as it is material hereto, provides that prisoners "may purchase....reading matter with private funds and gratuity." Paragraph 31(b), under the heading "Library and Reading Matter", provides as follows:

> "In terms of prescribed conditions and regulations, a prisoner may receive books and magazines from outside sources, as detailed in paragraphs 20(e) and 21."

In so far as reliance may be placed on the abovementioned handbook, therefore, it would seem that "approved" newspapers may be received by prisoners direct from a bookseller or publisher. It will be recalled that regulation 109(4) only refers to "books and periodicals", which, it was conceded, does not include newspapers. Nor were we referred to any regulation dealing with the censorship of news, newspapers or other reading matter (including letters). It is unlikely that the Commissioner's power of

censorship...../30a

censorship was intended to be embedded within regulation 109(4) because of the provision "subject to any prescribed conditions and rules", especially if (as seems likely) this sub-regulation, in the context of the regulation as a whole, probably relates only to educational books and periodicals, and, in any event, does not extend to newspapers and other news media. For reasons to be given later, I am of the opinion that the Commissioner's power to disseminate news (which necessarily includes the power to censor it wholly or partly) can only be derived from section 77 of the Act.

The question is, what are prisoners' rights (if any) in relation to the receipt by them of news, books, magazines, periodicals, newspapers and other similar publications? I disregard for the moment the fact that regulation 109(4),

on...../31

on which appellants rely, deals with books and periodicals only. In my opinion, there are no indications in regulation 109(4) that it was intended that "subject to any prescribed conditions and rules" prisoners would be entitled, as a matter of right, (in the sense indicated above), to receive books and periodicals from outside sources. Regulation 109 deals with the education of prisoners and the establishment of libraries for their use. Regulation 109(6) provides that permission to study and the utilisation of a library are subject to the discretion of the Commissioner and are not rights which a prisoner "can legally claim". There appears to be no acceptable reason why it should have been intended to confer on prisoners a right, enforceable by proceedings instituted in a court of law, to obtain any books and periodicals, let alone books and periodicals of their choice. If a prisoner is entitled, in terms of any "prescribed conditions and rules" to obtain books and periodicals from outside sources, and that "right" is frustrated by unlawful conduct on the part of a member of the Prisons Service, his remedy is to lodge a complaint with the head of that

prison which could lead to disciplinary steps being taken against the member concerned. For reasons of practical convenience in connection with the management of a prison, too, it is highly unlikely that it would ever have been intended to confer upon a prisoner a right to obtain a publication of his choice from outside sources, coupled with a remedy to enforce that right by instituting proceedings in a court of law if that right was denied him by the Commissioner or any member of the Prison Service.

I do not find it necessary to deal with the distinction between necessaries or basic rights, on the one hand, and privileges or comforts, on the other hand. See, as to this, Rossouw v. Sachs (supra, at p.504H) and Hassim and Another v. O.C. Prison Command, Robben Island & Another, 1973(3) S.A. 462 (C) at p. 472 H. - 473 A. Such basic rights or necessaries as, e.g., food, clothing, accommodation and medical aid, are dealt with in the regulations. The fact that these regulations deal with facilities generally regarded as basic to the maintenance of a reasonably civilised minimum standard of living, may no doubt be relevant to the question whether it was intended to confer

rights of the kind referred to above. In my opinion, access to the publications mentioned in regulation 109(4) and to sources of news of current events cannot be regarded as being basic to maintaining the minimum standerd of living above referred to. Cf. the dictum on p. 565 of Rossouw's case (supra), which, though relating to "detainees", are, in my opinion most appropriate here too. As already mentioned, that was virtually conceded by appellants' counsel in regard to news of current events, and in my view, the position in regard to publications is no different.

It follows, in my opinion, that in so far as appellants' application for relief was founded upon the alleged existence of rights enforceable in a court of law, it was rightly rejected by the Court a quo.

I next deal with the question relating to a prisoner's right to apply to the Supreme Court for the type of relief claimed by the appellants in these proceedings. The court will, of course, not concern itself with issues of an essentially academic nature. I have already

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in the preceding paragraph stated my opinion that access to sources of news and to publications such as books and periodicals is not governed by enforceable rights conferred on prisoners by the Act and the regulations, and that those facilities cannot be regarded as basic to the maintenance of a reasonably civilised minimum standard of living. Nevertheless, the issues raised in the papers can by no means be regarded as being of an academic nature. An illiterate and unsophisticated prisoner would no doubt be content with news restricted to the affairs of his family and friends. I would observe, though, that it goes without saying that the ordinary prisoner would for obvious reasons be primarily interested in receiving news concerning his family and friends, because that would be the only way in which the relationship between him and them can be maintained. Regulation 110 provides that: "Special attention shall be given to the preservation of the good relationship between a prisoner and members of his family in the best interests of both parties". The appellants, however, appear to be

sophisticated.../34

sophisticated persons and some of them are academically well qualified. I accept that a denial to them of having access to sources of news of current events in the Republic and abroad and to reading matter of their choice must of necessity result in severe hardship. They are all longterm prisoners and any prolonged isolation from news of current events must, so it would seem to me, necessarily result in frustration and possibly in some degree of disorientation eventually.

The Act and the regulations provide for a wide range of powers to be exercised by the Commissioner and members of the Prison Service in connection with the

administration...../35

administration of prisons. Virtually every power involves the exercise of some greater or lesser measure of discretion. In some instances a great latitude of choice is left to the person charged with the duty of exercising a particular discretionary power: he may virtually have complete freedom in the exercise of his discretion as to whether, when and in what manner he will act. At the other end of the scale, however, a power to act may be conferred which in effect constitutes a direction to the person required to exercise the power as to when and in what manner he is to act, leaving him virtually no freedom of choice at all. Section 77 of the Act confers a wide discretionary power on the Commissioner to "determine" the manner in which prisoners are to be employed, trained and treated. In so far as the Act is concerned, the only limitation is that his determination shall be "subject to the provisions of this Act (which by definition includes the regulations) and also to any special order of the court." In the affidavit of Brigadier Du Plessis, it is stated that "the treatment of the Applicants has been prescribed" by the Commissioner "in terms of the powers he has under

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the Act and more particularly section 77 thereof". In my opinion, the word "prescribed" is used in a non-technical sense, and means no more than that the Commissioner has determined the manner in which the appellants are to be treated. Section 77 does not provide for any particular procedure to be followed by the Commissioner in making his determination. It may, therefore, take the form of either oral or written directions to the personnel in regard to the employment, training and treatment of prisoners. Apart from the limitations imposed by section 77, the Legislature clearly intended that the Commissioner, who is in charge of the administration of all prisons, should have wide powers in determining the manner in which prisoners, or any one or group of them, are to be employed, trained and treated. The fact that section 77 refers to "every prisoner" and "a prisoner" indicates that the Commissioner may discriminate between individual prisoners or groups of them. This is understandable. It is an unfortunate and wellknown fact that the Republic has a large average daily prison population, who are detained in many prisons established in

cities...../36a

cities, town and rural areas throughout the Republic. Prisoners vary greatly in character, age, standard of education, kinds of crime they have committed and their willingness or ability to adapt to institu-

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tional life, which is aimed not only at their safe custody in prison but also at their reformation and rehabilitation.

