IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION

In the matter between:

CATHOLIC BISHOPS PUBLISHING COMPANY (ASSOCIATION INCORPORATED UNDER s21)..Appellant

AND

THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA ..... First Respondent

THE MINISTER OF HOME AFFAIRS AND OF COMMUNICATIONS..... Second Respondent

Coram: CORBETT CJ, HOEXTER, NESTADT, STEYN et F H GROSSKOPF JJA.

Date of Hearing: 29 August 1989

Date of Judgment: 1 December 1989

J U D G M E N T

CORBETT CJ:

In terms of the Public Safety Act 3 of 1953 ("the

Act") the State President is empowered to declare, by proclamation in the Gazette, that a state of emergency exists within the Republic as a whole or in any area within the Republic. He may do so if he is of the opinion that the circumstances set forth in sec 2(1) of the Act obtain. The proclamation of a state of emergency cannot remain in force for longer than twelve months (sec 2(2) of the Act). The State President is further empowered (by sec 3 of the Act) to make such regulations (termed "emergency 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."

These regulations apply with reference to the area in which

the state of emergency has been declared and for as long as the proclamation declaring the state of emergency remains in force (sec 3(1)).

In July 1985 and acting in terms of these powers the State President declared a state of emergency in certain areas (magisterial districts) within the Republic and at the same time promulgated a set of emergency regulations. This proclamation was withdrawn and the state of emergency abolished in March 1986, but in mid-1986 a new state of emergency was declared, this time in respect of the whole of the Republic and simultaneously a new set of emergency regulations was promulgated. The state of emergency was renewed for the whole of South Africa by Proc R95 of 11 June 1987 and in terms of Proc R96 of the same date fresh emergency regulations were published. At the same time, and in terms of Proc R97, the State President made and promulgated a separate set of regulations aimed generally at

the regulation and control of what is published in newspapers, periodicals, books, etc and by way of television or film recordings and the making of films and taking of photographs of unrest or security actions. These have commonly been referred to as the "media regulations". I shall speak simply of "the regulations". The regulations were amended by Proc R123 of 28 August 1987. One of the amendments effected by Proc R123 was the insertion of a new regulation 7A. The relevant portion of this regulation read as follows:-

> "7A. (1) If the Minister is of the opinion, solely on examination of any series of issues of a periodical -
>
> (a) that there is in that periodical a systematic or repeated publishing of matter, or a systematic or repeated publishing of matter in a way, which, in his opinion, has or is calculated to have the effect -

(i) of promoting or fanning revolution or uprisings in the Republic or other acts aimed at the overthrow of the Government otherwise than by constitutional means;

(ii) of promoting, fanning or sparking the perpetration of acts referred to in paragraph (b) or (c) of the definition of 'unrest';

(iii) of promoting or fanning the breaking down of the public order in the Republic or in any area of the Republic or in any community;

(iv) of stirring up or fomenting feelings of hatred or hostility in members of the public towards a local authority or a security force, or towards members or employees of a local authority or members of a security force, or towards members of any population group or section of the public;

(v) of promoting the public image or esteem of any organisation which is an unlawful organisation under the

Internal Security Act, 1982 (Act 74 of 1982);

(vi) of promoting the establishment or activities of structures referred to in paragraph (a) (viii) or (ix) of the definition of 'subversive statement'; or

(vii) of promoting, fanning or sparking boycott actions, acts of civil disobedience, stay-aways or strikes referred to in paragraph (a) (iii), (iv) or (v) of the definition of 'subversive statement'; and

(b) that the said effect which such systematic or repeated publishing in his opinion has or is calculated to have is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency, he may, subject to subregulation (4), by notice in the Gazette issue a warning to persons concerned in the production, importation, compilation or publication of issues of that periodical that the matter published in that periodical or

the way in which matter is published in that periodical, in his opinion, is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state or emergency.

(2) In any examination under subregulation (1) of a series of issues of a periodical, such series may include any issue of that periodical published before the commencement of Proclamation R 123 of 1987 but after 11 June 1987.

(3) If the Minister is of the opinion, solely on examination of any issue or series of issues of a periodical published after a warning under subregulation (1) has been issued in respect of that periodical, that there is in the said issue or series of issues a continuation of a systematic or repeated publishing of matter, or of a systematic or repeated publishing of matter in a way, which, in his opinion, has or is calculated to have an effect described in paragraph (a) of that subregulation and that the said effect which such systematic or repeated publishing in his opinion has or is calculated to have is causing a

threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency, he may, subject to subregulation (4), by notice in the Gazette issue an order -

(a) whereby the publication, during such period as may be specified in the order, but not exceeding three months at a time, of any further issue of that periodical is prohibited unless the matter to be published in any such issue and the way in which it is to be published in such issue has previously been approved for publication by a person specified in the order; or

(b) whereby the production, importation into the Republic or publication, during such period as may be specified in the order, but not exceeding three months at a time, of any further issue of that periodical is totally prohibited.

(4) No warning under subregulation (1) nor any order under subregulation (3) shall be published unless the Minister -

(a) has given notice in writing to the publisher or importer of the periodical concerned of the fact that action under subregulation (1) or (3), as the case

may be, is being considered in respect of that periodical, stating the grounds of the proposed action; and

(b) has given that publisher or importer an opportunity of submitting to him in writing, within a period of two weeks, representations in connection with the proposed action."

Reg 7A thus confers upon the Minister (who is the Minister of Home Affairs and of Communications) the power to issue an order either whereby the publication of a periodical is made subject, as to its content, to the prior approval of a specified person (whom for convenience I shall call "the censor") for a period not exceeding three months or whereby the production, importation or publication of a periodical is totally prohibited for a period not exceeding three months (see reg 7A(3)). Any such order must be preceded by a warning given in terms of reg 7A(1); but before he can give such a warning the Minister -

(a) must have examined a "series of issues" of the

periodical concerned;

(b) must have formed the opinion, on such examination, that there is in that periodical a systematic or repeated publishing of matter or a systematic or repeated publishing of matter in a way which is calculated to have the effects set forth in paras (a) and (b) of reg 7A(1);

(c) must have given notice in writing to the publisher or importer (henceforth, because of non-relevance in this case, I shall omit reference to "importer") concerned informing him of the fact that a warning is being considered in respect of that periodical and stating the grounds of the proposed action (reg 7A(4)(a)); and

(d) must have given the publisher an opportunity of submitting to him in writing, within a period of two weeks, representations in connection with the

proposed action (reg 7A(4)(b)).

