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124/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

(1) In the matter between:

THE STATE PRESIDENT ..... 1st Appellant

THE MINISTER OF LAW AND ORDER .2nd Appellant

THE MINISTER OF JUSTICE .....3rd Appellant

and

SOLOMON LECHESA TSENOLI .....Respondent

(2) In the matter between:

JOAN LYNETTE KERCHOFF .....1st Appellant

PETER CAMPBELL KERCHOFF .....2nd Appellant

and

THE MINISTER OF LAW AND ORDER.1st Respondent

THE MINISTER OF JUSTICE.....2nd Respondent

THE/.....

THE COMMISSIONER OF POLICE ..... 3rd Respondent

THE OFFICER COMMANDING

THE NEW PRISON, PIETERMARITZBURG..... 4th Respondent

Coram: RABIE CJ, JANSEN, CORBETT, JOUBERT et VILJOEN JJA.

Heard: 10 September 1986

Delivered: 30 September 1986

J U D G M E N T

RABIE CJ:

These two appeals are concerned with the validity of regulation 3(1) and (3) of the regulations contained in Proclamation R 109 of 1986, promulgated in terms of section 3(1)(a) of the Public Safety Act, No. 3

of/.....

of 1953.

In the first case (to which I shall refer as "Tsenoli's case") it was held on 11 August 1986 in the Durban and Coast Local Division (per Friedman J, with whom Leon and Wilson JJ agreed) that reg. 3(1) was invalid for being beyond the powers of the State President as set out in sec. 3(1)(a) of the aforesaid Act (hereinafter referred to as "the Act"), and that, without reg. 3(1), reg. 3(3) had no practical effect. The Court accordingly ordered the release of the applicant in that case (the respondent in the first appeal), who had been arrested and detained under the said regulations.

In the second matter (hereinafter referred to as "Kerchoff's case"), which was concerned with the arrest

and/.....

and detention of one Peter Campbell Kerchoff (the 2nd appellant in the second appeal), a full Court of three Judges (Kriek, Thirion and Law JJ), sitting in the Natal Provincial Division, held in a joint judgment, delivered on 14 August 1986, that it had been wrongly decided in Tsenoli's case that reg. 3(1) was ultra vires and invalid. (It does not appear from the Court's judgment that it was contended on the 2nd appellant's behalf that reg. 3(3) should be held to be invalid even if it were found that reg. 3 (1) was valid.) The Court accordingly refused to order the 2nd appellant's release from detention on the ground that reg. 3(1) was invalid. It also refused to do so on the ground that, as was argued on his behalf, his

detention/.....

detention was unlawful because it had not been preceded by an "arrest" within the meaning of that term in reg. 3(1).

In Proclamation R 108 of 11 June 1986 the State President, acting in terms of the powers conferred upon him by sec. 2(1) of the Act, declared the existence of a state of emergency in the Republic as from 12 June 1986. Sec. 2(1) of the Act reads as follows:

> 2. (1) If in the opinion of the Governor-General it at any time appears that -
>
> (a) any action or threatened action by any persons or body or persons in the Union or any area within the Union is of such a nature and of such an extent that the safety of the public, or the maintenance of public order is seriously threatened thereby; or
>
> (b) circumstances have arisen in the Union or any area within the Union which seriously threaten the safety of the public, or the

maintanance of public order; and

(c) the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order,

he may, by proclamation in the Gazette, declare that as from a date mentioned in the proclamation, which date may be a date not more than four days earlier than the date of the proclamation, a state of emergency exists within the Union or within such area, as the case may be."

Sec. 3(1)(a) of the Act empowers the State President to make regulations in any area in which the existence of a state of emergency has been declared. It reads as follows:

"3. (1)(a) The Governor-General may in any area in which the existence of a state of emergency has been declared under section two, and for as long as the proclamation declaring the existence of such emergency remains in force, by proclamation in the Gazette, make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or

> the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency."

By Proclamation R109, dated 12 June 1986, the State President, acting in terms of the powers conferred upon him by sec. 3(1)(a) of the Act, made regulations which came into operation on the date of the Proclamation. Subregulations (1), (2), (3), (4), (5) and (6) of reg. 3 of these regulations read as follows:

> "3. (1) A member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself, or for the termination of the state of emergency, and may, under a written order signed by any

member of a Force, detain, or cause to be detained, any such person in custody in a prison.

(2) No person shall be detained in terms of subregulation (1) for a period exceeding fourteen days from the date of his detention, unless the period is extended by the Minister in terms of subregulation (3).

(3) The Minister may, without notice to any person and without hearing any person, by written notice signed by him and addressed to the head of a prison, order that any person arrested and detained in terms of subregulation (1), be further detained in that prison for the period mentioned in the notice, or for as long as these Regulations remain in force.

(4) A person detained in a prison pursuant to an order referred to in subregulation (1), or a notice referred to in subregulation (3), may be removed in custody, if the Minister or a person authorized by him in writing so directs, from that prison for detention in any other prison, or for any other purposes mentioned in such direction.

(5) A member of a Force may, with a view to the maintenance of public order, the safety of the public or the termination of

> the state of emergency, interrogate any person arrested or detained in terms of this regulation.
>
> (6) The Minister may at any time by notice in writing signed by him order that a person detained in terms of this regulation, be released on such condition or conditions, if any, as may in his discretion be determined by the Minister in such notice."