To have insisted on inflexible and precisely detailed guide lines in regard to the employment, training and treatment of prisoners, or any one or group of them could, in my opinion, hinder rather than promote the efficient carrying out of its functions by the Prisons Department in the interest of the community and the prisoners themselves. It should, however, not be overlooked that the wider and more undefined the ambit of the discretionary power is, the greater the responsibility of the official who exercises that power is to act in good faith and with due regard to the purpose for which the discretionary power was granted to him.

As I have already pointed out, the right or facility of having access to news of current events is not specifically dealt with in the regulations, notwithstanding the power of the State President to make regulations in regard to the introduction into prison of, inter alia, newspapers. In my opinion, however, section 77 of the Act empowers the Commissioner to permit access to news in any

manner...../38

manner determined by him. That he has made such a determination under the section either generally, or specifically in relation to the appellants, is borne out by the censorship of the items of news in the appellants' reading matter complained about and by the affidavit of Brigadier Du Plessis in which he says: "the treatment of the (appellants) has been prescribed by (the Commissioner) in terms of the powers he has under the Act and more particularly section 77 thereof. The magazines, and the censorship thereof, which the (appellants) receive, are those prescribed by (the Commissioner)." In terms of regulation 148 of the prison regulations, the Commissioner is given a wide discretionary power to issue, amend or rescind Prison Service Orders, "not inconsistent with the Act and regulations", on a wide variety of matters concerning the administration of prisons under his control. It is, therefore, clear that the Legislature intended conferring wide powers on the Commissioner in connection with the performance of its functions by the Department of Prisons.

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In so far as the regulations are concerned, certain of the powers conferred are in mandatory form, leaving the members of the prisons service little or no discretion as to when and in what manner the power is to be exercised. Examples of such powers are those relating to the search of prisoners (regulation 89), the taking of fingerprints and photographs of prisoners (regulation 91),

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the removal of prisoners (regulation 95), the provision of suitable accommodation (regulation 97), food (regulation 114), and clothing (regulation 115). In some instances, these regulations are concerned with the welfare of prisoners without, however, creating any rights in their favour. Certain regulations impose a duty to act involving a measure of discretion as to the performance of that duty. Examples of such duties and powers are those relating to the head of a prison in regard to complaints and requests submitted to him by prisoners (regulation 103) and the opportunity to be granted to prisoners to satisfy their spiritual inclinations and needs (regulation 108). In certain instances the Commissioner is obliged, at the request of a prisoner, to exercise a discretionary power conferred upon him. See, e.g., regulation 121 which deals with the submission by a prisoner of a petition to the Minister and regulation 123 (as amended by Government Notice No. R.1199 dated 23 June 1977) which deals with interviews with a prisoner by his legal representative. Prior to its amendment, regulation 123(1) appears to have granted an

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unqualified right to a prisoner "who is a party to or witness in any civil or criminal proceedings or action" to be interviewed by his legal representative. As to this see Minister of Prisons v. Cooper and Others, 1978(3) S.A. 512(C).

If, as I have already said, the Commissioner has made a specific determination under section 77 relating to the censorship of the news items in the reading matter, that is wholly within his powers under the section. For, in my opinion, the Commissioner's power to determine the manner in which prisoners are to be employed, trained and treated, of necessity includes the power to make separate determinations in respect of individual prisoners or categories of prisoners.

Furthermore...../41

Furthermore, it must of necessity be implied that the Commissioner may amend or rescind any determination made by him. In exercising his power under section 77 of the Act, the Commissioner does not affect any antecedent right of a prisoner. The making of a determination in regard to any aspect of the employment, training and treatment of prisoners is a matter committed to the discretion of the Commissioner. It is for him to decide whether and when he will exercise his discretionary power and as to what aspect of the employment, training or treatment of prisoners it is to be directed.

In this regard he acts in a purely administrative capacity, and the only statutory limitation on his power is that a determination made by him shall not be inconsistent with the provisions of the Act, the regulations or any order of the court. If, therefore, the Commissioner, on considerations of expediency and policy, determines the manner in which prisoners, or any category or one of them, is to be employed, trained or treated, a court of law is

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not, in my opinion, empowered to enter upon a review of his conduct, provided it is not inconsistent with the provisions of the Act, the regulations or any order of a court. It follows, too, that a court cannot by means of an order direct him to exercise his power in the future in a manner specified in that order. The grant of facilities or privileges to prisoners is a matter committed to the exclusive discretion of the Commissioner. It follows that a court is not empowered to prescribe to the Commissioner what policy is to be applied by him in determining how prisoners are to be treated in respect of access to news. See Wiechers: Administratiefreg, p.231 and 278. In my opinion, therefore, appellants are not entitled to an order declaring that respondents are not entitled to apply a general policy depriving them of access to news of current events in the Republic and abroad. The fact that this Court may, on the information placed before it, entertain grave doubts as to the wisdom or reasonableness of the determination made by the Commissioner in regard to the appellants' access to news, other than that of a domestic and sport nature, is not relevant to the determination of

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the issue under consideration. At best, it is a factor which the Commissioner may possibly take into account if and when his earlier determination comes to be reconsidered.

I next deal with the submissions made by the appellants' counsel in regard to the relevance and effect of regulation 109(4), and more particularly in connection with the exercise of his discretionary power by the Commissioner regarding the receipt by appellants of books and periodicals from outside sources. It is to be observed that the regulation does not in terms or by necessary implication entitle prisoners to receive books and periodicals "of their choice" from outside sources. The receipt by them of such publications is stated to be subject to "any prescribed conditions and Rules". I have already dealt with the significance of the use of the word "prescribed", namely, that it means no more than conditions and rules determined by the Commissioner in terms of Section 77 of the Act. It is to be inferred from the above-quoted paragraph 20(e) of the Prisoner's Handbook that the Commissioner determined that

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only "approved" books, magazines and newspapers may be received from a bookseller or publisher. In determining that prisoners may receive newspapers, in addition to books and magazines (and periodicals?), the Commissioner did not do anything inconsistent with the Act or the regulations. Neither is his determination that only "approved" publications may be received, in my opinion, inconsistent with the Act or the regulations. It is, in my opinion, self-evident that it could never have been intended that a prisoner should be entitled, e.g., to books propagating unlawful political ideologies or describing techniques to be applied in carrying out terrorist activities. A prisoner is no doubt entitled to request approval for a publication of his own choice, if it is not already on a list of approved publications. However, if having considered the request, the Commissioner exercises his discretion adversely to the prisoner concerned, that would normally be the end of the matter.

It was, however, contended on appellants' behalf that in so far as the treatment complained of relates to matters committed to the discretion of the Commissioner,

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the exercise by him of that discretion was improper and could for that reason be reviewed by a court of law.