Thereafter, before making an order in terms of reg 7A(3) the Minister -

(1) must have given a similar written notice in terms of reg 7A(4)(a);

(2) must have given the publisher a similar opportunity to make written representations; and

(3) must have formed the opinion, on an examination of any issue or series of issues of the periodical, that there is a continuation of a systematic or repeated publishing of matter or a systematic or repeated publishing of matter in a way calculated to have the effects referred to in paras (a) and (b) of reg 7A(1).

Proc R 123 also inserted the following new definition in the regulations:

"'series of issues', in relation to -

(a) a periodical which is a daily newspaper, means at least six different issues of that newspaper whether or not issued on consecutive days;

(b) a periodical, other than a daily newspaper, which is ordinarily issued at intervals of 10 days or less, means at least three different issues of that periodical whether or not issued during consecutive intervals;

(c) a periodical which is ordinarily issued at intervals in excess of 10 days, means at least two different issues of that periodical whether or not issued during consecutive intervals."

The appellant in this appeal is the Catholic Bishops Publishing Company, a company incorporated according to the company laws of the Republic and having its principal place of business in Johannesburg. Appellant carries on business, inter alia, as a publisher of periodicals. One of its publications is a weekly newspaper called "New Nation".

On 1 October 1987 the Minister addressed a letter

to appellant. This letter was delivered to appellant the following day. In it the Minister informed appellant that he had examined a series of three issues of New Nation; that, having done so, he was of the opinion that there was a systematic and repeated publishing of matter calculated to have the effects referred to in reg 7A(1); that he was considering issuing a warning under this sub-regulation; and that appellant was thereby given the opportunity to submit written representations to him within a period of two weeks in connection with the proposed action. I shall refer to this letter as "the first notice". The three issues of New Nation referred to in the first notice are those of 27 August - 2 September 1987, of 3 - 9 September 1987 and of 17 - 23 September 1987. It is common cause that each of these issues was published on the first date given.

In response to the first notice and on 14 October 1987

appellant (through its attorneys) submitted written representations of a voluminous nature. (They, together with various annexed documents, occupy about 300 pages of the appeal record.) Fortunately it is not necessary to refer to these representations in detail. I would merely mention at this stage that the document contains a request that appellant be granted an interview by the Minister so as to have "the opportunity of debating the issue in person before the Minister". Thereafter, on 6 November 1987, the Minister wrote a further letter to appellant's attorneys stating that after "careful consideration" of appellant's representations it appeared to him that appellant did not appreciate the true import of reg 7A and had also misunderstood important aspects of his original notification. The letter further proceeded to elaborate upon this and then concluded -

"In view of the gravity of the matter and

> the fact that your clients' omission to deal with the matter on the basis as set out above, may be attributed to a bona fide misunderstanding, I am prepared to consider further representations from your clients provided that such representations are submitted to me in writing within a period of two weeks from the date of receipt hereof.
>
> In order to assist your clients I have prepared a prima facie evaluation of the said articles as set forth in the Annexure attached thereto."

I shall refer to this letter as "the supplementary notice".

In reply to the supplementary notice and on 18 November 1987 appellant's attorneys submitted further written representations (also fairly voluminous), dealing with the points raised by the Minister and the "prima facie evaluation" which accompanied the supplementary notice. These representations, too, contain a request for a personal interview. In a telex dated 26 November 1987 the Minister stated that as appellant had been afforded two opportunities

to submit written representations and had fully availed itself of these opportunities, he was in a position to consider whether to take further action in terms of reg 7A and in the circumstances had decided not to accede to the request for a personal audience. This prompted a telexed reply from appellant's attorneys on 27 November 1987 placing on record their client's "grave concern" at the Minister's refusal to entertain verbal representations. Despite this, on the same date the Minister published in the Gazette a notice under reg 7A(1) giving the formal warning prescribed therein to persons concerned in the production, compilation or publication of New Nation. I shall refer to this as "the warning notice".

On 5 December 1987 the Minister addressed a further written communication to appellant stating that in terms of reg 7A(3) he had examined the issue of New Nation dated 3-9 December 1987; that he was considering issuing an

order under reg 7A(3)(a) or (b) in respect of New Nation; that in order to assist appellant in the preparation of any representations it might wish to make in terms of reg 7A(4)(b) he had prepared a prima facie evaluation of the matter published in this issue of New Nation, particulars of which were contained in a document annexed; and that written representations had to be submitted within two weeks. I shall call this "the second notice". Again appellant responded by submitting (on 21 December 1987) written representations dealing with the matter in the issue of 3-9 December complained about by the Minister and reiterating its request for a personal audience.

Shortly thereafter appellant instituted proceedings on notice of motion in the Witwatersrand Local Division (to be heard as a matter or urgency), in which the State President was cited as first respondent and the Minister as second respondent and in which the substantive

relief claimed by the appellant consisted of (i) an interdict restraining the Minister from issuing any contemplated order in terms of reg 7A(3), (ii) orders declaring various provisions in reg 7A to be invalid, and (iii) orders declaring certain of the action taken by the Minister, purportedly under reg 7A, to be invalid. The application was heard by Curlewis, Spoelstra and Van Niekerk JJ, who unanimously dismissed it, with costs. With leave of the Court a quo, appellant now appeals to this Court against the whole of this judgment.

Appellant's case, as presented in the Court a quo and before this Court, is -

(a) that for various reasons reg 7A, or portions thereof, are invalid and that such invalidity vitiates the action taken and proposed to be taken by the Minister against New Nation in terms of the regulation; and

(b) that, alternatively, even if the regulation is valid, the action taken by the Minister was flawed and invalid upon various grounds.

And it was upon this basis that appellant claimed the interdict and the declaratory orders referred to above.

