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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER.....First Appellant

THE COMMISSIONER OF POLICE .....Second Appellant

THE DIVISIONAL COMMISSIONER OF POLICE

FOR PORT NATAL .....Third Appellant

and

DENIS EUGENE HURLEY ..... First Respondent

CARMEL PATRICIA RICKARD ..... Second Respondent

Coram: RABIE, CJ, JANSEN, TRENGOVE, BOTHA et

VAN HEERDEN, JJA.

Heard:	Delivery:
13 March 1986	22 May 1986

JUDGMENT/.....

J U D G M E N T

RABIE, CJ:

This is an appeal against the judgment of Leon, ADJP, sitting in the Durban & Coast Local Division, in which he declared that the detention of Gerald Patrick Kearney, which followed upon an arrest purportedly made in terms of sec. 29(1) of the Internal Security Act 74 of 1982, was unlawful and of no force and effect. The facts of the case are set out in detail in the report of the judgment at 1985(4) SA 709.

Colonel Ignatius Coetzee, who is an officer in the South African Police, caused the aforesaid Kearney to be arrested and detained on 26 August 1985. Coetzee states in an affidavit, made on behalf of all three of the appellants (the respondents in the motion proceedings in the Court a quo), that, in causing

Kearney/....

Kearney to be arrested and detained, he acted in terms of the provisions of sec. 29(1) of the aforesaid Act (hereafter referred to as "the Act"). As to his decision to have Kearney arrested and detained, Coetzee says the following in paragraph 4 of his affidavit:

"(c) Uit hoofde van die feite tot my beskikking, die aard waarvan uiters vertroulik is en, derhalwe, nie openbaar gemaak kan word nie, het ek rede gehad om te vermoed dat die gemelde Kearney, wat hom toe, en te alle wesenlike tye te Durban bevind het, 'n misdryf gepleeg het soos bedoel in artikel 54(1) van die gemelde wet, en dat hy inligting had aangaande die pleeg deur ander van gemelde misdryf, en dat hy sodanige inligting van die Suid-Afrikaanse Polisie weerhou het.

(d) Ek het, gevolglik, gemelde Kearney in hegtenis laat neem sonder lasbrief soos voormeld.

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(f) My besluit om die inligting op grond waarvan ek opgetree het kragtens artikel 29(1) en die arrestasie en aanhouding van Kearney gelas het, te weerhou, is geneem na deeglike oorweging en ten volle bewus van die moontlike nadelige afleiding wat daaruit te maak is. Ek bevestig egter dat die inligting van sodanige aard is dat dit nie openbaar gemaak kan word sonder om die handhawing van wet en orde en die regsadministrasie te benadeel nie. Voorts, sal openbaarmaking van gemelde inligting die polisie se inligtingsbronne in gevaar stel.

(g) Ek beweer voorts dat ek die diskresie aan my verleen deur artikel 29(1) bona fide en na deeglike besinning en oorweging van al die tersaaklike feite uitgeoefen het."

Coetzee also says in his affidavit that statements appearing in the affidavits of the respondents (the applicants in the Court below) concerning Kearney and his

activities - e.g. the statement that no person "having even the slightest acquaintance with the said Kearney or his activities can have reason to believe that his conduct could fall within the said section" (i.e. sec. 29(1)) - do not accord with information at his (Coetzee's) disposal.

Sec 29(1) of the Act, in so far as relevant, provides as follows:

> "29.(1) Notwithstanding anything to the contrary in any law or the common law contained .... , any commissioned officer as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), of or above the rank of lieutenant-colonel may, if he has reason to believe that any person who happens to be at any place in the Republic -
>
> (a) has committed or intends or intended to commit an offence referred to in section 54(1), (2) or (4), ...; or

(b) is withholding from the South African Police any information relating to the commission of an offence referred to in paragraph (a) ....,

without warrant arrest such person or cause him to be arrested and detained for interrogation in accordance with such directions as the Commissioner may, subject to the directions of the Minister, from time to time issue, ... ".

Sec. 29(6) of the Act, which is also relevant to the present proceedings, reads as follows:

"(6) No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section."

Mr Combrinck, who appeared for the appellants, contended that the Court a quo erred in holding (A) that

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Coetzee's decision to have Kearney arrested and detained was objectively justiciable, and also in finding (B) that sec. 29(6) of the Act did not preclude the Court from reviewing Coetzee's decision.

As to (A), counsel, starting from the premise that it is of vital importance to determine what sec. 29(1) of the Act means when it says that a commissioned officer of or above the rank of lieutenant-colonel may, without warrant, arrest a person "if he has reason to believe" that that person is a person as described in paragraph (a) or (b) of the subsection, accepted the proposition - put to him by a member of the Bench - that the officer must have grounds for his belief before he is entitled to effect an arrest. It is essential also,

counsel conceded, that there must in fact exist grounds which cause him to have the required belief. This does not mean, however, counsel submitted, that the Court is entitled to make an objective inquiry into the existence of such grounds, or to determine objectively whether they provide justification for the officer's belief and decision to arrest. The Legislature's intention is, counsel contended, that the officer concerned should be the sole judge of these matters. Consequently, it was argued, if the officer who made an arrest states that he did so because he had reason to believe that the person concerned was a person as described in sec. 29(1)(a) or (b), it is not open to the Court to inquire into the

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matter. When asked whether it was his contention that there is no real difference in meaning between the expressions "if he has reason to ....." in sec. 29(1) and "if in his opinion there is reason to ...." in sec. 28 (1)(c) of the Act, counsel's reply was "yes". Both these expressions, counsel said, provide for a purely subjective test. Counsel submitted, furthermore, that if Courts of law could objectively inquire whether reasonable grounds existed for the belief held by an officer who made an arrest under sec. 29(1), the police would be forced to disclose the information on the strength of which such arrest was made. The disclosure of such information, counsel argued, could be harmful

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to the security of the State, and it should, therefore, be held that the Legislature's intention was that action taken in reliance on the provisions of sec. 29(1) should not be objectively justiciable.