According to reg. 1, "Minister" means the Minister of Law and Order, while "Force" means -

> ".... the South African Police referred to in the definition of 'the Force' in section 1 of the Police Act, 1958 (Act 7 of 1958), the South African Railways Police Force established under section 43 of the South African Transport Services Act, 1981 (Act 65 of 1981), The South African Defence Force referred to in section 5 of the Defence Act, 1957 (Act 44 of 1957) or the Prisons Service established by section 2(1) of the Prisons Act, 1959 (Act 8 of 1959.)"

Before/.....

Before I proceed to discuss the two appeals, I propose to refer to what has been said by this Court concerning the interpretation of a statute of the kind that is in issue in the appeals, i.e. a statute which encroaches, or authorises an encroachment, upon the liberty normally enjoyed by the individual, but which is, at the same time, aimed at the protection of the public in an emergency situation. The approach to be followed by a Court in such circumstances was considered in the case of Rossouw v. Sachs 1964(2) SA 551(A), where sec. 17 of Act 37 of 1963, the predecessor of sec. 6 of the now repealed Terrorism Act, No. 83 of 1967, and of sec. 29 of the present Internal Security Act, No. 74 of 1982, was in issue. Ogilvie Thompson JA, who delivered the judgment of the Court, said (at 563 C-H):

".... as the Acts mentioned in sec. 17 and as various cases both in the Provincial Courts and in this Court bear witness, subversive activities of various kinds directed against public order and the safety of the State are by no means unknown, and sec. 17 is plainly designed to combat such activities. Such being the circumstances whereunder sec. 17 was placed upon the Statute Book, this Court should, while bearing in mind the enduring importance of the liberty of the individual, in my judgment, approach the construction of sec. 17 with due regard to the objects which that section is designed to attain. In this connection I cite, as being, in my opinion, very apposite to the present enquiry, sufficiently heedful of the necessity for the Court to avoid any 'strained construction' in favour of the Executive as elaborated by LORD ATKIN at p. 361 of his dissenting judgment in Liversidge's case, and in general harmony with what was said in a somewhat similar, though not identical, context by this Court in R. v. Sachs, supra at p. 399, the following excerpt from the opinion of LORD WRIGHT in Liversidge's case at p. 372 of (1941) 3 All E.R., viz.:

'All the Courts to-day, and not least this House, are as jealous as they have ever been/....

> been in upholding the liberty of the subject. That liberty, however, is a liberty confined and controlled by law, whether common law or statute ... If an Act of Parliament ... is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is as to the precise extent of the powers given. The answer to that question is only to be found by scrutinising the language of the enactment in the light of the surrounding circumstances and the general policy and object of the measure.'"

The learned Judge stated his conclusion in the following terms (at 563H-564A):

> "I accordingly conclude that in interpreting sec. 17 this Court should accord preference neither to the 'strict construction' in favour of the individual indicated in Dadoo's case, supra, nor to the 'strained construction' in favour of the Executive referred to by LORD ATKIN in Liversidge's case, supra, but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it

was enacted and of its general policy and object."

(The decisions mentioned in the passages quoted above, are: Liversidge v. Anderson and Another (1941) 3 All ER 338 (HL); R v. Sachs 1953(1) SA 392(A), and Dadoo Ltd and Others v. Krugersdorp Municipal Council 1920 A.D. 530.)

As to determining the meaning of a statutory provision which encroaches upon the liberty of the subject, it has often been said that, if the language thereof is uncertain or ambiguous, it should be interpreted in a way which least interferes with the rights of the individual. It is to be noted, however, that such an approach to the task of interpretation is permissible only if the language used by the Legislature is indeed ambiguous or open to doubt. If it is not, and the meaning

thereof is clear, the Court must give effect thereto, no matter how unfortunate the result may be for those who may be affected by it. See Rossouw v. Sachs, supra, and R. v. Sachs, supra, at 399 G-H, where Centlivres CJ said:

> "Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute. Where, however, the statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual."

In this connection I would also cite what was said by Lord Wilberforce and Lord Diplock in the case of Inland Revenue Commissioners and Another v. Rossminster Ltd and Others 1980 A.C. 952 (HL), where the issue was whether search

warrants were within the terms of the provision (sec. 20 of the Taxes Management Act 1970) under which they had been issued. Lord Wilberforce said (at 998A):

> "... while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation ..."

Lord Diplock said the following (at 1008 D-E):

> "So if the statutory words relied upon as authorising the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law. But judges in performing their constitutional function of expounding what words used by Parliament in legislation mean, must not be over-zealous to search

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for ambiguities or obscurities in words which on the face of them are plain, simply because the members of the court are out of sympathy with the policy to which the Act appears to give effect."

In Tsenoli's case Friedman J, reading sec. 3(1)(a) of the English version of the Act as if there were a comma after the word "order" (there is a comma after the word "orde" in the signed Afrikaans text), held that the section was capable of two meanings. The learned Judge said:

"The first meaning is to the following effect. The first respondent is empowered to make such regulations as appear to him to be necessary or expedient for one or more of the following purposes -

(a) for providing for the safety of the public;

(b) for providing for the maintenance of public order;

(c) for making adequate provision for terminating the state of emergency;

(d) for dealing with any circumstances which in his opinion have arisen as a result of the state of emergency.