The first target of appellant's attack upon the validity of reg 7A was sub-reg (2) which empowers the Minister, in examining a series of issues of a periodical in terms of sub-reg (1), to have regard to an issue published after 11 June 1987 (the date when the then-existing state of emergency commenced and when the regulations were originally published), but before the date of the commencement of the amending proclamation which introduced reg 7A, ie 28 August 1987. This sub-regulation is of relevance in this case because of the publication on 27 August 1989 of one of the issues of New Nation to which the Minister had regard for the purposes of issuing the warning. The appellant's

contention is that sub-reg (2) falls foul of the proviso to sec 3(2)(b) of the Act, which provides as follows:

> "(2) Without prejudice to the generality of the powers conferred by this section -
>
> .....
>
> (b) such regulations may be made with retrospective effect from the date from which it has under section two been declared that a state of emergency exists within the Republic or the area concerned, as the case may be: Provided that no such regulation shall make punishable any act or omission which was not punishable at the time when it was committed;....."

Mr Browde, who (with Mr Marcus as his junior) appeared for the appellant, argued that an order made by the Minister in terms of reg 7A(3) amounts to a punishment and that consequently sub-reg (2) makes "punishable" an act, namely the publication of an issue of the periodical in question prior to the commencement of reg 7A, which at the time when it was committed was not so punishable. Accordingly, so it

was contended, reg (2) offends against the proviso and is ultra vires and invalid.

The ordinary meaning of the word "punishable", when used of conduct, is "entailing punishment" (see The Oxford English Dictionary, sv "punishable"). "Punishment" is defined by the Oxford English Dictionary as: "the action of punishing or the fact of being punished; the infliction of a penalty in retribution for an offence; also, that which is inflicted as a penalty; a penalty imposed to ensure the application and enforcement of a law." In the Oxford Companion to Law, compiled by David M Walker, "punishment" is said to be -

> "The infliction of some pain, suffering, loss, disability or other disadvantage on a person by another having legal authority to impose punishment..... In modern societies punishment is generally confined to the consequences of infraction of the criminal law....."

This is similar to the definition of "punishment" given in 21 Am Jur 2nd, par 576:

> "Any pain, penalty, suffering or confinement inflicted on a person by authority of law and the judgment or sentence of a court for some crime or offense committed by him".

(See also S v Nel 1987 (4) SA 950 (W), at 958 D - G; Black's Law Dictionary, 5th ed, sv "punishment".)

In my opinion, in an ordinary legal context the term "punishment" has reference to some penalty imposed by a court of law for the commission of a criminal offence; and "punishable", when applied to an act or omission, means an act or omission which entails, or renders the person concerned liable to, such a punishment. The word "strafbaar" in the Afrikaans text of sec 3(2)(b) likewise means, in an ordinary legal context: "wat straf verdien; wat tot vervolging en straf kan lei" (HAT sv "strafbaar);

and "straf" has a similar meaning to that which I have attributed to "punishment."

In the light of the aforegoing, I am very doubtful whether an order made by the Minister, in terms of reg 7A(3), for the temporary appointment of a censor to a periodical or for a temporary prohibition on the publication of the periodical would constitute a punishment; and, therefore, whether any act or omission on the part of the publisher of the periodical giving rise to the order could be said to be "punishable". Be that as it may and assuming that such an order does constitute a punishment, I still do not think that sub-reg (2) conflicts with the proviso to sec 3(2)(b) of the Act. For the proviso to operate the act or omission which is punishable (ie liable to punishment or entailing punishment) must have been one which was not punishable at the time when it was committed. Now it is true that the publication of an issue of a periodical

containing matter falling within the ambit of sub-reg (1)(a), which took place prior to the promulgation of Proc 123, could be described as an act which was not "punishable" when it was committed; but the question is whether such an act could be said to render the publisher liable to the so-called punishment of an order under sub-reg (3). In my opinion, it could not. Sub-reg (2) is confined to the examination of a series of issues of a periodical which precedes a warning. And it is only when an examination of a further issue or series of issues of the periodical, published after the warning, reveals that the warning has not been heeded and that there is a "continuation" of the systematic or repeated publishing of matter, etc, that the Minister may make an order. It is this continuation that gives rise to the order; and it is consequently only the act or acts involved in such continuation that could be said to be punishable by the order, assuming that the latter

constituted a punishment. For these reasons the first ground of invalidity must be rejected.

The next point raised by the appellant relates to the validity of reg 7A(1). It was submitted that this sub-regulation purports to vest discretionary powers in the Minister which are greater than the powers enjoyed by the State President himself under the Act. And in this connection Mr Browde placed emphasis on the fact that the sub-regulation refers no less than three times to the "opinion" of the Minister. It was further argued that the delegation of powers by the State President to the Minister under reg 7A(1) offends against the rule that save in exceptional circumstances (which do not apply in this case) a subordinate authority may not confer an unfettered discretion on a public officer in a manner which affects the ordinary common law rights of the citizen. It also offends

against the rule that the repository of a power to make delegated legislation may not sub-delegate that power to another. On these grounds, so it was argued, the sub-regulation is ultra vires and invalid.

The starting-point of any enquiry as to whether or not delegated legislation is ultra vires is the empowering statute, its nature and scope. As I have indicated, under sec 3(1)(a) of the Act the State President is empowered to 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 the emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of the emergency. There is no doubt that this provision confers upon the State President powers of the widest possible character and leaves it to him to decide what methods to follow in order to achieve the

purposes stated in the subsection (see State President and Others v Tsenoli; Kerchhoff and Another v Minister of Law and Order and Others 1986 (4) SA 1150 (A), at 1182 B-F; Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987 (3) SA 859 (A), at 892 B-H; Staatspresident en Andere v United Democratic Front en 'n Ander 1988 (4) SA 830 (A), at 842 C-D, 845 H; also Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) 264 (W), at 268 B-271E, 277; United Democratic Front v Staatspresident en Andere 1987 (4) SA 649 (W), at 653 E-G). In the United Democratic Front case (AD case, reported in 1988 (4) SALR) Rabie ACJ further stated (at p 842 D) -

> "Die Wet magtig hom om, behalwe soos in die Wet bepaal, regulasies uit te vaardig wat teen bestaande wette indruis indien dit na sy

oordeel nodig of raadsaam is om dit te doen om die doeleindes wat in art 3(1)(a) genoem word, te bereik."