As to counsel's argument with regard to sec. 29(6) of the Act (see (B) above), the contention is that the subsection contains a clear expression of intention that an arrest by an officer of the required rank should not be objectively justiciable. Consequently, counsel says, when such an officer states with regard to an arrest effected by him that he acted in terms of sec. 29(1), the arrest is to be regarded as "action taken in terms of this section", i.e. as action which is not subject to review. Sec. 29(6), counsel contends, would

be a superfluous provision if the Court were entitled to inquire into the grounds which moved an officer to effect or cause an arrest.

With regard to Mr Combrinck's submissions as set out under (A) above, I think it is clear that the words "he has reason to believe" imply that there are grounds, or facts, which give rise to, or form the basis of, the belief of the officer concerned. In London Estates (Pty) Ltd v. Nair 1957(3) SA 591 (D & CLD) the Court, dealing with the meaning of the words "if .... there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated" in sec. 10(1) of the Insolvency Act 24 of 1936, said (at 592 E-F):

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> "'Reason to believe', in my opinion, is constituted by facts giving rise to such belief."

This view, although expressed in connection with words occurring in an Act of a kind different from the one with which we are concerned in this case, seem to me to apply also to the words "has reason to believe" in sec. 29(1).

If, then, one accepts that the officer who contemplates arresting a person in terms of the provisions of sec. 29(1) must have grounds which cause him to believe that the person concerned is a person as described in paragraph (a) or paragraph (b) of the subsection, the next question which arises is, it seems to me, whether it can be said that the Legislature intended that

those grounds should be reasonable grounds. As to this question, I do not think it can be doubted that it was the Legislature's intention that the grounds on which the officer's belief is based must be reasonable grounds. When regard is had to the serious consequences which an arrest and the subsequent detention under sec. 29(1) have for the individual concerned, it is, I think, inconceivable that the Legislature could have intended that a belief based on grounds which cannot pass the test of reasonableness would be sufficient to provide justification for such arrest and detention.

In this connection it is relevant to note, also, that the provisions of the Criminal Procedure Act 51 of 1977 which empower a peace officer to arrest someone

without a warrant on the strength of a belief or suspicion held by him, require that the belief, or suspicion, should be founded on reasonable grounds. (See sections 40, 41, 46 and 48 of that Act.) The corresponding provisions of the Criminal Procedure Act of 1917 and the Criminal Procedure Act of 1955 were to the same effect. This being so, and considering the consequences which an arrest under sec. 29(1) has for the person concerned, it is most unlikely, in my opinion, that the Legislature could have intended that the belief which is required for an arrest under sec. 29(1) need not be founded on reasonable grounds.

This conclusion leads me to the important question whether the Court is entitled to inquire into the existence of grounds which could reasonably found a belief as required by sec. 29(1). The appellants, as stated above, contend that the Court has no such power and that it cannot go behind the statement of the officer concerned that he had grounds for entertaining the belief required by sec. 29(1). Leaving aside, for the present, the question whether sec. 29(6) precludes the Court from making an inquiry as aforesaid (a question to be dealt with later in the judgment), I cannot accept the argument that the Legislature intended that the officer who contemplates making an arrest should be the sole

judge as to whether there are reasonable grounds for such action. Having regard, once again, to the serious consequences which an arrest under sec. 29(1) has for the person concerned, it seems to me, firstly, that if the Legislature had intended that the question whether reasonable grounds existed for a belief as required by sec. 29(1) should be left entirely to the subjective judgment of the officer making, or causing, the arrest, it would have used language which made that intention clear. I may refer, in this connection, to the language used by the Legislature in subsection (1) of sec. 28 of the Act. Paragraph (a) of this subsection empowers the Minister to order the detention of a person "if in his opinion there is reason to apprehend" that that person "will commit an offence referred to in sec. 54(1), (2)

or/.....

or (3)", whereas paragraph (c) of the subsection empowers him to issue such an order "if he has reason to suspect" that a person who has been convicted of an offence mentioned in Schedule 2 to the Act engages in or is likely to engage in activities which endanger the security of the State, etc. The language used in paragraph (a) of sec. 28(1) is in subjective terms, and I have little doubt that if the Minister were to state that he issued an order since there was, in his opinion, reason to apprehend that a particular person would commit an offence referred to in sec. 54(1) of the Act, the Court would not be entitled to query his judgment. See R. v Sachs 1953(1) SA 392(A) at 400 E-F; South African Defence and Aid Fund and Another v. Minister of Justice 1967(1) SA 31(C) at 35 A-B.

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Sec. 28(1)(c) employs virtually the same words, viz. "if he has reason to suspect", as those used in sec. 29(1). It was argued by counsel for the appellants, as stated above, that there is no difference in meaning between the words "if in his opinion there is reason to ..." in sec. 28(1)(a) and the words "if he has reason to ..." in sec. 29(1). Sec. 28(1)(a), as I have said above, provides for a subjective test (viz. "if in his opinion there is reason to apprehend"), and it seems to me that if the Legislature had intended to provide a like subjective test in sec. 28(1)(c), and in the virtually identically worded sec. 29(1), it would have used the same words in sec. 28(1)(c) and sec. 29(1) as it did in sec. 28(1)(a).