I have above referred to certain wide discretionary powers conferred upon the Commissioner by the Act and the regulations. In our law, however, a wide discretion is not necessarily synonymous with an unfettered discretion. See, e.g. Ismail and Another v. Durban City Council, 1973(2) SA.362(N) at p. 372A - G, Wiechers: Administratiefreg p.231, and Steyn: Uitleg van Wette (4th Ed.) pp. 209 and 235. In so far as the Commissioner is empowered to grant facilities to prisoners to receive publications and to have access to sources of news, the Act and regulation 109(4) confer a wide discretion on him, but, as I have already indicated above, it is not an unfettered discretion.

In Sinovich v. Hercules Municipal Council, 1946 A.D. 783, SCHREINER, J.A., suggested (at p.802) that the power of a court to declare a by-law invalid is greater than its power to go behind the exercise of a discretion by an official. The learned Judge stated that in the latter

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class of case, once the court is satisfied that a discretion has been given to the official, his exercise of it stands, unless it is shown that he has not applied his mind to the question or has acted from a wrong motive. In Shidiack v. Union Government, 1912 A.D.642, a case in which the decision of a Minister was in issue, INNES, A.C.J., stated (at p.651-2):

> "There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

The circumstances in which interference with the exercise of his discretion by an official would be "possible and right", have been similarly detailed in, e.g., Union Government v. Union Steel Corporation (S.A.) Ltd., 1928 A.D. 220 (at p.237); Van Eck N.O. and Van Rensburg N.O. v. Etna Stores, 1947(2)

S.A. 984 (A.D.) at p. 997, Laubscher v. Native Commissioner, Piet Retief, 1958(1) S.A. 546 (A.D.) at p. 549 F - G, Harneker v. Gaol Superintendent, 1951(3) S.A. 430 (C) at p. 436, Mustapha and Another v. Receiver of Revenue, Lichtenburg and Others, 1958(3) S.A. 343 (A.D.) at p. 348G and S.A. Defence and Aid Fund and Another v. Minister of Justice, 1967(1) S.A. 31(C) at p. 35 A - D.

In my opinion, the evidence placed before the Court a quo does not establish that in determining the extent to which appellants would be permitted to have access to news and the range of reading matter they would be permitted to receive in terms of regulation 109(4), the Commissioner either failed to apply his mind to the matter or to exercise his discretion at all. This much appears from the uncontradicted evidence of Brigadier Du Plessis. Indeed, if regard is had to the evidence of first appellant that he had raised the matters in dispute with successive Commissioners, it is improbable that they would not have been considered and that no decision would have been taken thereon.

I agree with counsel's submission that many of the examples of how censorship was applied was, to say the least, mystifying. In my opinion, however, this does not justify the inference contended for on appellants' behalf. The Commissioner determines the general policy to be applied in regard to censorship. If any member of the Service, through ineptitude or for any other reason, fails to comply with that determination, the prisoner's remedy, as I have stated above, is to complain to the head of the prison or to request an interview with the Commissioner. As to this, see the procedure prescribed by regulation 103.

There is no basis, either in fact or in law, for a finding that the Commissioner has disregarded the provisions of the Act or the regulations. As I have already indicated, section 77 of the Act confers a wide administrative discretion on the Commissioner in the determination of the manner in which prisoners are to be employed trained and treated. It was, therefore, competent for him to determine how prisoners, or any category of them, were to be treated as to their access to news and the receipt

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by them of reading matter from outside sources. This is what the Commissioner states was in fact done by him.

It was, in conclusion, submitted on appellants' behalf that the evidence establishes that in exercising his discretionary power in connection with the treatment of appellants in the manner complained of, the Commissioner acted mala fide or from ulterior or improper motives. It was submitted that the Commissioner discriminated against appellants, and did so for reasons unconnected with the maintenance of security and discipline, but with the intention of inflicting punishment additional to that necessarily involved in their being sentenced to imprisonment. It would, in my opinion, be unlawful for the Commissioner to inflict punishment on any prisoner other than that provided for by the Act or the regulations. The Commissioner is empowered to discriminate between prisoners and categories of prisoners in determining the manner in which they are to be treated. That he does so in the exercise of his discretionary power, does not without more justify an inference that he is abusing his power for some ulterior or improper purpose. As to that,

there is no direct evidence of bad faith on the Commissioner's part. It was, however, submitted on appellants' behalf that if regard is had to the degree of unreasonableness of the Commissioner's determination in the light of the statutory functions of the Prisons Department and his failure to produce the "conditions and rules prescribed" by him in connection with the treatment of appellants, the inference is justified that he was acting from some ulterior or improper motive - i.e., to inflict punishment on appellants.

The appellants rely on circumstantial evidence to establish the factum probandum, i.e. the motive of the Commissioner in not permitting appellants to have a wider access to news and to receive publications of their choice from outside sources. I have advisedly used the word "permitting" because, in my opinion, in general a prisoner is only entitled to enjoy such priviliges as are permitted; he is not entitled to all the facilities enjoyed by persons outside of prison except those which are in terms prohibited either by the Act, the regulations or by the Commissioner in the exercise of his discretionary powers. In so far as appellants seek to rely on the failure of the respondents

to produce the "prescribed" conditions and rules above as furnishing some evidence of mala fides on the part of the Commissioner, I am of the opinion that such failure does not, in the present circumstances, further their case. As to this, see National Transport Commission and Another v. Chetty's Motor Transport (Pty.) Ltd., 1972(3) S.A.726 (A.D.) at p. 736A. I have already above dealt with the Commissioner's power to "prescribe" (i.e. to determine) "conditions and rules" of the kind here under consideration and in the course of doing so referred to the fact that no procedure is "prescribed" which has to be observed by the Commissioner in making a determination, either as to any enquiry to be undertaken by him or as to the manner of publication thereof. I assume that it would usually take the form of a written minute conveying directions to the personnel as to the policy to be applied in regard, e.g., to censorship generally and to the approval of publications (including newspapers) which prisoners may be permitted to receive from outside sources. Personnel would be bound by these directions, and a failure by any member of the service to act in accordance therewith could result in

disciplinary...../52

disciplinary action being taken against him. In my opinion, however, these "prescribed" conditions and rules would not be binding upon the Commissioner. He may, in his discretion, and for reasons of expediency and policy at any time rescind, vary or amend them either in regard to their application to all prisoners generally or to any one or category of them. In the affidavit of Brigadier Du Plessis it is stated that appellants are treated in accordance with conditions and rules "prescribed" by the Commissioner. The affidavit also deals in some detail with the policy (and the reasons therefor) determined by the Commissioner in regard to the censorship of reading matter which appellants may receive and the nature of the news they may have access to. The nature of the privileges to which appellants were entitled are, in my opinion, not dependent on the interpretation of any departmental minutes. Such written minutes (if any) would probably be in the form of directions to the personnel as to the carrying out of the manner of treatment determined by the Commissioner. Little purpose, if any, could in the circumstances have been served by the production of such "written" conditions and

rules...../53

rules. In my opinion, therefore, no inference adverse to the Commissioner in relation to any matter in issue in these proceedings is warranted by the alleged failure to produce such minutes as might have a bearing on the nature of the privileges to which appellants claim to be entitled.