With sec 3(1)(a), which delineates the general power, must be read sec 3(2)(a) which creates a specific power in the following terms:

"(2) Without prejudice to the generality of the powers conferred by this section -

(a) such regulations may provide for -

(i) the empowering of such persons or bodies as may be specified therein to make orders, rules and by-laws for any of the purposes for which the State President is by this section authorized to make regulations, and to prescribe penalties for any contravention of or failure to comply with the provisions of such orders, rules or by-laws...."

In the United Democratic Front case (AD), supra, it was held by the majority of the Court that the specific power

conferred upon the State President by this subsection is to delegate by regulation to specified persons or bodies the competence to make orders, rules and by-laws and that this delegated competence is a legislative one (see pp 844 J - 845 B); and it would seem that Van Heerden JA, who delivered a minority, dissenting judgment, shared this view (see pp 861 I - 862 A). Indeed the power granted by sec 3(2)(a) to prescribe penalties for any contravention of, or failure to comply with, the provisions of such orders, rules or by-laws is strongly suggestive of an intention that orders, rules or by-laws made under the subsection would be legislative in character. In his aforementioned dissenting judgment Van Heerden JA indicated (at pp 861 I - 862 A) that the power of the State President, under sec 3, to delegate legislative competence did not extend beyond the provisions of subsec 2(a). I am, with respect, inclined to share this view, but I do not find it necessary in this case to decide

the point. (See also the judgment of Grosskopf JA at p 873 G; United Democratic Front case (WLD), supra, at 654 I - 655 B.)

In elaboration of his submission that reg 7A(1) is ultra vires in that it purports to vest in the Minister discretionary powers which are greater than the powers enjoyed by the State President himself under the Act, Mr Browde argued as follows (I quote from his heads of argument):

> "Section 3(1)(a) of the Act authorises the State President to make 'such regulations as appear to him to be necessary or expedient' for certain specific purposes. By contrast, Regulation 7A(1) vests the Minister of Home Affairs with a discretion which is not confined to matters 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 and for making adequate provision for terminating the

> state of emergency'. Everything is left to the 'opinion' of the Minister, a fact emphasised no less than three times in the Regulation. Indeed, the regulations require the Minister to form an opinion on an opinion."

I find it difficult, with respect, to comprehend this argument. The powers conferred upon the Minister by reg 7A are, in my opinion, executive or administrative, perhaps quasi-judicial, but certainly not legislative. The competence of the State President to confer such powers by regulation must, therefore, derive, if at all, from sec 3(1)(a). As I have shown, sec 3(1)(a) is of very wide import. It has not been suggested - nor do I think that it could be suggested - that a regulation curbing or placing restrictions on the systematic or repeated publication in periodicals of matter (for the sake of brevity I omit reference to the systematic or repeated publication of matter in a way) which has the effects defined in paragraphs

(a) and (b) of reg 7A(1) - for convenience I shall call this "offensive matter" - is beyond the competence of the State President. In order that such a regulation should operate in practice it is necessary that some person or body must be vested with the power to determine, in a particular case, whether the periodical concerned has been publishing systematically or repeatedly offensive matter. This can only be done by requiring such person or body to form an opinion thereon. Theoretically the State President could have conferred these powers on himself, but obviously this is not a practical proposition; and in the circumstances I cannot see why it should not be competent for the State President to confer the powers on the Minister of Home Affairs and Communications. It is theoretically possible, I suppose, that the Minister might reach a decision in a particular case which is contrary to what the State President would have decided had he been seized of the

matter, but I cannot for this reason conclude that the sub-regulation is ultra vires (cf the comments of Rabie ACJ on a similar argument in the United Democratic Front case (AD), supra, at pp 845 G - 846 E).

The statements in counsels' heads that "everything is left to the 'opinion' of the Minister" and that "the regulations require the Minister to form an opinion on an opinion" do not, in my view, correctly reflect the position. Basically, in terms of reg 7A(1) the Minister is required, on an examination of a series of issues of a periodical, to form an opinion on three separate matters:-

(a) whether the periodical exhibits a systematic or repeated publishing

(b) of matter which has or is calculated to have one or more of the effects listed in sub-paras (i) to (vii)

(c) and whether the said effect of the systematic or

repeated publishing is causing a threat to the safety of the public or to the maintenance of public order or is causing a delay in the termination of the state of emergency.

The various matters on which the Minister is required to form an opinion are thus limited and defined and I do not think that it is correct to say that he is required to form "an opinion on an opinion". In this connection I would point out that the words "in the opinion", appearing in reg 7A(1)(b), do not require the separate formation of an opinion: they merely appear as part of the description of the "systematic or repeated publishing", as determined in accordance with reg 7A(1)(a), which is required to cause, in the Minister's opinion, the results specified in reg 7A(1)(b).

I turn now to Mr Browde's arguments that the delegation of powers to the Minister under reg 7A(1) is

invalid in that it confers an unfettered discretion on a public officer and constitutes an incompetent sub-delegation. It is true that in general the repository of a delegated power of legislation - and here we are dealing with such a case, viz the power of the State President to legislate by making regulations - may not, in the absence of authorization in the empowering statute, sub-delegate his power to someone else. This principle is expressed by the maxim delegatus delegare non potest. Such an incompetent sub-delegation may occur where the repository of the legislative power, the delegatus, in the purported exercise of that power (say, by regulation) confers upon another an unlimited discretion to deal with the matter which is the subject of the regulation. In such a case the effect of the regulation is to make such other person, and not the delegatus, the legislator on the matter with which the regulation seeks to deal. It amounts to an abdication by

the delegatus of his power to legislate. This, in general, the delegatus cannot do, unless authorized thereto by the empowering statute. (See generally Natal Organic Industries (Pty) Ltd v Union Government 1935 NPD 701, at 714-15; Arenstein v Durban Corporation 1952 (1) SA 279 (A), at 297 A - 298 F; United Democratic Front v Staatspresident en Andere, supra, at 652 H - I, 654 F - H; Staatspresident en Andere v United Democratic Front en 'n Ander, supra, at 861 H - 863 C.)