There is a further consideration which shows, I think, that the question whether a police officer had the required belief when he made an arrest in reliance on sec. 29(1) is objectively justiciable. It is this: I stated earlier on that in my opinion the words "if he has reason to believe" carry the implication that the belief must be based on reasonable grounds, and it seems to me that, if this is correct, as I consider it to be, the Court should be entitled to inquire whether the belief was reasonably held. There is ample authority to the effect that the question whether a peace officer, or private person, reasonably suspected, or had reasonable grounds for suspecting, that the person whom he arrested without a warrant had committed an offence, is objectvely

justiciable. See e.g. R. v. van Heerden 1958(3) SA 150(T) at 152 D-E; Wiesner v. Molomo 1983(3) SA 151 (A) and at 159 B, Duncan v The Minister of Law and Order (AD Case No. 38/1985, in which judgment was given on 24 March 1986). In Duncan's case both parties adopted the view - and it is clear that this Court considered it to be correct - that

> "the question whether a peace officer 'reasonably suspects' a person of having committed an offence within the ambit of s 40(1)(b) of the Act is objectively justiciable".

The Court, referring to R v. Van Heerden, supra, Wiesner v. Molomo, supra, and Watson v. Commissioner of Customs and Excise 1960(3) SA 212(N) at 216, went on to say:

> "And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach,

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he in fact has reasonable grounds for his suspicion."

It follows from the aforegoing that I do not agree with the view expressed in Mbane v. Minister of Police and Others, 1982(1) SA 223 (Tk) at 229 B-F as to the meaning of the words "has reason to believe". Reference will again be made to this case later in the judgment.

As will have appeared from what I have said above, I am of the opinion that the conclusion of the Court a quo as to the meaning of the words "if he has reason to believe" is correct. (See 717A of the report.) I should indicate, however, that I do not agree with the learned Judge's statement as to the "abundant authority" which supports his interpretation of those

words. Not one of the English cases mentioned by him as providing authority for his interpretation dealt with the meaning of the words "has reason to believe." They were all concerned with the meaning of expressions in which the word "reasonable", or "reasonably" occurred, while the issue in the present case is whether the words "has reason to believe" carry with them the implication that the belief must be reasonable, or be based on reasonable grounds. The first of the South African cases to which the learned Judge referred in this connection, viz. London Estates (Pty) Ltd v. Nair, supra, discussed the meaning of the words "has reason to believe", but it did not deal with the question of reasonableness.

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In Watson v. Commissioner of Customs and Excise, supra, the second South African case referred to by the learned Judge (at 717C), the words in question were "has reasonable cause to believe". In "L.S.D." Ltd and Others v. Vachell and Others 1918 WLD 127, the third South African case, the question was whether a police officer was entitled to search premises without a warrant because he believed "on reasonable grounds", as required by sec. 50(1) of Act 31 of 1917, that the delay in obtaining a search warrant would defeat the object of the search. The fourth South African case referred to by the learned Judge, viz. Metal & Allied Workers Union v. Castell NO 1985(2) SA 280 (D & CLD), does not appear to be relevant to the question with which we are here concerned.

The first case cited in the judgment of the Court a quo which is directly in point in that it provides support for the learned Judge's view (set out at 718 G-H of the report) as to the meaning of the words "if he has reason to believe", is Sigaba v. Minister of Defence and Police and Another 1980(3) SA 535, a decision by Rose-Innes, J, in the Supreme Court of Transkei. One of the issues in that case was whether Sigaba had been lawfully arrested and detained in terms of the provisions of sec. 47(1) of Transkei's Public Security Act 30 of 1977. This subsection, which is, to a large extent, a reproduction of sec. 6 of the Terrorism Act 83 of 1967 (which, in turn, was the

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predecessor of sec. 29(1) of Act 74 of 1982) reads as follows, in so far as relevant:

> "47(1) Any commissioned officer as defined in s. 1 of the Transkeian Police Act 5 of 1966 may, if he has reason to believe that any person has committed an offence under this Act ....., without warrant arrest such person or cause him to be arrested and detain such person or cause him to be detained in custody, for interrogation .... ".

Rose-Innes, J, held (at 544 E-F) that the words "if he has reason to believe....." "carry the premise that the belief mustbe a reasonable belief," and that the commissioned officer "must have information such as would lead a reasonable man to believe that the suspect had committed an offence under the Act." In a later

Transkeian case, Mnyani and Others v. Minister of Justice and Others 1980(4) SA 528, which was also concerned with a detention under sec. 47(1) of the aforesaid Act 30 of 1977, Van Rensburg, AJ, dissented from the decision in Sigaba's case, supra, and held that Rose-Innes, J, erred in holding that the onus was on the Minister of Justice to show that a detention was lawful (532 D-F and 533 C-D), and in finding that a Court could inquire objectively into the grounds on which the officer decided to effect an arrest (534E). The learned Judge stated that his conclusions were based on certain decisions of this Court, viz. Groenewald v. Minister van Justisie 1973(3) SA 877, Shidiack v. Union Government 1912 AD 642 and Divisional Commissioner of S.A. Police, Witwatersrand

Area; and Others v. S.A. Associated Newspapers Ltd and Another 1966(2) SA 503. With regard to Groenewald's case, the Court relied on the following passage in the judgment of Van Blerk, JA (at 883 G- 884B):