The second meaning is to the following effect. The first respondent is empowered to make such regulations as appear to him to be necessary or expedient for one or more of the following purposes -

(a) for providing of the safety of the public and for making adequate provision for terminating the state of emergency;

(b) for providing for the maintenance of law and order and for making adequate provision for terminating the state of emergency;

(c) for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of the state of emergency."

The learned Judge held that the second meaning was the correct one.

It will immediately be apparent that according to the learned Judge's interpretation of sec.

3(1)(a) the words "and for making adequate provision for terminating such emergency" constitute a qualification of, or limitation upon, the State President's power to make regulations "for providing for the safety of the public, or the maintenance of public order", the effect of which is that the State President is entitled to make regulations which provide for the safety of the public or the maintenance of public order, and which, at the same time, also provide for the termination of the state of emergency, but not regulations which provide only for the safety of the public or the maintenance of public order as independent purposes. According to this interpretation of sec. 3(1)(a), as I understand it, reg. 3(1) would be invalid because the State President, by using the word "or"

instead/.....

instead of "and" before the words "for the termination of the state of emergency", ignored the qualification, or limitation, which the words "and for making adequate provision for terminating such emergency" place upon his power to make regulations for providing for the safety of the public or the maintenance of public order, and, in the result, went beyond the powers conferred on him by sec. 3(1)(a).

The learned Judge's reasons for adopting his aforesaid interpretation of sec. 3(1)(a) of the Act appear from the following passages in his judgment:

> "It seems to me, in the first place, that by far the most important single factor in seeking to ascertain which of the two meanings the section bears, is the use of the word 'and' before the words 'for making adequate provision'. Immediately

prior/.....

prior to that word the section lists two of the purposes of the regulations to be 'for providing for the safety of the public' and 'for providing for the maintenance of the public order.' These two purposes are linked by the use of the word 'or'. The word 'or' has clearly been used not to suggest that the first respondent can make regulations for alternative purposes, and if he does it for the one purpose it excludes the other, but rather to suggest that he can make regulations for either or both of those purposes. Thus the word 'or' is used by the legislature before the phrase 'the maintenance of public order' so as to indicate that an additional power or purpose to that of 'providing for the safety of the public' is being specified by it. The word 'or' is also used in precisely the same manner in the latter part of the section in order to add an additional purpose for which regulations can be made, namely, 'for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency.' That being so, if the words 'for making adequate provision for terminating such emergency' were intended

by the legislature simply to add yet a further purpose for which the first respondent may make regulations, one would have expected it once again to have used the word 'or' to introduce the phrase. The use of the word 'and' would therefore tend to suggest that the legislature intended to link or connect the phrase following that word, to the phrase which preceded it. The use of the commas to which I have referred, tend to suggest that that phrase was being linked to both and not simply one of the preceding purposes which, as I have said, is indicated by the positioning of the comma in the English version. This object would be reached by giving to the section the second, but not the first, meaning."

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"The second meaning, and the emphasis to which I have just referred, appears to accord with the reasons for the declaration of a state of emergency as they emerge from a consideration of the provisions of section 2(1) of the Act. In essence, a state of emergency may be declared where the first

respondent is of the opinion that, firstly, there are either actions or threatened actions by persons or bodies of persons or there are circumstances which have arisen, which seriously threaten the safety of the public or the maintenance of public order and, secondly, that the ordinary law of the land is inadequate to enable the government to ensure the safety of the public or the maintenance of law and order. In other words, it is not the mere threat to the safety of the public or the maintenance of law and order which gives rise to the state of emergency, but also, the circumstance that the ordinary law is inadequate to deal with the problems which have arisen. The object of the declaration of the state of emergency, therefore, is not simply to bring about the elimination of threats to public safety and law and order, but also to bring about a situation where the ordinary law once again will be adequate to cope with such threats. In other words, it might be said that an important purpose of the declaration of a state emergency is to bring an end to such emergency. If this then is an underlying object of the declaration of a state of emergency, as I believe it to be upon a consideration of section 2(1), then

it makes good sense to give to section 3(1)(a) the second meaning ; .....".

"There is a further important consideration which leads me to believe that the second meaning is the correct one. The legislature in enacting section 3(1)(a) no doubt had in mind that the regulations made by the first respondent might, for example, make provision for not only the arrest but also for the detention of persons, otherwise than in accordance with the ordinary law of the land (cf. for example sections 3(4) and 3(4) bis). Such detention might, and probably would be, summary or without what is often referred to as, due process of law. If, therefore, the first respondent were to be empowered to make regulations for not only the arrest but also the summary detention of persons believed to be a threat to the safety of the public or a threat to the maintenance of law and order, such detentions might continue even if the detention of such persons in no way accelerated or might even be thought to be in any way relevant to the acceleration of, the termination of the state of emergency. In order to obviate such an undesirable result, it seems logical to suppose that the legislature inserted the words 'and for making adequate provision

for/.....

for terminating such emergency' as an additional requirement of, or qualification to, the power of the first respondent to make regulations for the detention of persons believed to be a threat to the safety of the public or a threat to the maintenance of law and order. To look at the matter somewhat differently, if the first meaning of sec. 3(1)(a) is the correct meaning, persons whose activities, actual or potential, were in no way related to either the existence or continuance of the state of emergency, might be subject not only to arrest but also to summary detention for as long as the state of emergency exists. Thus, for example, every common criminal, at any rate those with a propensity for violence, might be considered a threat to the safety of the public and liable as such to be detained summarily for the duration of the state of emergency, a result which does not seem to accord with the object of the Act insofar as the declaration of a state of emergency is concerned."