In the United Democratic Front case (WLD), supra, at 657 G - 659 A Coetzee DJP (Preiss J and Stafford J concurring) emphasized the distinction that must be drawn in this context between the delegation of legislative powers and the delegation of purely administrative powers. The Court was there considering the validity of reg 11 of the emergency regulations promulgated on 11 June 1986, in terms of which the Minister (in that case the Minister of Law and

Order) was empowered by the State President to order the seizure of any publication which in his opinion contained a "subversive statement" (defined in the regulations) or -

> ".... any other information which is or may be detrimental to the safety of the public, the maintenance of the public order or the termination of the state of emergency."

With reference to this regulation Coetzee DJP remarked (at 657 H - 758 A) -

> "Wat onmiddellik tref by die lees van hierdie regulasie en wat hom onderskei van reg 7, is dat niks daarin slaan op enige vorm van wetgewende bevoegdheid wat verleen word nie. Dit is nie asof enigiemand enige algemene reël of iets wat beskryf kan word as 'n verordening of iets van daardie aard, kan uitvaardig nie. Dis magsverlening tot ad hoc administratiewe optrede of handeling puur en simpel.
>
> Wanneer die kwessie van delegasie ter sprake kom, is dit nodig om te weet presies

> wat dit is wat die onderwerp vorm van die beweerde delegasie. Daar is in die administratiefreg 'n baie duidelike verskil wat getrek moet word tussen delegasie van wetgewende bevoegdheid en delegasie van bevoegheid nie om algemene reëls te maak nie maar om op te tree en slegs uitvoerende handelinge te verrig. Naidoo and Others v Johannesburg City Council and Others 1979 (4) SA 893 (W) illustreer hierdie verskil. Kyk bv op 897. Vgl ook Minister of Defence v Bourke 1950 (1) SA 393 (A) op 404."

Having further analysed the nature of reg 11, the learned Judge concluded that the powers conferred on the Minister thereby had nothing to do with the delegation of legislative power, but were typical of the powers which were included in the wide authorization given the State President by sec 3(1)(a) of the Act. Referring to the State President, Coetzee DJP further stated (at 658 H - I) -

> "As wetgewer kon hy net soos die Parlement of enige ander wetgewer wat met

> wetgewende mag van hierdie wydlopende aard beklee is, wetgewing uitvaardig waardeur uitvoerende bevoegdhede en diskresies met of sonder spesifiek beskrewe magte van delegasie of subdelegasie verleen word. Dit moet onthou word dat hy dit nie oordra of dit doen as bekleër van slegs uitvoerende of administratiewe bevoegdhede nie. Indien dit so was, kon die applikant se argument moontlik opgaan. Inteendeel, hy is self die skepper van daardie tipe bevoegdheid in reg 11 qua wetgewer en staan dit hom vry om die bevoegdheid ten opsigte van ad hoc uitvoerende optrede te koppel aan diskresies hetsy vry of gebonde, subjektief of objektief, ongeag of dit deur 'n delegatus of subdelegatus uitgeoefen word."

This approach is consistent with the basic principle underlying the rule delegatus delegare non potest, viz. that the repository of a statutory power is not normally entitled, in the absence of statutory authorization, to delegate the exercise of that power. If

the power in question is a power to legislate, then this principle would apply to a purported delegation of legislative power, but not prima facie to the conferment of executive or administrative powers to deal ad hoc with particular cases. Of course, the conferment of what appear ostensibly to be ad hoc administrative powers may in truth amount to the delegation of the power to legislate and thus fall foul of the rule. Arenstein's case, supra, would appear to be an example of this. Much would depend, however, on the nature and ambit of the powers conferred and the statutory authority under which this was done. Relevant in this connection is whether or not what is conferred on the sub-delegee amounts to an arbitrary discretion to be exercised in each case without any guide-lines being laid down.

Furthermore, certain exceptions to the general rule against sub-delegation have been recognized. As was

stated by Feetham JP in the Natal Organic Industries case, supra, at 713-14 (quoting what he had previously said in Farah v Johannesburg Municipality 1928 TPD 169, at 174) -

> "By-laws which confer discretionary powers on officials are not for that reason necessarily to be held unreasonable and therefore invalid. The nature of the particular decision which is required, and the conditions under which it has to be given have been held to justify the granting of discretionary authority to officials to make that decision in two classes of cases; (1) in cases, of which the regulation dealt with in Lewis v Rex, [1910] T.S. 413, affords an example, where authority is given to a skilled official, who is qualified to bring a trained judgment to bear on all the factors of a complicated situation, such as cannot adequately be covered by rigid rules made in advance; and (2) in cases, of which the by-law considered in Smith v Germiston Municipality, [1908] T.S. 240, conferring discretion on the superintendent of a native location to order a person to leave the

> location, is an example, where authority is given to the official on the spot to decide, in the light of the actual circumstances of the moment, a particular question which may fairly be regarded as requiring immediate decision."

(See further Natal Newspapers (Pty) Ltd and Others v State President of the Republic of South Africa and Others 1986 (4) SA 1109 (N), at 1119 I - 1120 D). I do not think that the exceptions to the general rule are necessarily confined to the two instances referred to in this quotation. It all depends ultimately upon the scope and terms of the enabling section and the nature of the discretionary authority conferred by the delegated legislation.

If these principles be applied to reg 7A(1) of the regulations, then, in my opinion, the making thereof did not amount to an improper sub-delegation by the State President of the power of legislation conferred upon him by

sec 3(1)(a) of the Act. As I have pointed out, the powers conferred upon the Minister by reg 7A(1) are not legislative in nature. They are executive or administrative (perhaps quasi-judicial) powers, to be exercised ad hoc in regard to particular periodicals. The powers, and the procedures for their exercise, are specified in detail in reg 7A(1), and also in sub-regs (2), (3) and (4), and it cannot be said that in terms thereof the State President conferred upon the Minister unfettered discretionary powers with no guidelines as to how the latter was to act. In my opinion, the position is quite the contrary. Necessarily the exercise of the powers created by reg 7A(1) involves the formation of certain value judgments and this is where the opinion of the Minister comes into the picture, but I can find no ground for holding that this renders the sub-regulation ultra vires and invalid.