> "In hoofsaak is eiser se betoog hier, soos dit ook in die Hof a quo was, dat aangesien die injuria waarop hy steun op vryheidsberowing neerkom, die bewys volgens die gewysdes van ons Howe by die verweerder berus om die arrestasie te billik en die opset om te laedeer (leed aan te doen) te ontsenu. Met ander woorde, hy moet bewys dat redelike gronde vir verdenking wel aanwesig was en die lasbrief bygevolg geldig was. Hierdie betoog gaan nie op nie. Deur art. 28(1) van die Strafproseswet, wat die landdros met die bevoegdheid beklee om 'n lasbrief uit te reik, lê die Wetgewer 'n verantwoordelikheid op dié beampte om 'n diskresie uit te oefen; hy moet die gronde waarop die Staatsaanklaer steun, oorweeg en hy kan op grond daarvan of op grond van inligting met dieselfde

strekking deur iemand onder eed afgelê voor hom 'n lasbrief uitreik. By die uitreiking van die lasbrief oefen die landdros 'n diskresie uit. Die bona fide uitoefening van sodanige diskresie is nie by wyse van objektiewe benadering deur 'n Hof beregbaar nie. (Sien Shidiack v. Union Government, 1912 A.D. 642 op bl. 651). Dit sou volg dat daar geen onus op die verweerder rus om te bewys dat redelike gronde wel bestaan het nie. (S.A. Police, Divisional Commissioner of Witwatersrand v. S.A. Associated Newspapers Ltd., 1966(2) S.A. 503 (A,D.) op bl. 511). Hierdie beslissing het gegaan oor 'n visenteerlasbrief wat uitgereik was ingevolge die bepalings van art. 42(1) van die Strafproseswet wat nie wesenlik van art. 28(1) verskil wat betref die gronde vereis vir 'n aansoek om 'n lasbrief en wat betref die verantwoordelikheid wat die wetgewer gelê het op die uitreiker van die lasbrief om 'n diskresie uit te oefen."

The passage does not support the conclusions at which the learned Judge arrived. When Van Blerk, JA, said

"Die bona fide uitoefening van sodanige diskresie is

nie by wyse van objektiewe benadaring deur 'n Hof beregbaar nie," he was not referring to the discretion exercised by a peace officer when considering whether he should make an arrest, but to the discretion exercised by a magistrate when he has to decide whether he should issue a warrant of arrest on the strength of information put before him by the public prosecutor. The discretion so exercised by a magistrate is of a judicial nature and cannot be equated with that exercised by a peace officer when considering whether he should make an arrest. As to the learned Judge's reference to Shidiack's case, it is sufficient to say that what was decided in that case relates to the situation where a decision is left to the sole discretion of a public officer or body. It may be noted that the relevant phrase in that case was "to

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the satisfication of the Minister", which suggested that the Minister was entitled to decide on grounds which he considered to be sufficient. This differs from the case where a peace officer is authorised to make an arrest if he reasonably believes that a certain fact, or state of affairs, exists. It happens not infrequently that Courts are called upon to decide whether a peace officer who made an arrest entertained the required belief. In the aforesaid Divisional Commissioner of S.A. Police case the matter in issue was the validity of a warrant which had been issued by a justice of the peace in terms of sec. 42 of the Criminal Procedure Act 56 of 1955. This case, too , does not provide support for the conclusions

at which the Court arrived in Mnyani's case.

In this connection reference must also be made to the Transkeian case of Mbane v. Minister of Police and Others, supra, in which, as in Mnyani's case, supra, the Court found support for its decision in the aforesaid judgments of this Court in Groenewald v. Minister van Justisie and Divisional Commissioner of S.A. Police. Mbane's case was concerned with regulations made under Transkei's Public Security Act 30 of 1977, and the question was whether the Court was entitled to inquire into the validity of the detention of a person (Mbane) who had been detained under reg. 4(2)(a)(ii) of those regulations. Reg. 4(2)(a) reads, in so far as relevant, as follows:

"The Commissioner of the Transkeian Police or any commissioned officer acting under his directions may .... -

(a) ..... without warrant detain or cause to be detained .... -

(i) any person arrested under ss (1), and

(ii) any other person if the said Commissioner or such officer has reason to believe that such other person has committed or intends committing an offence under these regulations or any other law .... for such period as may be necessary for the proper investigation of the offence or suspected offence concerned or the proper interrogation of such person -------."

(Subsec. (1) deals with the powers of peace officers to arrest without warrant.) Hefer, CJ (with whom Van Coller, J, agreed), held that the Court was not entitled to inquire into the question whether the commissioned officer who caused the arrest and detention of Mbane had

reason to believe that Mbane had committed or intended to commit an offence. In coming to this conclusion, Hefer, CJ, found it unnecessary to decide whether the cases of Sigaba, supra, and Mnyani, supra, had been correctly decided, because, the learned Judge said (at 227 i.f. and 228 A-B), those cases were concerned with the Public Security Act 30 of 1977 and not with the Security Regulations, and because there was "at least one consideration .... which affects the regulation and assists in its interpretation, but which does not affect the section." In view of this statement by the learned Judge it may be thought to be unnecessary to have regard to Mbane's case, but I think I should nevertheless deal briefly with one of the points which

weighed with the Court when it came to the conclusion that it did. The point appears from the following passage in the judgment (at 228 E-F):

> "There does not, at least as far as persons arrested in terms of reg 4(1)(a) are concerned, appear to be any material distinction in principle between the functions performed by an officer acting under reg 4(2)(a) and a magistrate issuing a warrant (as to which see Groenewald's case supra; Divisional Commissioner of SA Police, Witwatersrand Area, and Others v. Associated Newspapers Ltd and Another 1966 (2) SA 503 (A) at 511-512), except for the purpose of the detention."