In my opinion the learned Judge's interpretation of sec. 3(1)(a) of the Act is forced and strained, and

not supported by the language used by the Legislature.

The Afrikaans text of the section - the punctuation of which the learned Judge adopted when considering the meaning of the section - reads as follows:

> "3. (1)(a) Die Goewerneur-Generaal kan in 'n gebied waar die bestaan van 'n noodtoestand kragtens artikel twee verklaar is, en vir solank die proklamasie wat die bestaan van so 'n noodtoestand verklaar, van krag bly, by proklamasie in die Staatskoerant die regulasies uitvaardig wat hy nodig of raadsaam ag om voorsiening te maak vir die veiligheid van die publiek of die handhawing van die openbare orde, en om voldoende voorsiening te maak vir die beëindiging van die noodtoestand, of om te handel met omstandighede wat na sy oordeel as gevolg van so 'n noodtoestand ontstaan het of waarskynlik sal ontstaan."

In what follows, I refer to the Afrikaans version of the section, not because I believe that it has a meaning which is in any way different from that of the English version,

but because I consider that the relevant part of the section in the Afrikaans version is grammatically so constructed as to reveal immediately what the Legislature intended to say. On reading the Afrikaans text of the section, I find myself quite unable to construe the words "en om voldoende voorsiening te maak vir die beëindiging van so 'n noodtoestand" (my emphasis) as constituting a qualification of, or limitation upon, the power mentioned in the earlier part of the section, viz. to make regulations "om voorsiening te maak vir die veiligheid van die publiek of the handhawing van die openbare orde". The section empowers the State President to make regulations "om voorsiening te maak vir die veiligheid van die publiek of die handhawing van die openbare orde, en om voldoende voorsiening te maak vir die beëindiging van so

'n/.....

'n noodtoestand", and in my view it is clear that the words "en om voldoende voorsiening te maak vir die beëindiging van so 'n noodtoestand" refer to a power additional to that referred to in the words "om voorsiening te maak vir die veiligheid van die publiek of die handhawing van die openbare orde". There is nothing in the words "en om voldoende voorsiening te maak vir die beëindiging van so 'n noodtoestand" which, as a matter of language, qualifies or limits the power "om voorsiening te maak vir die veiligheid van die publiek of die handhawing van die openbare orde". The power to make regulations "om voorsienig te maak vir die veiligheid van die publiek of die handhawing van die openbare orde, en om voldoende voorsiening te maak vir die beëindiging van so 'n

noodtoestand" relates to two concepts, the one being the safety of the public and the maintenance of public order, and the other the termination of the state of emergency. It is no doubt likely that measures which are designed to ensure the safety of the public or the maintenance of public order will often contribute to the termination of the state of emergency, but this does not detract from the fact that the protection of the public or the maintenance of public order, on the one hand, and the termination of the state of emergency, on the other, are not the same concept. In Kerchoff's case the Court a quo said the following in this connection:

"It seems to us that section 3(1)(a)

contains/.....

> contains two distinct notions which are joined by the word 'and'. The first envisages regulations which appear to the State President to be necessary or expedient for providing for the safety of the public or the maintenance of public order while the second envisages regulations which appear to him to be necessary or expedient for making adequate provision for terminating the emergency or for dealing with any circumstances which have arisen or are likely to arise as a result of such emergency.....".

In a recent appeal heard in the Eastern Cape Division (Phila Nqumba and Another v. The State President and Three Others; case no. M1173/89) Kannemeyer J (with whom Jennett and Wilshire Jones JJ agreed) expressed a similar view regarding the meaning of sec. 3(1)(a). The learned Judge said:

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> "In my view the above envisages two groups of situations which are linked together with the word 'and'. The first two are the situations envisaged in section 2(1)(a) and (b) of the Act. Regulations may be necessary in order to provide for the safety of the public or the maintenance of public order or both, because the ordinary law of the land is inadequate for this purpose. Apart from this, powers are given to the State President to make regulations designed to end the emergency or for dealing with circumstances which have (arisen) or may arise because of the emergency. These are the second group of situations again conjoined with an 'or'".

Having said this, Kannemeyer J proceeded to reject the suggestion that "every regulation made to provide for public safety or the maintenance of public order must also have the ingredient of making adequate provision for terminating the emergency."

There/.....

There is only one further point in the judgment in Tsenoli's case to which I wish to refer, viz. the learned Judge's suggestion that if sec. 3(1)(a) were given the first of the two possible meanings mentioned by him (as quoted above), persons whose activities were in no way related to either the existence or continuance of the state of emergency - such as those of common criminals, "at any rate those with a propensity for violence" - might be subject not only to arrest but also to detention for as long as the state of emergency exists. The suggestion is ill-founded. The power which sec. 3(1)(a) confers on the State President is one to make regulations for providing for the safety of the public or the maintenance of the public order during

a state of emergency, or for the termination of the state of emergency. It is not a power which includes the power to control (or curtail) the movement of persons, such as common criminals, whose conduct is not related to the existence or continuance of the state of emergency.