As to the alleged unreasonableness of the exercise of his discretionary power by the Commissioner, it seems to me that the appellants' complaints must be viewed in their proper perspective. Imprisonment undoubtedly involves harsh consequences for a convicted prisoner. To detail some of the more obvious consequences: he loses his liberty, is removed from society and is detained in an institution where strict discipline is enforced; he is no longer able to enjoy any free association with his family and friends; and he is effectively deprived of the opportunity of earning his livelihood. Added to this is the realisation by a prisoner that he is the author of his own misfortune and that of his family. These consequences were intended, so that imprisonment may have some deterrent effect, not only in so far as the prisoner himself is concerned, but also in so far as other

persons...../54

persons might contemplate engaging in criminal conduct. On the other hand, prisoners (including appellants) are granted many privileges, e.g. to maintain some association with their family and friends, by means of visits and correspondence, to study so as to improve their academic and other qualifications, to have access to literature of a constructive and educational nature, to receive a wide variety of other approved publications, to satisfy their spiritual inclinations and needs and (in the case of appellants), to have a restricted access to news (mainly concerning the welfare of their families and friends and of sporting and similar events). The list is by no means exhaustive. The Commissioner's determination that appellants are not to be permitted access to news of a more general nature, i.e. of current events in the Republic and abroad, is, in my opinion, not to be considered in isolation, if it is intended to draw inferences therefrom as to his purpose or motive in making the determination in question. The Commissioner is a high ranking commissioned officer, and it cannot be lightly assumed that he is uninformed as to the statutory functions

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of the Prisons Department and unmindful of his responsibility to account to the Minister in regard to the proper performance by the Department of those functions. News is, of course, a very wide concept, and it is difficult (if not impossible) to determine precisely what restrictions on access to news of current events could be regarded as reasonable or otherwise. Appellants describe themselves as "political prisoners". I understand this to mean that they have sought to achieve political objectives by resorting to criminal conduct. Would it be unreasonable for the Commissioner to determine that appellants are to be denied access to news of a political nature, more particularly to news of the progress (or lack of it) of opposing political ideologies both in the Republic and abroad? I do not think so.

There is abundant authority for the proposition that interference by the Court in a case such as this on the ground of unreasonableness is only justified if it is gross to so striking a degree as to warrant the inference that the

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repository of the discretionary power has acted in bad faith and from an ulterior or improper motive. See, e.g., National Transport Commission and Another v. Chetty's Motor Transport (Pty.) Ltd., (supra) at p.735F, Northwest Townships (Pty) Ltd., v. Administrator, Transvaal and Another, 1975(4) S.A.1 (A.D.) at p. 8 B - G and Union Government v. Union Steel Corporation (S.A.) Ltd., (supra) at p.237.

In my opinion, the evidence does not in this case establish by a preponderance of probabilities the requisite degree of unreasonableness warranting the inference contended for on appellants' behalf.

The appeal is dismissed with costs, including the costs occasioned by the petition for leave to adduce further evidence.

P.J. Rousseau
ACTING CHIEF JUSTICE.

TROLLIP J.A.)
HOFMEYR J.A.) concur.
JOUBERT J.A.)

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

DENIS THEODORE GOLDBERG
IAN DAVID KITSON
JOHN EDWARD MATTHEWS
ALEXANDER MOUMBARIS
RAYMOND SORREL SUTTNER
DAVID RABKIN
JEREMY PATRICK CRONIN
CHARLES ANTHONY DAVID HOLIDAY ..... Appellants,

and

THE MINISTER OF PRISONS
THE COMMISSIONER OF PRISONS
THE OFFICER COMMANDING, PRETORIA PRISON .... Respondents

Coram: Wessels, A.C.J., Trollip, Corbett, Hofmeyr et Joubert, JJ.A.

Heard: 15 May 1978.

Delivered: 06 September 1978

J U D G M E N T

CORBETT, J.A.

The basic facts with which this appeal is concerned

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appear from the judgment of the Acting Chief Justice, which I have had the privilege of reading. I agree that the application for leave to file additional affidavits (relating to relaxations of the policy of denying access to news and restrictions upon the right to study) introduced after the hearing of the matter by the Court a quo, should be dismissed with costs, but in regard to the appeal itself, for the reasons which follow, I have come to a conclusion different from that reached by WESSELS ACJ and am unable to concur in the order dismissing the appeal.

In presenting appellants' case to this Court their counsel, Mr Kentridge, disavowed any reliance upon the common law. Nevertheless, the common law position of a person sentenced to undergo a term of imprisonment as a punishment for the commission of a crime and the general effect thereon of the Prisons Act, 8 of 1959 ("the Act") and the prison regulations framed thereunder ("the regulations") were debated to some extent at the bar. Because of this and because these matters have at least some background

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relevance to the issues before the Court I propose to make some tentative observations in this connection.

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily makes upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of "rights") are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress. I would emphasize

the use of the words "basic" and "denied" / in

in this connection because I do not wish to convey the impression that every alleged infraction of a prisoner's rights should be allowed to be a cause for legal action. If that were permitted, the position of the prison authorities could become intolerable and the proper administration of gaols exceedingly difficult. In terms of the regulations prisoners who have complaints about their treatment in gaol are given the opportunity to voice them and the regulations also prescribe how such complaints are to be dealt with (see reg. 103 and also reg. 104). This should be the remedy for complaints not amounting to a denial of basic rights. I shall come later to what is meant by basic rights.

Some support for the general approach which I have outlined is to be found in certain remarks of INNES, JA in Whittaker v Roos and Bateman, 1912 AD 92, a case concerning claims for damages by two prisoners who alleged that they had been mistreated while in gaol. With reference

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to the conduct of the governor of the gaol in which the plaintiffs had been imprisoned INNES, JA stated (at p 122-3):

> "I agree with WESSELS, J., in holding that the illegal treatment to which the plaintiffs were subjected amounted to a delict on the part of those responsible for it. And I think the delict was of the class dependent upon intent (dolus); in other words, that it constituted an injuria. The action of the Governor was a wrongful and intentional interference with those absolutely natural rights relating to personality, to which every man is entitled. True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr. Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration. Any such punishment would amount to an injuria."

Whittaker's case admittedly dealt with the position of an awaiting-trial prisoner, whose treatment is necessarily different from that of a sentenced prisoner. The former is imprisoned merely to ensure that he attends his trial and his incarceration should not degenerate into a form of punishment. This was recognized under the law of Holland (see Voet 48.3.6.) and under the Act and the regulations there are special provisions in regard to the detention and treatment of the awaiting trial prisoner which tend to ameliorate his lot as compared with that of a sentenced prisoner (see secs. 82 and 83 of the Act and reg. 132). The latter undergoes imprisonment as a punishment and although this punishment, like others, aims at reformation and rehabilitation as well, the fact that it is a form of punishment inevitably affects the quality of life of the sentenced prisoner.