If I understand this passage correctly, it says that there is no material distinction between the function excercised by a magistrate who has to decide, on information put before him by the public prosecutor, whether he

should issue a warrant of arrest, and the function exercised by the Commissioner of Police, or a commissioned officer acting under his directions, when he has to decide whether a person who has been arrested by a peace officer under reg. 4(1)(a) should be detained under reg. 4(2)(a). If this is a correct understanding of what the learned Judge said, I would hesitate to agree with it. A magistrate is a judicial officer, and when he decides whether he should, on information put before him by a prosecutor, issue a warrant of arrest, he excercises an independent discretion. In the case of police officials, whatever their rank, this can hardly be the case. (In Mbane's case, it would seem, the same officer caused

both the arrest and the detention of Mbane. See 244 H. If this is correct, there would have been no independent exercise of a discretion by a second police officer concerning action taken by another officer.) But in any event, even if it could be said that there is no material difference between the function exercised by a magistrate when issuing a warrant and that exercised by a commissioned officer when deciding under reg. 4(2)(a) whether a person who was arrested under reg. 4(1)(a) should be detained, the same would not be true of an arrest and detention under sec. 29(1) of Act 74 of 1982. Under sec. 29(1) detention follows automatically and immediately on arrest: it is not the subject of a further decision after an arrest has been made.

I turn now to counsel's final argument in support of his contention that the Legislature did not, when using the words "if he has reason to believe ... " in sec. 29(1) of the Act, intend that the decision of the officer who arrested or caused the arrest of someone should be subject to objective inquiry by the Court. Such an inquiry, counsel says, could result in the police being forced to disclose information which, if divulged, could endanger the security of the State, and the Legislature could not have intended such a result. It must be accepted that occasions may arise when the police will, for security reasons, not be able to disclose information available to them, and it must

be acknowledged, in my view, that there is force in counsel's argument. At the same time it should not, I think, be assumed that occasions of the kind mentioned will frequently arise. It is, also, not to be assumed that the police will on such occasions necessarily have to disclose all the information of which they are possessed, or the sources of their information. Sec. 29(1) requires merely that it be shown that there were grounds on which the officer concerned could reasonably have held the belief that the person whom he arrested or caused to be arrested was a person as described in the subsection. I would sum up my view of counsel's argument by saying that, while it must be recognized

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that it has some force, it does not outweigh the considerations, discussed above, which indicate, in my opinion, that the words "if he has reason to believe...." in sec. 29(1) should be construed as constituting an objective criterion.

In my discussion of the appeal up to this point I have left out of account the question whether sec. 29(6) of the Act precluded the Court a quo from inquiring into the validity of Kearney's arrest and detention. I now proceed to consider the appellant's contention that the Court was so precluded by sec. 29(6). The contention is, it will be recalled, that when an officer of the rank mentioned in sec. 29(1) of the Act states that he acted in terms of sec. 29(1) in arresting or causing the arrest of a person, the

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arrest is to be regarded as "action taken in terms of the section" and that it is, then, by virtue of the provisions of sec. 29(6), not subject to review by the Court.

It is a well recognised rule in the interpretation of statutes, it has been stated by this Court, "that the curtailment of the powers of a court of law is, in the absence of an express or clear implication to the contrary, not to be presumed." (Schermbrucker v. Klindt, NO 1965(4) SA 606 at 618 A, per Botha, JA, citing Lenz Township Co. (Pty) Ltd v. Lorentz, NO en Andere 1961(2) SA 450(A) at 455, and R v. Padsha 1923 AD 281 at 304). The Court will, therefore, closely examine

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any provision which appears to curtail or oust the jurisdiction of courts of law. Having considered the provisions of sec. 29, I am of the opinion that sec. 29(6), despite its wide terms, does not preclude the Court from inquiring into the question whether an officer who arrested or caused the arrest of a person in reliance on the provisions of sec. 29(1) had reasonable grounds for entertaining a belief as required by sec. 29(1). I have come to this conclusion in the light of the considerations set out hereunder.

Sec. 29(1) provides inter alia that a commissioned officer of or above the rank of lieutenant-colonel may, if he has reason to believe that a person is a person as described in paragraph (a) or paragraph (b)

of the subsection, without warrant arrest and detain such person, or cause him to be arrested or detained. Sec. 29(6) precludes the Court from pronouncing upon the validity of any action taken "in terms of" sec. 29, and from ordering the release of a person detained "in terms of the provisions" of sec. 29. It is clear from this that it is only action taken "in terms of" sec. 29, and a detention "in terms of" the provisions of sec. 29, which are not open to inquiry by the Court. This being so, it is obvious that the meaning of the words "in terms of" is a question of vital importance.

An arrest as contemplated by sec. 29(1) is an arrest by an officer of the required rank "if

he has reason to believe" that the person whom he arrests or causes to be arrested is a person as described in paragraph (a) or (b) of the subsection. An arrest by, or caused by, an officer who is not of the required rank would, therefore, not be an arrest in terms of sec. 29. Similarly, an arrest by, or caused by, an officer of the required rank who does not have reason to believe that the person concerned is a person as described in paragraph (a) or paragraph (b) of sec. 29(1) would not be an arrest as contemplated by sec. 29(1) and, therefore, not an arrest "in terms of" sec. 29. It follows from this that the jurisdiction of the Court will be ousted by sec. 29(6) only if the officer who arrested or caused

the arrest of a person was an officer of the required rank, and if he had reason to believe - i.e., if he had reasonable grounds for believing - that the person concerned was a person as described in paragraph (a) or paragraph (b) of sec. 29(1). Whether he was such an officer, and whether he entertained such belief, are questions of fact, and it is only when such facts exist that it can be said that sec. 29(6) is of application.