The third ground of attack upon reg 7A centres

upon the use of the word "solely" (Afrikaans: "bloot") in the opening portion of sub-reg (1). Upon the premise that in terms of the sub-regulation the Minister is required to act solely on an examination of a series of issues of a periodical and consequently may not have regard to any other relevant or material fact or circumstance, Mr Browde argued that a manifestly unfair and grossly unreasonable situation arises, since it is trite that a person vested with a discretion is obliged to base his decision on all relevant considerations. Consequently, so it was contended, the sub-regulation is ultra vires and invalid.

I cannot agree. Even assuming the premise to be correct, I am doubtful whether the result would be that the sub-regulation is put beyond the very wide powers of delegated legislation accorded to the State President under sec 3 of the Act. But be that as it may, I am convinced that the premise does not represent a correct interpretation

of the sub-regulation. What the word "solely ("bloot") connotes, in the context of reg 7A(1), is that as far as the published material is concerned the Minister may come to the opinion predicated by the sub-regulation merely on an examination of a series of issues of the periodical in question: it does not mean that in evaluating the matter contained in these issues and deciding whether there has been a systematic or repeated publishing with the effects stated in the sub-regulation the Minister must close his eyes to relevant facts and surrounding circumstances. In fact, it would often not be practically feasible to make the value judgments involved without viewing the published matter in the context of the general situation in the country. There is, accordingly, in my view, no substance in this ground of attack.

Fourthly, appellant's counsel contended that the vagueness and uncertainty of meaning of various words and

phrases in reg 7A(1) invalidates the sub-regulation. In this regard Mr Browde acknowledged that the majority decision in the United Democratic Front case (AD), supra, stood in his path, but he invited this Court to depart from that decision. In that case it was held by the majority that the ouster provision in sec 5B of the Act precluded the Court from pronouncing on the validity of a regulation made by the State President in terms of sec 3 of the Act where it was assailed on the ground of vagueness (see particularly pp 852 H - 855 H, 866 F - 873 C).

The reluctance of this Court to depart from a previous decision of its own is well-known. Where the decision represents part of the ratio decidendi and is a considered one (as is the position in this case) then it should be followed unless at the very least, we are satisfied that it is clearly wrong (see Government of Lebowa v Government of the Republic of South Africa and Another

1988 (1) SA 344 (A), at 361 B - D). Mr Browde advanced various arguments aimed at showing that the majority decision in the United Democratic Front case (AD), supra, was an incorrect one. I do not propose to deal with these arguments in detail. I have carefully considered them, but I remain unpersuaded that the majority decision in the United Democratic Front case (AD), supra, on this particular point is clearly wrong. I am, therefore, precluded by sec 5B from considering the arguments directed at the alleged vagueness of reg 7A(1) in various respects.

The fifth ground of attack upon reg 7A is directed at sub-reg (3)(a) which empowers the Minister to make an order prohibiting the publication of the periodical in question unless the matter to be published therein has been approved for publication by a censor, who is to be "a person specified in the order". The choice and the appointment of the censor are thus left in the hands of the Minister. It

was contended on appellant's behalf that this provision is invalid in that -

(1) it amounts to an improper sub-delegation to an unnamed person; and/or

(2) the person specified by the Minister is given an entirely free hand without any guidelines.

I do not think that either of these contentions is well-founded. Admittedly sec 3(2)(a) of the Act enacts that regulations made by the State President under sec 3 may provide for the empowering of such persons "as may be specified therein" (i e in the regulations) to make orders, rules and by-laws, etc. Consequently were the State President's powers to make regulations confined to those conferred by sec 3(2)(a) there might be some difficulty in holding that sub-reg 3(a), in so far as the power to appoint a censor (an unspecified person) is concerned, was intra vires. But, of course, the State President's powers are

not confined to those specified in sec 3(2)(a). The general power, as I have indicated, is to be found in sec 3(1)(a); and sec 3(2)(a) deals with the delegation by the State President of legislative powers by way of order, rule or by-law. The powers conferred on the censor are clearly not legislative in character and consequently the source of the State President's authority to provide for his appointment must be sought in sec 3(1)(a). Having regard to the amplitude of the power to make regulations under sec 3(1)(a), I do not think that the State President can be held to have acted ultra vires when he made provision in reg 7A(3)(a) for a censor to be appointed by the Minister in the circumstances prescribed by that sub-regulation. It is not suggested that a provision for the appointment of a censor as such is ultra vires; and I think that it could hardly be expected that the State President should himself always name and appoint the censor by regulation. Moreover, it seems

likely that the Minister would be in a better position to select a suitable person for appointment. There is, in my opinion, no basis for holding that the conferment of this power of appointment amounts to an improper sub-delegation.

As to the argument that the censor has been given an entirely free hand without any guidelines, it seems to me that it is necessarily implicit in reg 7A(3)(a) that in deciding whether or not to approve the publication of matter in the periodical concerned the censor must be guided by the criteria laid down in reg 7A(1). The obvious intention underlying reg 7A, read as a whole, is the prevention of the systematic or repeated publishing of what I have termed "offensive matter". If, despite warning, a publisher continues to do so, then the Minister may either appoint a censor or prohibit publication (each for a period not exceeding three months), clearly in order in that way to prevent the publication of offensive matter. A censor who

used his powers to censor arbitrarily or indiscriminately, and not merely to eliminate offensive matter, would, in my view, be acting ultra vires. (Cf the limitations implied in other emergency regulations in Tsenoli's case, supra, at 1183 C - 1184 F; Omar's case, supra, at p 896 H - 897 C; Visagie v State President and Others 1989 (3) SA 859 (A), at 870 D-F; and cf Natal Newspapers case, supra, at pp 1125 G - 1126 B.) The absence of express guidelines in reg 7A(3)(a) does not, therefore, result in its invalidity.