In view of the aforegoing I am of the opinion that the judgment in Tsenoli's case was wrong.

In addition to contending that reg. 3(1) is invalid for the reasons stated by Friedman J in Tsenoli's case, counsel submitted that it is ultra vires on certain other grounds, which I set out below. This further argument was, it would seem, raised in Tsenoli's

case/.....

case, but Friedman J did not discuss it or give a decision thereon. It was not advanced in the Court a quo in Kerchoff's case. Counsel's argument may be summed up as follows:

(a) The State President is entitled to make regulations in which he provides for the arrest and detention of persons (see sec. 3(4) and 3(4) bis of the Act), but he may make such regulations only for the purposes set forth in sec. 3(1)(a) of the Act. The regulations must, therefore, be confined in their terms to the purposes for which the State President is entitled to make regulations. The State President, however, in conferring powers of arrest and detention in reg. 3(1), did so in terms which permit those powers to be used

for purposes other than those set forth in sec. 3(1)(a) of the Act. He has accordingly exceeded his powers to make regulations. The powers of arrest and detention, it is said, are conferred in such wide terms that they may be used for any purpose which the member of a Force who arrests, or orders the detention of, a person, may wish. Reg. 3(1) is accordingly invalid.

Counsel also submitted in this connection that a member of a Force who orders the detention of a person "is not required to have any opinion at all as to any matter and (that) the validity of the detention is determined by the existence of a written order." (The quotation is from counsel's heads of argument.)

(b)/.....

(b) It is admitted that the function of arresting a person is clearly to be carried out by someone other than the State President, but it is contended that the State President failed to set forth in the regulations the circumstances in which, in his view, an arrest and detention will be necessary to achieve the purposes contemplated by sec. 3(1)(a) of the Act, and that he delegated to others the task of determining what is necessary to provide for the purposes mentioned in the section. No guidelines or criteria, it is said, are laid down in the regulations for the exercise of the powers of arrest and detention, with the result that members of the Forces have to form an opinion on

the very matters in regard to which Parliament vested the responsibility for forming an opinion in the State President. The State President, it is submitted, should have laid down the necessary criteria in objective terms, and should not have left it to the subjective judgment of members of the Forces as to whether it is necessary to arrest and detain someone in order to achieve the purposes mentioned in reg. 3(1). He should also, it is said, have circumscribed the sort of conduct which is liable to lead to arrest and detention.

With regard to the argument set out in paragraph (a) above, it is no doubt correct, as counsel submitted, that the State President, in making regulations

under the powers conferred upon him by sec. 3(1)(a) of the Act, must do so for the purpose of achieving the purposes mentioned in the section. I do not, however, agree with the submission that the powers conferred in reg. 3(1) are so wide that they may be used for any purpose which the member of the Force who effects an arrest, or orders a detention, may wish. There is nothing in the wording of reg. 3(1) which justifies the submission. A member of a Force who arrests, or causes the arrest of, a person and who detains, or orders the detention of, a person may do so only if he is of the opinion that it is necessary to do so for the safety of the public, or the maintenance of public order,

or the termination of the state of emergency. These purposes are mentioned in reg. 3(1), and it can accordingly not be said that reg. 3(1) empowers, or permits, a member of a Force to arrest, or order the detention of, a person for a purpose not envisaged by sec. 3(1)(a) of the Act. (I leave out of account the power, mentioned in reg. 3(1), to arrest and detain a person when it is considered necessary "for .... the safety of that person himself." Friedman J, in his judgment in Tsenoli's case, raised, in passing, the question of the validity of this provision, but it was not relevant to the case with which he was concerned and he gave no decision on it. I, too, do not propose to discuss the point, and would merely say that, even if this provision could be said not to fall within a purpose envisaged in

sec. 3(1)(a) of the Act, it would clearly be severable from the other provisions in reg. 3(1) and not affect their validity.

The argument, mentioned in paragraph (a) above, that the detention of a person may be ordered by a member of a Force who is "not required to have any opinion at all as to any matter and (that) the validity of the detention is determined by the existence of a written order", is without substance. Reg. 3(1) does not contemplate the detention of a person without a member of a Force having formed the opinion that it is

necessary that he should be arrested and detained. It is true that reg. 3(1) contemplates that a "written order" as mentioned therein may be signed by a member of a Force who did not form the opinion that the person concerned is one whom it is necessary to arrest and detain for any of the purposes mentioned in the regulation, but in such an event the member who signs the order would merely be performing an administrative, or secretarial, task - probably at the request of the member who formed the required opinion, but who can, for some reason, not himself sign the order. The order is, it would seem, intended to authorise the officer in charge of a prison to detain the person in question. (Cf. reg.

3(3), quoted above.) An argument similar to the one advanced by counsel with regard to the "written order" was also advanced in the case of Phila Nqumba and Another v. The State President and Three Others, to which I referred earlier on. It was rejected by Kannemeyer J on the same grounds as those mentioned by me above.