My aforesaid view is supported by views that were expressed in the judgments of Rumpff, JA, and Trollip, AJA, in the case of Schermbrucker v. Klindt, NO 1965(4) SA 606 (A). The issue in that case was whether the Court could in terms of Rule 9(a) (f) order that a

person/....

person who was being detained under the provisions of sec. 17 of the General Law Amendment Act 37 of 1963 should be brought before it for the purpose of giving viva voce evidence. It was common cause between the parties that the detention of the said person was lawful. Sec. 17 provided inter alia as follows:

> "17. (1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section one of the Police Act, 1958 (Act No. 7 of 1958), may from time to time without warrant arrest or cause to be arrested any person whom be suspects upon reasonable grounds of having committed or intending or having intended to commit any offence under the Suppression of Communism Act, 1950 ---, or the offence of sabotage, ... and detain such person or cause him to be detained in custody for interrogation ....
>
> (2) No person shall, except with the consent of the Minister of Justice or a commissioned officer as aforesaid, have access to any person detained under sub-section (1) ...

(3) No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody."

This Court decided by a majority of three to two that the Court did not have the power to make an order as aforesaid. Botha, JA, with whom Steyn, CJ, and Trollip, AJA (who also wrote a separate judgment) agreed, held that the Court could not order a detainee to be brought before it to give evidence on the ground that, if such an order were made, the manner of the detainee's detention "as prescribed by sec. 17 would be interfered with in more ways than one, and the purposes of the section may be defeated". (See 619 D-H.) Rumpff, JA,

who wrote a minority judgment, said inter alia at 613 A-D):

"Die bepaling in art. 17(2) dat niemand toegang het tot 'n kragtens sub-art. (1) aangehoudene nie, is prima facie bedoel om regsadviseurs, maagskap en vriende uit te sluit en volkome isolasie as dwangmiddel te bewerkstellig. Sub-art. (3) bepaal dat geen hof bevoeg is om die vrylating van so 'n aangehoudene te beveel nie. So 'n aangehoudene is natuurlik 'n aangehoudene wat binne die bevoegdhede deur art. 17(1) verleen aangehou word en hierdie subartikel verklaar met ander woorde dat wanneer die bepalings van die artikel behoorlik uitgeoefen is, geen hof jurisdiksie het ten opsigte van so 'n aangehoudene nie. 'n Voorvereiste vir die uitsluiting van die bevoegdheid van die hof is dat die aangehoudene kragtens die bepalings van art. 17(1), eksplisiet sowel as implisiet, aangehou word. Wanneer dit bv. bewys kan word dat iemand anders as 'n omskrewe offisier die aangehoudene laat arresteer het, of dat so 'n offisier nie op redelike gronde verdink het dat die aangehoudene in verband

gebring/.....

> gebring kan word met sekere in die artikel genoemde misdade nie, het die hof wel deeglik die bevoegdheid om die aangehoudene te ontslaan. Dat so 'n aangehoudene nie maklik 'n saak by die hof aanhangig kan maak nie, of nie maklik so 'n saak kan bewys nie, is momenteel irrelevant."

Trollip, AJA, in a separate judgment written by him (with which Steyn, CJ, also agreed), expressed a view similar to that op Rumpff, JA. He said (at 623 F-G):

> "Sec. 17 of Act 37 of 1963 does not impair the Court's jurisdiction in any case affecting a detainee except to the extent mentioned in sub-sec. (3); that is, it cannot order 'the release from custody of any person so detained'; otherwise it retains full jurisdiction; thus it can order his release if he has been unlawfully arrested or is being unlawfully detained, and it can restrain any unlawful conduct which is being committed upon him during his detention."

And also (at 626 i.f.):

> "....this/.....

> ".... the Court still retains its jurisdiction to determine whether or not a detainee has been lawfully arrested or is being lawfully detained under sec. 17(1)".

The points on which Rumpff, JA, and Trollip, AJA, expressed their above-quoted views were, of course, not directly in issue in the appeal, but I nevertheless consider them to be of significance.

Finally, as to the question when it can be said that action was taken "in terms of" a statutory provision, reference may be made to two further cases. The first is Ngqulunga and Another v. Minister of Law and Order 1983(2) SA 696(N). The applicants in that case had been detained under the provisions of regulations contained in the Schedule to Proclamation R103 of 1973,

and the issue was whether the police were entitled to deny their legal advisers access to them. The respondent contended inter alia that the Court was precluded from pronouncing upon the validity of the action of the police by one of the regulations which provided that "No court of law shall pronounce upon the validity of any action taken in terms of these regulations, or order the release of any person arrested and detained in terms of reg. 1". The Court (Howard, J.) rejected the contention and stated (at 698G) that "the action in question cannot have been 'taken in terms of these regulations' unless the regulations authorised it, either expressly or by necessary implication." The second case is South West African Peoples Democratic United Front en 'n Ander v. Administrateur-Generaal/.....