The above-quoted remarks of INNES, JA were

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referred to by OGILVIE THOMPSON, JA in the case of Rossouw v Sachs, 1964 (2) SA 551 (AD), at p 560 F-G, who stated that they had to be read in the context of the facts of Whittaker's case and pointed out that on those facts the plaintiffs in that case had been detained in a wrong place, in a manifestly unauthorised manner and plainly inconsistent with their status as awaiting-trial prisoners. Rossouw v Sachs (supra) was, of course, concerned with the rights of a person temporarily detained under sec. 17 of Act 37 of 1963 - the so-called "90-day" detention law - and for the reasons stated in the judgment it was held that the position of such a detainee could not be equated to that of an unconvicted prisoner (see p 564 C). I do not read the judgment in Rossouw's case, however, as indicating or implying that the general approach adopted in Whittaker's case (as expounded by INNES, JA) is not relevant to the case of a sentenced prisoner, due allowance being made for the essential differences that exist between his position

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and that of an awaiting-trial prisoner. It is also of considerable interest to note that in the United States of America the same approach is adopted in regard to sentenced prisoners. According to American Jurisprudence, 2nd ed, Vol 60, p 846 —

> "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."

(See also Coffin v Reichard, 155 ALR 143.) Furthermore, a convicted prisoner's entitlement as a citizen to certain basic rights and to their enforcement by a court of law, where necessary, was asserted in this country in the case of Hassim v O.C. Prison Command, Robben Island, 1973 (3) SA 462 (C), correctly in my view.

In determining the basic rights of a prisoner regard must clearly be had not only to the common law principle to which I have referred but also to the relevant legislation, viz. the Act and the regulations. In many

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instances these basic rights have been incorporated, sometimes with remoulding or modification, in this legislation. (See, e.g., reg. 97, relating to accommodation; reg. 98, prohibiting unlawful assaults upon prisoners; reg. 108, dealing with religious observances; reg. 111, prescribing medical and hospital services; reg. 113, concerning exercise and physical fitness; reg. 114, relating to food, and reg. 115, regarding clothing.) Where this is so, it is primarily the legislation that must be looked at, but, save where the language is clear, it would be appropriate when interpreting it to have regard also to this common law background. The common law would, a fortiori, be relevant when there is no corresponding legislative enactment.

In Hassim's case (supra) DIEMONT, J said, with reference to a prisoner's basic rights, (at p 473 A) —

> "He must have the right to eat, to be clothed, to be given shelter and to receive medical aid — and if these rights are imperilled he must be entitled to ask the Court for relief".

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In his opposing affidavit filed upon behalf of the present respondents Brig. Du Plessis submitted that (while not claiming the list to be exhaustive) a prisoner's rights embraced (i) proper clothing and housing, (ii) adequate food and medical care, and (iii) protection against assault. In his heads of argument respondent's counsel added to this list (iv) the right to practise religion and (v) the right to have access to legal representatives. I am not sure that this enumeration is a complete one. Apart from (iv) and (v) the rights mentioned relate principally to the prisoner's physical well-being. To my mind his mental and psychological well-being is also of basic importance. And this, I think, is recognized by the Legislature in providing that one of the functions of the Prisons Department shall be, as far as practicable, to reform and rehabilitate prisoners and train them in habits of industry and labour (sec. 2(2)(b) of the Act, and see also sec. 77 of the Act and reg. 117). The same recognition is discernible in those regulations which include provision for, inter alia, studies by prisoners,

the establishment of libraries in prisons and the receipt of books and periodicals from outside sources (reg. 109).

It is said that a prisoner has no right to study or to access to libraries or to receive books; that these facilities are privileges not rights, comforts not necessities. To my mind, this is an over-simplification. To test the position, suppose that an intellectual, a university graduate, were sentenced to life imprisonment and while in gaol was absolutely denied access to reading material - books, periodicals, magazines, newspapers, everything; and suppose further that there was no indication that this deprivation was in any way related to the requirements of prison discipline, or security or the maintenance of law and order within the prison and that, despite his protests to the gaol authorities, he continued to be thus denied access to reading material. Could it be correctly asserted that in these circumstances he would be remediless? That all that he could do was to fet for the comforts which he was denied? I venture to suggest that it could not be so asserted and that he would not be remediless. This,

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of course, is an extreme hypothesis. I do not suggest that it is comparable with the facts of the instant case; nor do I imagine for one moment that such a situation could arise in the prisons of this country. Nevertheless, I consider the hypothesis an apt one in order to test certain fundamental assumptions. One of these is that access to reading materials is not a basic right.

It is true that in Rossouw v Sachs (supra) the Court regarded reading matter as a comfort and not as a facility to which a detainee was entitled as a matter of right. This decision was arrived at, however, after a careful study of sec. 17 of Act 37 of 1963, "its object, its radical nature and its express terms" and in the light of the conclusion that "it was not the intention of Parliament that detainees should as of right be permitted to relieve the tedium of their detention with reading matter....." (see 1964 (2) SA 551, at p 565 B). Here we are not dealing

/ with.....

with "radical" legislation providing for the temporary detention of persons in the interests of State security. We are considering the ordinary rights of sentenced prisoners under the laws relating to prisons. In my view, what was decided in Rossouw v Sachs (supra) in regard to reading matter does not necessarily apply to sentenced prisoners.

It is also true that a prisoner cannot be allowed an uninhibited right of access to reading materials. If he were, he might gain access, for example, to books or other writings which in the circumstances were harmful to himself or others or were detrimental to security or the maintenance of good order and discipline in the prison. Control by the prison authorities is a very necessary measure. Such control is provided for in the regulations, particularly reg. 109, subject to which any right to reading materials must be read. And this brings me to reg. 109 (4) which is the cornerstone of appellants' case.

As I see it, there are only two possible sources of reading material available to a prisoner: the prison

library and outside sources. Material might, I suppose, be passed from one prisoner to another but originally it would have come from one of these sources, normally from outside. The regulations in their original form provided (in reg. 109 (3) and (4)) as follows:

> "Establishment of Library.
>
> (3) A properly organised library containing literature of constructive and educational value shall as far as possible be established and maintained at a prison and shall be at the disposal of all prisoners detained in such prison.
>
> Books and Periodicals from Outside Sources.
>
> (4) Subject to any prescribed conditions and rules, a prisoner may receive books and periodicals from outside sources."

With this must be read the following definition in reg. 1 —

> " 'prescribe' or 'prescribed', unless otherwise provided, means as the Commissioner may prescribe or as may be prescribed by him."

In 1973 reg. 109 was amended, inter alia, by the substitution of a new sub-para. (3) and the introduction of a new sub-para. (6) reading as follows:

/ "(3) A.....

> "(3) A properly organised library containing literature of constructive and educational value shall, as far as possible, be established and maintained at a prison and may in the discretion of the Commissioner be placed at the disposal of all prisoners detained in such prison.
>
> .....
>
> (6) Permission to study or the utilisation of any library in terms of this regulation is subject to the discretion of the Commissioner and the provisions of the said regulation may in no way be so construed as implying that such permission and/or utilisation of any library allows any prisoner a right which he can legally claim".

Prisoners' access to reading material would, therefore, appear to be governed by the provisions of these regulations.