That concludes my consideration of the grounds advanced by appellant's counsel in support of the contention that portions of reg 7A are invalid. As appears from the aforegoing, none of these grounds is in my opinion well-founded. I turn now to the contention that the action taken by the Minister under the regulation in respect of New Nation was flawed and invalid in various respects.

The first point raised in this connection was that

the first notice (dated 1 October 1987) failed to comply with the requirements of reg 7A(4)(a) in that it did not state the "grounds" of the proposed action: it merely recited the words of the regulations. This rendered the opportunity to make representations in connection with the proposed action "meaningless". In this connection counsel referred, by way of analogy, to sec 28(3)(b) of the Internal Security Act 74 of 1982, which requires the Minister, when ordering preventive detention, to give a written statement setting forth the "reasons" for the detention of the person concerned; and to the case of Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A), in which it was held that a written statement merely informing the person concerned of the statutory grounds for his detention did not constitute a setting forth of the "reasons" for his

detention and, therefore, did not comply with the requirements of sec 28(3)(b): see pp 772 I - 775 B. In relying on Nkondo's case, counsel equated in meaning the words "grounds" and "reasons". I am not convinced that this equation is justified. As appears from the pages of the report referred to, this Court drew a distinction in Nkondo's case, supra, between the statutory grounds for detention and the reasons therefor; and it seems to me that there is much to be said for the view that the word "grounds" in reg 7A(4)(a) simply means one or other of the statutory grounds set forth in reg 7A(1). At all events, whatever the precise meaning of "grounds" may be, I do not think that a duty to state grounds is as extensive as the duty to give reasons. Counsel's reliance on Nkondo's case is, therefore, in my opinion, misplaced.

It is true that the first notice (in para 3) merely lists the various items in the three issues of the

New Nation involved which are said to constitute offensive matter, in various groups, and indicates which of the sub-paragraphs of reg 7A(1) applies. Thus, for example, each of the first group of five items, which are taken from all three issues, are said to have or be calculated to have the effect of promoting or fanning revolution or uprising in the Republic or acts aimed at the overthrow of the Government otherwise than by constitutional means. This obviously has reference to sub-para (i) of reg 7A(1)(a). The other groups are linked respectively to sub-paras (iii), (iv) and (v). But, as I have already recounted, on 6 November and after appellant had submitted its first set of written representations the Minister sent the supplementary notice to the appellant. This included the "prima facie evaluation" of the various items listed in the first notice. This prima facie evaluation elaborates substantially upon the grounds set forth in the first notice. Without going

into detail, I am satisfied that the first notice, read together with the supplementary notice, sufficiently sets forth the grounds for the Minister's proposed action, whatever the precise meaning of "grounds" in reg 7A(4)(a) may be.

Appellant's counsel seek to neutralize the effect of the supplementary notice by arguing that because of its alleged defects the first notice was a nullity and that as a result thereof the whole procedure under reg 7A was invalidated; and that, in any event, the supplementary notice had "no legal status".

It seems to me that this argument involves an unduly technical approach. Assuming in appellant's favour that the first notice insufficiently set forth the grounds of the Minister's proposed action, I fail to see why its defects could not validly be remedied by a supplementary notice. Although normally the "notice in writing"

referred to in reg 7A(4)(a) would comprise a single document, the sub-regulation does not appear to preclude or forbid the notice being contained in more than one document. Nor, on the facts of this case, does appellant appear to have been prejudiced in any way by the issue of a first notice and a supplementary notice. Indeed, the supplementary notice invited further written representations and appellant availed itself of the opportunity to make them. Accordingly, I hold that the Minister's notice in writing did sufficiently state the grounds of his proposed action.

Further criticisms levelled at the notices (ie the first and supplementary notices) were that -

(a) the material part of the first notice, viz para 3, states why in the Minister's opinion certain articles have or are calculated to have certain of the effects defined in reg 7A(1)(a), but fails to

state that in relation thereto the Minister has formed the requisite opinion that the effect of the systematic or repeated publishing of the articles in question is to cause one or other of the situations mentioned in reg 7A(1)(b);

(b) in the first notice the Minister refers merely to the matter published as such, whereas in the supplementary notice he speaks of the publishing of matter or the publishing of matter "in a way" calculated to have certain effects, and in the prima facie evaluation he again speaks only of publishing of matter "in a manner" calculated to have certain effects; this, it is said, is not only confusing to the recipient of the notices (the appellant) but also shows confusion in the mind of the Minister;

(c) in the first notice it is stated, in the various

sub-paragraphs of para 3, that <u>each</u> of the articles listed has or is calculated to have the effect specified (this leading to the appellant in its first written representations placing emphasis on the effect of each article), while in the supplementary notice it is indicated that the case is that the articles, "considered as a whole", constituted a systematic or repeated publishing of matter, etc; and it is argued that this, too, is contradictory and confusing; and

(d) the supplementary notice nowhere states that the Minister has formed the requisite opinion that the publishing of the articles in question has the effects specified in reg 7A(1)(b) and at the same time fails to give any reasons for reaching such a conclusion.

It is certainly true that the first notice and the

supplementary notice are not models of lucid draftmanship. Nevertheless, I do not think that the above points of criticism, taken either individually or together, are sufficiently substantial to enable the Court to say that the Minister failed to comply with the requirements of reg 7A(4)(a) as regards notice.

This sub-regulation requires, as a prelude to the issue of a warning under reg 7A(1) or of an order under reg 7A(3) -

(a) a notice in writing from the Minister to the publisher of the periodical concerned,

(b) intimation in the notice of the fact that action under reg 7A(1) or reg 7A(3) is being considered in respect of the periodical, and

(c) a statement in the notice of the grounds of the proposed action.

These basic requirements are imperative, but when it comes to the way in which the grounds are expressed in the notice it seems to me that it is sufficient if there is substantial compliance with the sub-regulation in the sense that the publisher concerned is adequately apprised of the "case" against him so that he can make appropriate representations to the Minister in connection with the proposed action (cf Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A), at 434 H - 435 F). Such a notice does not have to be drafted with the precision and comprehensiveness of, say, a pleading.