Generaal, Suidwes-Afrika, en Andere 1983(1) SA 411(A), in which this Court (per Jansen, JA) held inter alia that a provision to the effect that the Court could not set aside the announcement of an election result made in terms of sec. 34 of a certain proclamation ("ingevolge art. 34 gedoen"), could not oust the jurisdiction of the Court where it appeared that the announcement had been made, not on the basis of the registered list of candidates as prescribed by the said sec. 34, but on the basis of an irregularly altered list. The ouster provision, the Court held, was clearly intended by the Legislature to apply if "die aankondiging van die uitslag deur die hoofverkiesingsbeampte 'ingevolge art. 34 gedoen' word". (5

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The appellants contend, as stated above, that if one were to be interpret sec. 29(6) in the manner I have suggested, the provision would be rendered ineffective and redundant. I do not agree. The Court will, as I have indicated, be entitled to inquire whether the officer concerned had reasonable grounds for his belief that the person whom he arrested was a person as described in sec. 29(1) - reasonable grounds being grounds on which he could reasonably have held the belief he did. The Court will, however, be precluded by sec. 29(6) from going further and considering whether, if there were such grounds, he should nevertheless not have held the belief that he did, or not have arrested the person concerned. In other words, given the

existence of grounds on which the officer could reasonably have held the belief that he did, the Court cannot hold that it would have come to a different conclusion on those grounds, or that the officer did not exercise his discretion properly, and that his action should, therefore, be found to be illegal. I do not find it necessary to discuss the matter in greater detail and to determine what actions may possibly be taken in terms of sec. 29 which the Court will be precluded from considering by sec. 29(6).

Having concluded that the Court was not precluded from considering whether Coetzee had reasonable grounds for his aforesaid belief concerning Kearney, I now turn to the question of onus, i.e. the question whether the appellants had to prove that Coetzee had the

required belief, or whether the respondents had to prove that he did not. The Court a quo did not decide the question, but held (at 725 D-E) that, even if one assumed that the onus was on the respondents, they had discharged it. I deal with the question in the paragraphs that follow.

Arrests without warrant by peace officers acting under the powers of arrest conferred upon them by the Criminal Procedure Act 51 of 1977 and its predecessors (Act 31 of 1917 and Act 56 of 1955) have on many occasions given rise to disputes in which the lawfulness of an arrest was in issue, and in cases of this kind the question of onus may be of vital importance. It has been held, or assumed, in a number

of cases decided in the Provincial and Local Divisions of the Supreme Court that the onus lies on the peace officer who made the arrest in issue to prove that he acted lawfully, i.e. that he acted within the powers of arrest conferred upon him by statute. Some of those decisions are referred to in Botha v. Lues 1981 (1) S.A. 687(O). In that case a full Court of the Orange Free State Provincial Division dissented from those decisions and held that the onus was on the plaintiff, who claimed damages on the ground of an alleged wrongful arrest, to establish the unlawfulness of the arrest of which he complained. The basis of this finding by the Court was that if a peace officer who is empowered

by statute to arrest a person whom he reasonably suspects of having committed an offence proceeds to arrest someone whom he so suspects, the arrest cannot be unlawful, since the exercise of a power which is conferred by law cannot constitute unlawfulness ("uitoefening van 'n bevoegdheid (en plig) wat van regsweë verleen word kan nie weder-regtelikheid daarstel nie": 691 C-D). Since unlawfulness is necessary to establish liability, the Court said (at 691 D-E), a plaintiff who complains of an arrest can succeed in his claim only if he establishes that the person who arrested him did not have the required suspicion. When this decision came on appeal to this Court (see Botha v. Lues 1983(4) SA 496), Corbett, JA, found it unnecessary to decide the question of onus.

He did say, however, that it was doubtful whether the decision of the Provincial Division concerning the question of onus could be reconciled with what was said in certain decisions of this Court. The learned Judge referred to Mabaso v. Felix 1981(3) SA 865 at 872 H-874 B, and Ramsay v. Minister van Polisie en Andere 1981(4) SA 802 at 807 E-F and 817F-818B. In the judgment of the Provincial Division no reference was made to the judgment of this Court in Brand v. Minister of Justice and Another 1959 (4) SA 712, a case in which the appellant claimed damages for alleged unlawful arrest and detention in consequence thereof. In the course of his judgment Ogilvie Thompson, JA, dealing with the question of onus, said (at 714 F-H):

"Second/.....

"Second respondent justified his action in admittedly arresting appellant without a warrant by relying upon sec. 22(1)(a) of Act 56 of 1955 which authorises a peace officer to arrest, without warrant, 'any person who commits any offence in his presence'. It was conceded by counsel for respondents in this Court that the onus of establishing that an offence was committed in his presence rests upon the peace officer who relies upon the above-cited sec. 22(1)(a) of the Code. This concession was, in my opinion, rightly made. For that view of the onus, which has been taken in Provincial Divisions (see e.g. R. v. Henkins, 1954(3) SA 560 (C); Rosseau v. Boshoff, 1945 C.P.D. 135 at p. 137; R. v. Folkus, 1954 (3) S.A. 442 (S.W.A.) at pp. 445/6), accords with principle and is in conformity with what was said by this Court in Union Government v. Bolstridge, 1929 A.D. 240 at p. 244, and in Tsose v. Minister of Justice and Others, 1951 (3) S.A. 10 (A.D.) at p. 18."

In the case of Rosseau v. Boshoff (referred to in the passage quoted above), where the legality of an arrest

under sec. 26(b) of Act 31 of 1917 was in issue (see now sec. 40(1)(b) of Act 51 of 1977), the Court held (per Jones, AJP, at 136-137):

> ".... when the law says that a person is empowered to arrest without warrant every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule of the Act, when such arrest has been effected, the onus is on the person effecting the arrest to show that he had reasonable grounds."