As to counsel's argument as summarized in paragraph (b) above, it is essential to have regard to the powers which sec. 3(1)(a) of the Act confers on the State President. As has been shown above, the section empowers him, when a state of emergency has been declared, to make such regulations "as appear to him to be necessary or expedient" for providing for the safety of the public,

the maintenance of public order, or the termination of the state of emergency, etc. It is obvious that the power is a most extensive one. (As to the words "as appear to him to be necessary or expedient", see R. v. McGregor 1941 A D 493; R v Beyers 1943 A D 404; Momoniat & Naidoo v. Minister of Law and Order 1986(2) SA 264(W) at 268-272; R v Comptroller-General of Patents; Ex parte Bayer Products Ltd (1941) 2 All E R 677 at 681.) The State President can, it is clearly stated in sec. 3 (1)(a), make such regulations as appear to him to be necessary or expedient for the purposes mentioned in the section. He can, in regulations made by him, prescribe the method and means to be employed for the achievement

of the purposes stated in the section. (See Attorney-General for Canada and Another v. Hallet & Carey Ltd and Another 1952 AC 427, where the Court said (at 448, per Lord Radcliffe), with regard to the power of the Governor in council to do such things and to make such regulations in a time of emergency as he may "deem necessary or advisable" for certain stated purposes, that those words gave him "the amplest possible discretion in the choice of method.") There is no doubt that the State President was entitled to delegate powers with a view to achieving the purposes mentioned in sec. 3(1)(a). This is not disputed. The complaint is, as indicated above, that the regulations do not provide proper guidelines to members

of the Forces, and, more particularly, that reg. 3(1) leaves it to the subjective opinion of members of the Forces as to whether it is necessary to detain an individual. It is not correct to say that no guidelines are laid down for the direction of members of the Forces. It is clear from reg. 3(1) that a member may arrest a person only if he has formed the opinion that the detention of that person is necessary for one or more of the purposes mentioned in reg. 3(1). As to the fact that reg. 3(1) entrusts the decision as to whether someone should be detained to the subjective judgment of members of the Forces, it may be pointed out that in ordinary - i.e. non-emergency - legislation the fact that a decision is left to the discretion of an official is not per se sufficient

to invalidate the regulation permitting the delegation. A complaint of a lack of guidance in a regulation, it has been held, is valid only if such lack offends against the enabling statute. See e.g. R v Zondo 1942 TPD 187 at 192; R v Ngati and Others 1948(1) SA 596(C) at 602-604; Arenstein v Durban Corporation 1952(1) SA 279(A) at 297 A-C. The ultimate inquiry is, therefore, what powers the enabling Act confers. In the present case I am of the opinion that the powers conferred on the State President by sec. 3(1)(a) of the Act are so wide as to include the power to make a regulation as contained in reg. 3(1).

Counsel also contended that reg. 3(3) is invalid. His submission is that reg. 3(3) goes beyond the powers conferred on the State President by sec. 3(1)(a) of the Act in that it empowers the Minister to

extend/.....

extend the detention of a person arrested and detained under reg. 3(1) without confining that power to the purposes stated in sec. 3(1). Reg. 3(3), it is said, leaves the Minister free to order the further detention of a person for whatever reasons he deems fit, including reasons quite unrelated to the purposes mentioned in sec. 3(1)(a) or reg. 3(1), and it is accordingly ultra vires and invalid.

The argument cannot be sustained. It is true that reg. 3(3) does not state in express terms on what grounds, or for which purposes, the Minister can extend the detention of a person arrested under reg. 3(1), but that is not the end of the matter. Reg. 3(3) should not be read in isolation. It is one of a number of

subregulations which comprise regulation 3, and it should be read together with such other subregulations as have a bearing on the question of detention. Subreg. (1) provides that a member of a Force may arrest a person if it is, in his opinion, necessary to detain that person for the purposes mentioned in subreg. (1), i.e. for the maintenance of public order, or the safety of the public, or the termination of the state of emergency. Subreg. (2) provides that no person shall be detained in terms of subreg. (1) for a period of more than 14 days unless that period is extended by the Minister in terms of subreg. (3). Subreg. (3) refers, in terms, to subreg. (1), and provides that the Minister may, by written notice signed by him, order that a person arrested and detained

in terms of subreg. (1) be further detained for the period stated in the notice, or for as long as the regulations remain in force. Subreg. (4), which also refers in terms to subreg. (1), provides that a person who is detained in terms of subreg. (1), or in terms of a notice under subreg. (3), may be removed from one prison to another if the Minister so directs. Subreg. 5 provides that a member of a Force may, "with a view to the maintenance of public order, the safety of the public or the termination of the state of emergency, interrogate any person arrested or detained in terms of this regulation", i.e. regulation 3, which includes subregulations (1) and (3). Sub-reg. (6) provides that the Minister may at any time order that "a person detained in terms of this regulation"

(i.e. reg. 3, which includes subreg. (1) and subreg. (3)) be released on such conditions as he, the Minister, may determine.