The appellants' complaint relates to books and periodicals received from outside sources and consequently it is upon reg. 109 (4) that attention must be focussed. This provides that "subject to any prescribed conditions and rules, a prisoner may receive books and periodicals from outside sources". In this context "may", in my view, means "is entitled to" (cf. Wright v Jockey Club and Others, 1945 NPD 356,366; Ex parte Pupkewitz and Sons (Pty.) Ltd.,

of this is to be found in the fact that when the new reg. 109 (6) was introduced denying prisoners a legal right this was applied only to study and library facilities. Should the appropriate authority fail and refuse to make the necessary prescription it is probable that he could be compelled to do so by mandamus in order that prisoners' rights should not be totally frustrated but that is apparently not the position here and it is not necessary to pursue this point.

Some reliance was placed by respondents' counsel on sec. 77 of the Act which provides that prisoners shall be " employed, trained and treated in such manner as the Commissioner may determine". I do not, however, read this section as giving the Commissioner (second respondent) carte blanche in regard to, inter alia, the treatment of prisoners. The section itself makes the powers of the Commissioner granted thereunder "subject to the provisions of this Act" and, according to the definition of "this Act" in sec. 1, this would include the regulations.

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1957 (3) SA 29 (SWA)) and the general effect of reg. 109 (4) is that a prisoner has a right to receive books and periodicals subject to prescribed conditions and rules. (The word "any", incidentally, does not appear to have any significance: it has no equivalent in the Afrikaans version of the sub-regulation which simply speaks of "voorgeskrewe voorwaardes en reëls".) The right conferred upon a prisoner by the sub-regulation is, however, not only subject to prescribed conditions and rules but is also dependent, in my opinion, on conditions and rules having been prescribed. It could not have been intended that, in the absence of such conditions and rules, a prisoner would enjoy an uninhibited right to receive books and periodicals. On the other hand, bearing in mind that access to some reading material is a basic right and, having regard to the wording of the sub-regulation itself, I have no doubt that subject to such prescribed limitations a right is conferred by the sub-regulation upon the prisoner. A further indication

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The power or discretion conferred upon the Commissioner by sec. 77 in regard to the treatment of prisoners must, therefore, be read subject to specific provisions contained in the Act and the regulations with reference to certain matters pertaining to their treatment. Were it otherwise the Commissioner could for instance, ignore provisions in the regulations relating to basic rights of prisoners in regard to, say, medical services or religious observances or food, and point to sec. 77 as being his authority to do so.

The affidavit of Brig. Du Plessis does not clearly indicate in terms of what power or purported power the censorship (as will later be described in more detail) of appellants' reading material is alleged to have been carried out. In reply to an allegation in the founding affidavit (para. 15 (b)) averring that —

> "... the Applicants have a right to receive such books and periodicals from outside sources as they may require subject to the conditions and rules which may have been prescribed and which are not inconsistent with the Act and the said regulations."

Brig. Du Plessis stated —

(1) "I deny the conclusions herein drawn and state that the treatment of the Applicants has been prescribed by the Second Respondent in terms of the powers he has under the Act and more particularly Section 77 thereof. The magazines, and the censorship thereof, which the Applicants receive, are those prescribed by the Second Respondent".

The founding affidavit went on to state that so far as could be ascertained no conditions and rules had been prescribed entitling respondents to prohibit certain magazines and journals and censor others. To this Brig. Du Plessis replied —

(2) "I deny the allegations herein contained and repeat that the treatment of the Applicants has been prescribed by the Second Respondent as aforesaid".

It was further stated in the founding affidavit that "the only rules applicable to prisoners as referred to in Regulation 109(4) of the Regulations" were those contained in certain quoted sections of the Prisoner's Handbook. The reply to this reads —

/ (3) "I.....

(3) "I respectfully submit that Regulation 109(4) is subject to the conditions and rules prescribed by the Second Respondent. I again respectfully point out that the Applicants are treated according to the conditions and rules as prescribed by the Second Respondent."

(For convenience of future reference I have numbered these extracts from the affidavit of Brig. Du Plessis.)

Thus while Brig. Du Plessis appears to suggest in extracts (1) and (2) above that the control and censorship of books and periodicals was exercised in terms of the powers granted to the Commissioner by sec. 77 of the Act, extract (3) seems to indicate that such censorship was in accordance with conditions and rules prescribed by the Commissioner under reg. 109 (4). Although the position remains somewhat obscure, I am of the view, for the reasons which follow, that as a matter of probability such control and censorship took place in accordance with conditions and rules prescribed in terms of reg. 109 (4). Firstly, reg. 109 (4) makes specific provision for the prescription of such conditions

/ and.....

and rules by the Commissioner and in view of the importance obviously attached to the control of reading material received by prisoners from outside sources it seems likely that the Commissioner would have availed himself of the power of prescription given by reg. 109 (4). Secondly, in extract (3) Brig. Du Plessis speaks of "conditions and rules as prescribed by" the Commissioner; this conforms to the wording of reg. 109 (4) and consequently suggests that they were conditions and rules prescribed in terms of reg. 109 (4). Thirdly, as I shall later indicate, it appears that such conditions and rules did exist at the time. And, finally, I find it difficult to visualize a system of censorship operating except in terms of conditions and rules laid down as guidelines for the officials charged with the actual day-to-day administration thereof. (It appears from para. 4(d) of the affidavit of Brig. Du Plessis, quoted below, that the duty of censoring is entrusted to prison authorities.)

/ It.....

It seems unlikely that the Commissioner himself would undertake such censorship or prescribe how it should be done on an ad hoc basis. I shall, therefore, proceed on the basis that the control and censorship of books and periodicals reaching appellants from outside sources took place in terms of conditions and rules prescribed by the Commissioner under reg. 109(4), as indeed the law (meaning the Act and the regulations), as I understand it, demands.

A major problem in this case is that despite all this and in particular despite the indications that the treatment of the appellants and the censorship of their reading material is in accordance with conditions and rules (henceforth for convenience I shall simply speak of "rules") prescribed by the Commissioner under reg. 109 (4), no such rules have been placed before the Court. In fact,

/ respondents.....

respondents displayed a notable reticence in regard to these rules. Prior to the hearing in the Court below an application was apparently made in terms of Rule of Court 35 (12) calling upon the respondents to produce the rules and at the hearing there was some dispute between counsel as to whether or not this notice had been duly complied with. This matter is dealt with by the learned Judge a quo as follows:

> "There is before me in the papers an application for Respondents to produce certain documents. I told both Counsel yesterday in the course of argument that I was not prepared to listen to what either Counsel said in regard to what did or did not happen as a result of that notice to produce. This is not I may say because I disbelieve what Counsel said. It is simply not convenient or proper to have as it were a dispute between Counsel in Court. There have been no affidavits

/ put.....

> put before me in regard to this matter. In my view this is one of those cases where convenience takes precedence over the strict rules of evidence. It is clearly unnecessary to burden a record with possibly a bulky mass of documents which constitute rules and conditions where there is no specific challenge to their existence. I accept therefore the statements on oath that the treatment of Applicants and their receipt or not of publications is as prescribed by the Commissioner. This of course disposes really of the matter."