As I have indicated, the two notices should be read together. So read, I think that it clearly emerges that the Minister informed the appellant that, with reference to the issues of New Nation examined by him, he had formed the opinion both that there was a systematic publishing of matter which had, or was calculated to have,

the effects set forth in reg 7A(1)(a) and those stated in reg 7A(1)(b). It is true that in regard to the effects stated in reg 7A(1)(b) no specific reasons are given (whereas in regard to the effects provided for in reg 7A(1)(a) reasons are given) but, as I have held, "grounds" and "reasons" are not the same concept. Moreover, if, for example, the Minister is of the opinion that there has been a systematic or repeated publishing of matter calculated to promote or fan revolution or uprisings, then the further opinion that this effect is calculated to cause a threat to the safety of the public or the maintenance of public order hardly demands elaborate rationalization. The grounds for the second opinion are self-evident. And, in my view, this disposes of criticisms (a) and (d) above.

As to point (b) above, I do not think that the two notices, read together, leave any doubt that the Minister was of the opinion which he held by reason both of the

matter contained in the articles specified and the way in which this matter was presented. No doubt, in some individual instances the intrinsic nature of the matter would have been the dominant factor and in others the way or manner of presentation may have assumed greater importance, but I do not think it was incumbent upon the Minister to endeavour to evaluate this in relation to every individual item.

As to (c) above, the first notice does not, in my view, convey that the Minister did not have regard to the cumulative effect of the articles - indeed the idea of the cumulative effect is inherent in the statement that there is "a systematic and repeated publishing of matter" - and the supplementary notice makes it clear that he considered the articles "as a whole" in reaching his conclusions. There is no substance in this criticism.

The next point raised by Mr Browde relates, as I

understand the position, to the manner in which the Minister formed the opinion which led to his giving the warning under reg 7A(1). In the first place, counsel emphasized the use in the prima facie evaluation of certain words, such as "tends", "derogative", "negative", "negatively", which do not appear in reg 7A(1) and argued that this showed that the Minister had wrongly exercised his discretion. I do not propose to discuss this argument in detail. I have carefully considered the use of these words in their context and in the light of what is stated in the Minister's affidavit in this regard and am satisfied that they do not indicate any such wrongful exercise of discretion.

Secondly, it is contended that the Minister's failure to grant the appellant a personal audience contravened the principle of audi alteram partem. In this connection counsel for the appellant referred to a meeting held by the Minister on 2 September 1987 with a number of

newspaper editors and senior journalists at which the Minister "briefed" them on the new measures introduced by Proc R123. At this meeting the Minister indicated that he was in favour of an "open-door" policy and that much could be settled by without-prejudice discussions. The regulation lays down an elaborate procedure for hearing the party concerned (by way of written representations) and in the circumstances, where this procedure has been adhered to, I do not think that the Minister can be held to have acted unfairly if he jibs at a personal interview as well. Nor do I think that (as argued by appellant) what was said by the Minister at the meeting of 2 September 1987 raised a "legitimate expectation" (cf Administrator of the Transvaal and Others v Traub and Others (AD) 24 August 1989) that a party against whom action under reg 7A was contemplated would be entitled to a personal interview before the action was taken.

Thirdly, it was argued that the Minister took into account extraneous factors in forming his opinion. This argument was founded upon a statement by the Minister in his answering affidavit to the following effect:

> Ek het die gemelde vertoë, tesame met die Applikant se eerste vertoë, deeglik in ag geneem. Met inagneming van die vermelde vertoë sowel as die ander tersaaklike inligting waaroor ek beskik het, was ek van oordeel dat daar in NEW NATION stelselmatige of herhaalde publisering van stof of 'n stelselmatige of herhaalde publisering van stof op 'n wyse was wat volgens my oordeel die uitwerking het of bereken was om die uitwerking te hê soos uiteengesit in Regulasie 7A(1)(a)(i), (iii), (iv) en (v) en dat sodanige uitwerking wat die stelselmatige or herhaalde publisering volgens my oordeel gehad het 'n bedreiging vir die veiligheid van die publiek of vir die handhawing van die openbare orde of 'n vertraging in die beëindiging van die noodtoestand veroorsaak het."

The Minister went on to say that by reason of the aforegoing

he issued the warning. Later in his affidavit the Minister stated:

> "Nadat ek die Applikant se skriftelike vertoë ontvang het, is dit met inagneming van alle ander tersaaklike inligting waaroor ek beskik het, bona fide en behoorlik en sonder enige bymotiewe oorweeg en is die oordeel gevorm dat dit nodig is dat ek 'n bevel kragtens die bepalings vervat in Regulasie 7A(3)(b) moet uitreik met werking vanaf datum van afkondiging van die bevel tot en met 8 April 1988."

Thus at each stage the Minister had regard to "ander tersaaklike inligting", but there is no indication as to what this information comprised. In the appellant's replying affidavit (deposed to by Bishop Orsmond) the deponent stated, with reference to these passages in the Minister's answering affidavit -

> "..... there is mention of certain relevant information which was at the disposal of the

> second respondent but which was not made available to the applicant to enable it to deal therewith."

At the hearing below no attempt was made, by cross-examination or otherwise, to elucidate the position in regard to this other relevant information: what it was, how it was used, whether it ought to have been conveyed to the appellant, and so on. The onus to establish that reliance on this information vitiated the Minister's decisions rested on the appellant and in the circumstances it cannot be said that appellant discharged this onus.

Finally, it was argued on appellant's behalf that the second notice does not comply with reg 7A(4)(a), read with reg 7A(3), in that it does not state the grounds for the proposed action. The second notice, as I have said, has annexed to it a "prima facie evaluation" of the offensive matter contained in the issue of the New Nation of

3 - 9 December 1987. Having regard to what I have previously stated in regard to the meaning of "grounds" in the sub-regulation, I am not persuaded that the second notice is defective in this regard.

For these reasons the appeal fails and is dismissed with costs, including the costs of two counsel.

M M CORBETT

HOEXTER JA)
NESTADT JA)
STEYN JA) CONCUR.
F H GROSSKOPF JA)