The power given to the Minister under subreg. (3) is a power to extend the period of detention of a person "arrested and detained in terms of subregulation (1)", and it seems to me to follow as a matter of necessary inference that it was intended by the State President that the Minister should, when considering whether he should act under subreg. (3), decide whether the person concerned should, in his opinion, be further detained for the purposes for which he was previously arrested and detained. I find it impossible to accept that the State President,

after providing in subreg. (1) that a person may be arrested and detained if it were thought necessary that it be done for the purposes mentioned in subreg. (1), would have intended to provide in subreg. (3) that the Minister should be free to extend such person's detention without having regard to the purposes for which he was previously detained, and without forming an opinion as to the necessity for his further detention for those same purposes. If, as was contended, the State President intended that the Minister could order the further detention of persons without having regard to the purposes stated in reg. (3), it would seem that the reference in the subregulations to persons detained in terms of subregulations (1) and (3) would be a reference not only to persons detained for the purposes mentioned

in subreg. (1), but also to persons whose detention may have been ordered by the Minister under subreg. (3) for purposes not connected with those stated in subreg. (1). This is wholly unlikely. Subreg. (5) contains a strong indication, I think, that detentions under subreg. (3) are required to be for the same purposes as those mentioned in subreg. (1). It provides that a member of a Force may "with a view to the maintenance of public order, the safety of the public or the termination of the state of emergency" - i.e. for the purposes mentioned in subreg. (1) - interrogate "any person arrested or detained in terms of this regulation", i.e. regulation 3, which includes subregulations (1) and (3). Subreg. (5) therefore contemplates that a person detained under subreg. (3) is

a person who has been detained for the purposes mentioned in subreg. (1), which indicates, in turn, that a detention under subreg. (3) is a detention that was ordered for the same purposes as those mentioned in subreg. (1). It is hardly conceivable that subreg. (5) was intended to provide for the interrogation of persons "with a view to the maintenance of public order, the safety of the public or the termination of the state of emergency", if their detention was ordered for purposes other than those stated in reg. 3(1).

In view of the aforegoing I consider that the Minister's power under reg. 3(3) must, by necessary implication, be taken to be subject to the limitation

that he may order the further detention of a person already detained under reg. 3(1) only if he is of the opinion that it is necessary to do so for the purposes stated in reg. 3(1). If reg. 3(3) is so construed, as I think it must be, it is not ultra vires the State President.

In the appeal in Kerchoff's case the legality of the detention of the 2nd appellant (to whom I shall refer as "the appellant" in the paragraphs that follow) was attacked on a further ground, viz. that he was not arrested as required by reg. 3(1). Counsel's argument on this point is to the following effect: (a) on a proper construction of reg. 3(1) and reg. 3(3) an arrest is a necessary prerequisite

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to detention, and according to the affidavits filed the appellant was not formally arrested; (b) no one had the requisite intention to arrest the appellant; and (c), alternatively to (a) and (b), Brigadier Beukes (who caused the appellant to be detained) could not bona fide have been of the opinion that the detention of the appellant was necessary for the safety of the public or the maintenance of public order.

The facts relating to this argument are as follows. The appellant was arrested in the early hours of 12 June 1986 under the provisions of sec. 50 of the Internal Security Act, No. 74 of 1982, on the instructions of Brig. B J Beukes, the Commanding

Officer of the Security Branch of the South African Police in Pietermaritzburg. He was lodged in the New Prison in Pietermaritzburg. Later on the same day Brig. Beukes directed that the appellant be detained under the provisions of reg. 3(1), and a written order for the appellant's detention was signed by an officer in the Security Branch of the South African Police. The appellant was on the same day, while still in custody in the New Prison, Pietermaritzburg, informed that he was no longer being detained under the provisions of sec. 50 of the Internal Security Act, but would be kept in detention under the provisions of reg. 3(1). On 21 June 1986 the Minister, by a written notice signed by him, ordered in terms of reg. 3(3) that the appellant be further

detained in the New Prison, Pietermaritzburg, for as long as the regulations remained in force.

Sec. 50 of the Internal Security Act, No. 74 of 1982, in so far as relevant, reads as follows:

"50. (1) If a police officer of or above the rank of warrant officer is of the opinion -

(a) (i) that the actions of a particular person contribute towards the continuation of a state of public disturbance, disorder, riot or public violence which exists at any place within the Republic; and

(ii) that the detention of that person will contribute towards the termination or combating of that state of public disturbance, riot or public violence: or

(b) that the detention of a particular person will contribute towards the prevention of the resumption, at the same place or at any other place in the Republic, of such a state of public disturbance, disorder, riot or public violence,

he may without warrant arrest that person or cause him to be arrested and, subject to the provisions of this section, cause him to be detained in a prison referred to in section 20 (1)(a) or (b) of the Prisons Act, 1959 (Act No. 8 of 1959), or a police cell or lock-up.

2 (a) Any person arrested in terms of the provisions of subsection (1) may at any time be released from detention, but shall at the expiration of a period of forty-eight hours as from the time of his arrest be released from detention unless a warrant for his further detention has in terms of the provisions of paragraph (b) been issued before the expiration of the said period: Provided that no such person shall on any particular occasion when he is being detained in terms of the provisions of this section be so detained for a period exceeding fourteen days as from the date of his arrest.

(b) Whenever a magistrate is of the opinion, on the ground of information submitted to him upon oath by a police officer, that the further detention of any person arrested in terms of subsection (1) is justified on the ground of a consideration contemplated in paragraph

(a) or (b), as the case may be, of that sub-section, he may on the application of the said police officer issue a warrant for the further detention of such person.

(c) .....

(d) .....