I am afraid that I cannot agree with the learned Judge's approach to this application. It seems to me that the contents of the rules were of prime importance in this case, inasmuch as one of the issues was whether the censorship of appellants' reading material was in accordance with the rules. The Judge a quo resolved the difficulty by accepting the ipse dixit of the respondents that the treatment of the appellants was in accordance with the rules. His approach was, in my opinion, an incorrect one for this was an issue which the Judge himself was called upon to try. I also, incidentally, have some difficulty in understanding

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why this was a case where "convenience (took) precedence over the strict rules of evidence" or why the learned Judge should have anticipated the possibility that the production of the rules would result in the addition to the record of a "bulky mass of documents".

In this Court, too, respondents, through their counsel, adopted a somewhat enigmatic attitude. In answer to enquiries from the Bench respondents' counsel - as I understood him - indicated that there were written rules but he did not endeavour to place them before us. In the result we do not know what the rules prescribe and are, therefore, unable to judge whether the treatment of appellants in regard to the censorship of their reading material is in accordance with the rules or not.

This is an appropriate stage at which to make some reference to the complaints of the appellants in regard to the censorship of the reading material received by them from outside sources. From the papers the following facts (as at the time when the application was heard) appear to be

either common cause or not seriously disputed:

(1) The books and periodicals which appellants are permitted to receive from outside sources are either severely restricted, in the sense that certain such material is not permitted at all, or are censored, in the sense that those publications which are permitted have excised from them various pages or portions of pages.

(2) Some indication of the severity of the restrictions may be gained from the list of publications that appellants are completely prohibited from receiving. It includes "Panorama", "S.A. Digest", "Financial Mail", "S.A. Financial Gazette", "To the Point", "Time", "Newsweek" and "New Nation".

(3) As regards censorship of permitted publications, which include "Argosy", "Rooi Rose", "Darling", "Fair Lady", "S.A. Garden and Home", "Huisgenoot", "Farmers Weekly", "Landbou Weekblad", "Readers Digest",

/ "Photography.....

"Photography and Travel", "Top Sport" and "Public Works Construction and Transport", it is clear from a careful study of the many instances on record that the effect of such censorship is to exclude entirely all reference to contemporary events here and overseas, other than those of a purely sporting nature. The stringency of the censorship may be illustrated by a few random examples. From an issue of the Readers Digest of September 1976 the following, inter alia, were deleted: an article entitled "Opec strikes for Hunger", dealing with the detrimental effect on various countries of the oil price increases in 1973; an anecdote about General Charles de Gaulle; a profile-type of article on Herr Helmut Schmidt, the West German Chancellor; and an article entitled "The U.S. Presidential Race" recording in question and answer form the views of the candidates in the 1976 Presidential election, President Gerald Ford and Governor Jimmy Carter, on various matters of

/ national.....

national policy. From an issue of the "Huisgenoot" of 29 October 1976 were excised: an article on Mr Ian Smith, the Prime Minister of Rhodesia; an article describing SABC-TV coverage of Transkei independence celebrations; and an article on Women for Peace in Ireland. And from an issue of "Fair Lady" of 24 November 1976 an autobiographical article by Mrs Golda Meir, former Prime Minister of Israel, was deleted.

(4) The appellants are not permitted to receive newspapers, to listen to radios or to receive any news, other than that of a purely domestic nature, in letters or in the course of conversation with visitors.

(5) This stringent system of censorship, having the effect of cutting appellants off from all news (other than sporting), is not applied to other prisoners, of the respective grading of the appellants, who have not been convicted of "political offences". This aver-

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ment was made in the founding affidavit, the deponent prefacing it by saying, "To the best of my belief". In reply Brig. Du Plessis stated that this averment constituted hearsay evidence and that application would be made to strike it out. He added the somewhat ambiguous statement:

> "I repeat that all prisoners are treated according to the policies and principles laid down by the Act and with the general principles, stated above, in mind."

In fact no such application to strike out was made and before this Court I did not understand respondents' counsel seriously to dispute the assertion that so-called "political prisoners" are treated differently from other prisoners in this respect.

(6) The system of censorship and the policy underlying it, as applied to books and periodicals reaching appellants from outside sources, are in accordance with what has been prescribed by the Commissioner.

/ (7) .....

(7) Complaints have been made about this system of censorship at various times to, inter alia, the Minister of Justice, the Commissioner of Prisons and the Commanding Officer of the prison concerned ("the Commanding Officer"), without avail.

In my view, the inescapable inference to be drawn from these facts is that in regard to reading material in the form of books and periodicals received by "political prisoners" (which term includes the appellants) the prison authorities consciously and deliberately apply a system of censorship which is designed to prevent such prisoners from having any access to news of contemporary or even recent events in the outside world, other than news items of a sporting nature. (For convenience I shall simply refer to this as "news", omitting for the sake of brevity the qualification in regard to sporting events.)

The policy reasons underlying this system of

/censorship....

censorship are also something of an enigma to me. Respondents have again been somewhat reticent on the subject.

In para. 4(d) of his affidavit Brig. Du Plessis stated —

> "Censorship of permitted magazines is done with particular reference to certain prisoners depending on their potential as security risks and with the following in mind:-
>
> (i) avoiding sexually stimulating matter;
> (ii) avoiding inflammatory or seditious matter;
> (iii) avoiding matter which advocates or propagates unlawful ideology;
> (iv) avoiding matter which could advance or assist any breach of security.
>
> The duty of censoring is entrusted to Prison Authorities."

Apart from this and apart from what is contained in the three other extracts from his affidavit previously quoted, no explanation is offered.

In all the circumstances I am impelled to the conclusion that the actual reason for the censorship of news has not been revealed. By no stretch

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of imagination could any of the articles to which I have referred in paragraph (3) above be said to offend against any of the prohibitions listed in para. 4(d) of Brig. Du Plessis's affidavit. One is, therefore, left to speculate as to what purpose the censorship was intended to serve.

This brings me back to the rules which we have not been permitted to see and the problem as to how, in the circumstances, this Court should deal with the matter. Factually there are various possibilities. The written rules, which we were assured did exist, might have authorised the censorship policy of denying appellants access to all news or they might not. If they did, then this authorisation might have ~~been~~ taken one of two forms: either (i) an express provision in which this policy was clearly spelt out, or (ii) a blanket provision, giving someone a general power to approve or disapprove of reading material sent to prisoners.

Having regard to these various factual possibili-

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ties the question is whether this Court should remit the matter to the Court a quo in order to have the rules placed on record and/or for the hearing of viva voce evidence in that regard or whether we should endeavour to deal finally with the matter on the record as it stands. After careful consideration I have decided that the latter course should be followed. If the matter were remitted, it would have to be on the basis that the Court a quo should then deal correctly with the application to produce in terms of Rule 35(12) and there is no certainty that this would result in the rules being placed on record. Moreover, as this judgment shows, I do not, with respect, agree with the Judge a quo's approach to the legal issues in this case and consequently the matter might become rather protracted. And finally, it is possible, in my view, to come to a conclusion, on a preponderance of probabilities, on the record as it is.