It is clear, therefore that the decision of the Provincial Division in Botha v. Lues with regard to the question of onus is in conflict with the judgment of this Court in Brand v. Minister of Justice and Another.

As to the aforesaid decision of the Provincial Division in Botha v. Lues, there is a further matter which calls for some discussion. It is this: The Court suggested (see 689 G-H) that it could be argued that in Groenewald v. Minister van Justisie, supra, at 883, and Minister van Polisie en 'n Ander v. Gamble en 'n Ander 1979(4) SA 759(A), at 763, the Appellate Division adopted the view that a person who alleges that he was unlawfully arrested has to prove that the arrest was unlawful. The Court did not, however, discuss the point raised by it. As for the reference to Groenewald's case, it seems that the Court had in mind the passage in the judgment of Van Blerk, JA, which appears at p. 883 of the report

and/....

and which I quoted above when discussing the decision in Mnyani's case. That passage, as I pointed out in the course of that discussion, was concerned with an arrest which followed upon the issue of a warrant of arrest by a magistrate and it does not support the view that a plaintiff who complains of an arrest without warrant by a peace officer has to prove that the arrest was unlawful. In Gamble's case the respondent (the plaintiffs at the trial) claimed damages on the ground that they had been unlawfully arrested. (See 763 E-F of the report of the judgment.) The judgment contains no reference to the judgment of this Court in Brand v. Minister of Justice and Another, supra, and it seems to be clear that it was not intended to dissent from what was said by Ogilvie Thompson, JA, in the above-quoted

passage/.....

passage in Brand's case as to the question of onus. It would seem that in Gamble's case it was assumed in favour of the appellants (the defendants at the trial) that the onus was on the respondents (the plaintiffs at the trial) to prove that the arrest of which they complained was unlawful.

With regard to the question of onus in the case of an arrest under sec. 29(1) of the Act, I should point out that it was said in Mnyani's case, supra, at 532 B-C, that, while there was "ample authority for the proposition that, in an ordinary case of unlawful arrest, the onus rests on the arresting authority to justify the arrest", "entirely different principles" applied in a case of an arrest and detention under sec. 47(1) of Transkei's Public Security Act 30

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of 1977. The Court reasoned as follows (532 B-E):

Sec. 47(1) gives a commissioned officer certain powers of arrest and detention; he must weigh the information available to him and thereafter decide whether arrest and detention would be justified in terms of the section; when he so decides, he exercises a discretion; the bona fides of the exercise of such discretion is not objectively justiciable ; consequently, when an officer has made an arrest in the exercise of such discretion, there is no onus on the arresting authority to show that reasonable grounds existed for the arrest.

The Court was of the opinion (see 533 C of the report of the judgment) that these views were supported by the decision of this Court in Groenewald's case, supra,

and in the case of Divisional Commissioner of S.A. Police, supra, but it erred in that belief, as I stated earlier on. In my opinion there is no warrant for saying that the principles which govern an arrest by a commissioned officer under sec. 47(1) of the Transkeian Act - or sec. 29(1) of Act 74 of 1982 - differ from those which apply to the case of an arrest under, say, sec. 40(1)(b) of the Criminal Procedure Act 51 of 1977. In the case of all three of these sections the officer concerned has to exercise a discretion in the light of information available to him, and I can see no difference between the discretion exercised by an officer acting under sec. 47(1) of the Transkeian Act and sec. 29(1)

of/.....

of Act 74 of 1982, on the one hand, and sec. 40(1)(b) of the Criminal Procedure Act 51 of 1977, on the other hand.

In view of the aforegoing I hold that the above-quoted passage in the judgment of Ogilvie Thompson, JA, in Brand's case, supra, contains a correct statement of the law as to the question of onus in the case of arrests without warrant, and, furthermore, that the law as there stated also applies to arrests under sec. 29(1) of Act 74 of 1982. I would add that I consider it to be good policy that the law should be as there stated. An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested

or caused the arrest of another person should bear the onus of proving that his action was justified in law. See generally Weeks and Another v. Amalgamated Agencies, Ltd 1920 AD 218 at 226; Cohen Lazar & Co. v. Gibbs 1922 TPD 142 at 144-145; May v. Union Governemnt 1954(3) SA 120(N) at 124 H; Ingram v. Minister of Police 1962 (3) SA 225(W) at 227 D, and Areff v. Minister van Polisie 1977(2) SA 900(A) at 914 G.

In view of the aforegoing I hold that the onus was on the appellants to show that Coetzee had reasonable grounds for his alleged belief concerning Kearney. The appellants' counsel, I must add, conceded (without addressing any argument on the point to us)

that/.....

that if it were held that the Court was entitled to inquire into the existence of reasonable grounds for Coetzee's belief, the onus would be on the appellants to establish the existence of such grounds. Having held that the Court was entitled to inquire into the question of Coetzee's belief, and that the onus was on the appellants to show that Coetzee had reasonable grounds for his belief, the only remaining question is whether the onus was discharged. The answer to the question is obviously "no", the appellants not having put any facts before the Court from which the conclusion that Coetzee had reasonable grounds for his alleged belief could have been drawn.

The/.....

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

P J RABIE
CHIEF JUSTICE.

JANSEN, JA
TRENGOVE, JA
BOTHA, JA Concur.
VAN HEERDEN JA