(3) Any person being detained in terms of the provisions of this section shall be so detained in accordance with the provisions of the Prisons Act, 1959, which relate to un-convicted prisoners awaiting trial for an alleged offence.

..... ".

As to the contention referred to in (a) above, counsel's argument was that, after the appellant had been informed that he was no longer being detained under the provisions of the aforesaid sec. 50, he should again have been arrested since arrest is a prerequisite to detention under reg. 3(1) and reg. 3(3), and that he was not so arrested. It was, rightly in my view,

not/.....

not contended that an arrest as contemplated in reg. 3(1) is an arrest as provided for in sec. 39 of the Criminal Procedure Act, No. 51 of 1977. (An arrest as contemplated in sec. 39 of the latter Act is an arrest that is intended to bring a person before a Court of law to answer a criminal charge. See R. v. Malindisa 1961(3) SA 377(T) at 380 C; Wiesner v. Molomo 1983 (3) SA 151(A) at 158 E-F.) The submission is, however, that the appellant should have been "formally arrested" and that, because he was not so arrested, his subsequent detention was unlawful. The same argument was advanced in the Court a quo. The Court dealt with it at some length in its judgment and, correctly in my view, rejected it. As to the argument that the appellant should have been "formally arrested" after he

had been told that he was no longer being detained under the provisions of sec. 50 of the Internal Security Act, but would be detained under the provisions of reg. 3(1), it was not suggested that a member of a Force should actually have 'touched' the appellant's body. Nor could it reasonably have been so suggested. The appellant was informed that his detention under the said sec. 50 had come to an end, and that he would remain in detention under reg. 3(1). Having been thus kept in prison, he was, in my view, under arrest. As Hoexter J said in R. v. Mazema 1948(2) SA 152 (E) at 154, "A person is under arrest as soon as the police assume control over his movements." The suggestion seems to be, however, that, to effect the arrest of the appellant, he should have been told, in so many words, that he was being arrested. It is common cause that

he was not told in express terms that he was being arrested, but I cannot accept the argument that the fact that he was not so informed means that there was not an arrest as contemplated in reg. 3(1). An arrest under reg. 3(1) is, in my view, intended to be a means to secure the detention of a person whose detention is considered to be necessary for any of the purposes stated in reg. 3(1), and where, as happened in the present case, the person whom it is sought to detain is already confined in prison, and is, in addition, informed that he is being detained in terms of reg. 3(1), it can hardly serve any purpose to require that he should also be told that he is under arrest. To hold that the failure to inform the appellant in express terms that he was being

arrested/.....

arrested has the effect of rendering his detention under reg. 3(1) invalid, would, therefore, in my opinion, be to pay undue reverence to formalism.

As stated above, it was also contended that the appellant's detention was unlawful because there was no intention to arrest him. In the light of what I have said above, I consider this argument to be unsound, and I do not propose to discuss it.

It remains, finally, to consider the argument that the appellant's detention is invalid because Brig. Beukes could not bona fide have been of the opinion that his detention was necessary for the safety of the public or the maintenance of public order. The argument

is that, since the appellant was already in detention for the relevant period (i.e. 14 days as from 12 June 1986) under the provisions of sec. 50 of the Internal Security Act, Brig. Beukes could not bona fide have held the opinion he alleges that he did, and that it was "accordingly not competent for him to order the detention of the second appellant in terms of reg. 3(1)". (Quotation from counsel's heads of argument.) The submission is - to quote from counsel's heads of argument - that "the only bona fide approach which Beukes could have adopted would have been to continue the second appellant's detention under sec. 50 and then to reconsider the entire position on the 26th June, 1986 .....". The

argument has no merit. I can see no reason why Beukes' decision to detain the appellant under reg. 3(1) rather than under sec. 50 of the Internal Security Act should be considered to afford proof of mala fides on his part. Detention under reg. 3 is intended as a means of providing for the safety of the public, the maintenance of the public order or the termination of the state of emergency, and Brig. Beukes, who states that he was of the opinion that the appellant's detention was necessary for the safety of the public and the maintenance of public order, would have been fully entitled to think that detention under reg. 3 was a more effective means of achieving the purposes mentioned by him than detention

under sec. 50 of the Internal Security Act. It may be pointed out in this connection that reg. 3(5) provides that a member of a Force may, "with a view to the maintenance of public order, the safety of the public or the termination of the state of emergency, interrogate any person arrested or detained in terms of this regulation." Sec. 50 of the Internal Security Act does not provide for the interrogation of a detainee. According to subsection (3) thereof a person detained under the provisions of the section is to be detained as if he were an unconvicted prisoner awaiting trial for an alleged offence.

In/.....

In view of all the aforegoing I am of the opinion

(a) that the appeal in Tsenoli's case must succeed, and

(b) that the appeal in Kerchoff's case must be dismissed.

The following orders are made:

(A) In the first appeal (Tsenoli's case):

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order made by the Court a quo is set aside and the following order is substituted therefor, viz.: "The application is dismissed with costs, including the costs of two counsel."

(B) In the second appeal (Kerchoff's case):

The appeal is dismissed with costs, including the costs of two counsel.

JANSEN JA
CORBETT JA
JOUBERT JA Concur
VILJOEN JA

P J RABIE
CHIEF JUSTICE