Reverting to reg. 109(4), I am of the opinion that, as submitted by appellants' counsel, the word "prescribed"

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in that sub-regulation means a previous ordering or ordaining and not an ad hoc determination (cf. Read v S.A. Medical and Dental Council, 1949 (3) SA 997 (T), at p 1009 and 1013), and that the sub-regulation, therefore, contemplates rules or guide-lines laid down by the Commissioner which would be implemented by, inter alios, the officials charged with the task of censorship. No doubt, in prescribing such rules, and including amongst them provision for censorship, the Commissioner would be exercising a discretionary power but, as was pointed out in Ismail and Another v Durban City Council, 1973 (2) SA 362 (N), at pp 371 H - 372 B, the discretion so vested in the repository of the power is not an unfettered one. An exercise of a discretion is assailable in a court of law where it is shown that the party in whom it is vested acted mala fide or from ulterior motive or failed to apply his mind to the matter (Administrator, Transvaal and Firs Investments v Johannesburg City Council, 1971 (1) SA 56 (AD), at p 80 B-H; Schoch NO and Others v Bhettay and

Others, 1974 (4) SA 860 (AD), at p 865 A -H).

In this context "ulterior motive" does not necessarily connote a sinister motivation: it can relate simply to the case where, for instance, a person or body vested by statute with the discretionary power uses it for a purpose not expressly or impliedly authorised by the statutory enactment (see Administrator, Cape v Associated Buildings Ltd., 1957 (2) SA 317 (AD), at p 325 D, 329 H - 330 A; Rose-Innes, Judicial Review of Administrative Tribunals, pp 127-30; Wiechers, Administratiefreg, pp 242-3). Moreover, in Northwest Townships Ltd. v The Administrator, Transvaal, 1975 (4) SA 1 (T), COLMAN, J (in whose judgment CILLIE, JP and DAVIDSON, J concurred) pointed out that the failure by the person vested with the discretion to apply his mind to the matter (see p 8 - G) —

> "..... has been held, in other English and South African cases, to include capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and

/ limits...

> limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles."

(See also Minister of Prisons v Cooper and Others, 1978 (3) SA 512 (C), where relief was granted to prisoners on the ground that the Commissioner had not properly exercised a discretion conferred by reg. 123(2) of the regulations.)

Bearing in mind the finding made above to the effect that, with reference to reg. 109 (4), appellants are treated in accordance with conditions and rules prescribed by the Commissioner and having regard to the circumstances generally, I am of the view that the probabilities point to there having been an express provision in the written rules directing and authorising the deletion from books and periodicals sent to appellants (in common with other "political prisoners") of all news. In view of what Brig. Du Plessis stated in extract (3) above it is unlikely that there is no such authorisation at all in the rules. On the other hand, it also seems improbable that the authorisation consists merely of a blanket provision. Those officials charged with the actual task of censorship, (...

particularly in the case of permitted reading material, would surely require guide-lines as to how to proceed with their task and the actual pattern of censorship revealed by the evidence before us indicates that a "no-news" policy was systematically followed. This points to the likelihood of a more precise and specific authorisation.

Proceeding on the basis of an inference that the rules prescribed by the Commissioner contain a specific provision authorising the censorship of books and periodicals sent to "political prisoners" in such a way as to exclude all news, I fail to see how such a rule can be related to, or brought within the ambit of, the purposes, express or implied, for which the discretionary power to make rules was conferred. In my view, as I have already indicated, the purpose of the power conferred by reg. 109(4) to make rules was to ensure that books or periodicals likely to be harmful to prisoners or to prison security or to the maintenance of good order and discipline within prisons - in fact the

/ types.....

types of literature listed in para. 4(d) of Brig. Du Plessis's affidavit - were not imported into prisons. It may well be that in the pursuit of these general aims the Commissioner would be entitled to differentiate between different classes of prisoners but I am at a loss to understand how a rule of no news for "political prisoners" can be said to advance the above-mentioned aims: how, for example, it could be said to be in the interests of appellants (or other "political prisoners") or of prison administration that they be denied access, inter alia, to an article on the U.S. presidential election or to an autobiography by Mrs Golda Meir. Nor can I understand how the factors mentioned in para. 4(d) of Brig. Du Plessis's affidavit can be said to warrant or even explain a blanket prohibition on news. The true purpose or reason for the "no-news" rule remains obscure and respondents' reticence about this and in regard to the rules themselves strengthens the inference

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that the purpose, whatever it may be, is an extraneous one, unconnected with the purposes for which the discretionary power was conferred. In all the circumstances I am of the view that this is the inference that on the probabilities I should draw. It follows that in laying down a "no-news" rule the Commissioner exercised his discretion improperly.

In my view, too, this is a serious matter, amounting to a drastic inroad upon the basic rights of the appellants. In this regard respondents sought to rely upon an affidavit sworn to by the medical officer to the Pretoria prison, in which the deponent stated —

> "(b) Ek het die verklaring van DENIS THEODORE GOLDBERG gelees aangaande sy bewerings dat die optrede van die Gevangenisowerhede neerkom op "psychological mistreatment".
>
> (b) Ek besoek die afdeling van Pretoria-gevangenis waarin die genoemde DENIS THEODORE GOLDBERG en ander aangehou word op gereelde grondslag. Volgens my waarneming toon geeneen van die persone psigiese afwykings nie."

I am not particularly impressed by this evidence. The

/ deponent.....

deponent does not state what his qualifications are to determine the existence of psychic deviations ("psigiese afwykings") or what real steps he took to diagnose their absence or presence. Moreover, it is not clear to me that "psychological mistreatment" would necessarily lead to discernible psychic deviations. In truth, it does not require medical evidence, one way or the other, to satisfy me that to cut off a well-educated, intelligent prisoner from all news as to what is happening in the outside world for a long period of time, in one case for life, is a very serious psychological and intellectual deprivation indeed.

For these reasons I would hold that appellants are entitled to an order declaring that in regard to the censorship of books and periodicals sent to appellants from outside sources respondents are not entitled to apply a rule or policy depriving appellants of all access to news.

I might add that even if my factual hypothesis

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were found to be incorrect, I would reach the same result. Thus, if the rules do not contain any provision authorising a total deprivation of news, then a fortiori appellants are entitled to the above-mentioned declaration. And if the rule merely consists of a blanket provision conferring upon someone a general power of approval or disapproval, then in my view the evidence shows that this discretionary power of disapproval has been exercised in a manner not warranted by the regulation or the rule and that a declaration on the above-mentioned lines should be made in favour of the appellants. In this connection I would point out that if it was incompetent for the Commissioner to lay down a "no-news" rule, a person to whom the power to approve or disapprove had been delegated by the rule (assuming such delegation were permissible and amounted to a proper prescription in terms of reg. 109(4)) could hardly adopt such a policy himself.

I would therefore allow the appeal with costs (including those of two counsel) and substitute the following order for that made by the

/ Court.....

Court a quo —

"(1) It is declared that in regard to the censorship of books and periodicals sent to applicants from outside sources in terms of reg. 109 (4) and/or the conditions and rules prescribed thereunder, respondents are not entitled to apply a rule or policy depriving applicants of all access to news.

(2) Applicants are granted the costs of the application."

M.M. Corbett

M.M. CORBETT.