119/88

Case No 260/87

IN THE SUPREME COURT OF SOU

APPELLATE DIVISION

In the matter between

THE MINISTER OF LAW AND ORDER 1st APPELLANT

THE COMMISSIONER OF POLICE 2nd APPELLANT

and

NABIL (BASIL) SWART RESPONDENT

CORAM: JOUBERT, HEFER, VIVIER, STEYN JJA et VILJOEN AJA.

HEARD : 19 SEPTEMBER 1988

DELIVERED : 29 SEPTEMBER 1988

J U D G M E N T

HEFER JA :

This appeal is against an order granted by SELIKOWITZ AJ in the Cape of Good Hope Provincial Division for

respondent's release from Victor Verster prison, where he was detained purportedly in terms of the emergency regulations made by the State President in terms of sec 3(1) of the Public Safety Act 3 of 1953 and published on 12 June 1986 in Proclamation R109.

The regulation relevant to the present enquiry is reg 3. Subregulations (1), (2) and (3) read as follows:

> "3. (1) A member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.
>
> (2) No person shall be detained in terms of subregulation (1) for a period exceeding fourteen days from the date of his detention, unless that period is extended by the Minister in terms of subregulation (3).
>
> (3) The Minister may, without notice to any person and without hearing any person, by written notice signed by him and addressed to the head of a prison,

> order that any person arrested and detained in terms of subregulation (1), be further detained in that prison for a period mentioned in the notice, or for as long as these Regulations remain in force."

It is common cause that respondent was arrested and detained by a member of the police force and that first appellant thereafter ordered that he be further detained for as long as the regulations remained in force. Respondent challenged the validity both of the arrest and initial detention and of first appellant's order and argument proceeded in the court a quo on the basis that it was for the present appellants to justify both. SELIKOWITZ AJ, without pronouncing on the validity of the arrest, found it not established that the order had properly been made in terms of reg 3(3), nor that there was "lawful cause" for respondent's detention at the time when the application for his release was launched. (It was launched about five months after the order had been made).

It is against these findings that the submissions

in the appellant's heads of argument in this court were initially aimed. However, shortly before the hearing of the appeal respondent's counsel filed supplementary written heads of argument which contained a submission not made in the heads originally filed on respondent's behalf. Very briefly stated, the new submission was that the detention was unlawful simply because the respondent had not been sufficiently and timeously informed of the reason for his arrest. In the event this was the only submission on which counsel addressed us and I proceed to deal with it forthwith.

An examination of reg 3 reveals that there are, in effect, three stages in the process of detention. First there is the arrest by a member of a Force, which is followed by detention in prison under a written order signed by a member of a Force, which is followed in turn by detention in prison under the Minister's order in terms of reg 3(3). As appears from the decision in

<u>State President and Others v Tsenoli</u> 1986(4) S A 1150 (A) an arrest in terms of reg 3(1) can only be made if a member of a Force is of the opinion that the detention of the person concerned is necessary for any of the purposes stated in that subregulation (1182 G-H), whilst the Minister may only make an order extending the detention in terms of reg 3(3) if he is of the same opinion (1184 F).

Respondent's counsel submitted, and I agree, that regs 3(1) and 3(3) do no operate independently since the Minister's power to extend a detention has been related to persons "arrested and detained in terms of subregulation (1)". From this it follows logically that, unless a detention can be brought within the ambit of reg 3(1), it cannot be said to be one which the Minister may extend under reg 3(3). Thus, if a person were to be arrested by someone who is not a member of a Force, his subsequent detention would obviously not be in terms of reg 3(1), nor will it be if the arrest is effected by a

member of a Force but the opinion which reg 3(1) requires, is lacking. (Cf Minister of Law and Order and Others v Hurley and Another 1986(3) S A 568 (A) at 584 F-I). In neither of the postulated cases would the Minister be empowered to extend the detention and, if he were to do so, the extension would plainly be a nullity.

I say this in view of Mr Burger's argument on behalf of first appellant that the Minister's action in extending a detention falls to be judged entirely on its own without reference to the arrest and detention which preceded it. Relying on the fact that the Minister is required to form his own opinion on the necessity of extending a detention and to take an independent decision in this regard, Mr Burger submitted that any irregularity in the preceding arrest and detention is cured by the Minister's order in terms of reg 3(3). From what I have said it is clear that there is no substance in this submission. Perhaps I should add that, if Mr Burger were to be correct,

all the Divisions in the country, including this court, have been wasting their time during the last few years in their punctilious enquiries into the validity of the arrest in cases where an order had been made in terms of reg 3(3). Ngqumba and Others v The State President and Others in which judgment by this court was delivered on 25 March 1988 was just such a case; and this court did not find the Minister's order an obstacle to its enquiry into the validity of the arrest and detention which preceded the order. It enquired into its validity, moreover, on the very ground on which the respondent now seeks to rely.

In Ngqumba's case this court held that it is indeed a requirement for a valid detention in terms of reg 3(1) that the detainee be informed of the reason for his detention. As to the time when he is to be so informed the court held that

> "-----indien 'n gearresteerde nie by sy arrestasie van die rede vir sy arrestasie verwittig word nie, hy so gou

> doenlik daarna daarvan verwittig moet word. Hiermee bedoel ek nie dat die mededeling noodwendig moet geskied sodra dit fisies moontlik word om dit te doen nie. Die vraag wat doenlik is, sal van die omstandighede van elke besondere geval afhang."

(Per RABIE ACJ at 108 of the typed judgment).

This brings me to the real question for decision which is whether the respondent in the present case was informed of the reason for his arrest as soon as was reasonably possible in the circumstances.

It emerges from the appellant's opposing affidavits that lieutenant Erasmus arrested the respondent on the instructions of captain Rust. Both these officers are members of the South African Police and thus members of a Force as defined in reg 1. Captain Rust is the member who became aware of respondent's activities and who formed the opinion that his detention was necessary for the maintenance of public order or the safety of the public or for the termination of the state of emergency. Lieutenant Erasmus, on the other hand, knew nothing about the

respondent or of his activities, nor did he know why respondent had to be arrested. He was simply given an order to go and arrest him and that is what he proceeded to do.

Respondent describes his arrest and the subsequent events as follows in his founding affidavit:

"12. The person who was in charge said he was arresting me. He did not tell me in terms of which legislation he was arresting me.

13. My bags were packed and I was taken to Wynberg Police Station where I was held for approximately 4 hours. No one informed me why I was being arrested and or in terms of which legislation I was being arrested. Whilst at Wynberg Police Station I met Mr K. Desai, the principal of Alexander Sinton, who said that he had also been arrested that morning.

14. Thereafter I was taken to Woodstock Police Station, where I stayed for approximately an hour. I was still not told in terms of which legislation I was being arrested, or the grounds or reasons in this regard, and to date have still not been so informed.

15. Thereafter I was taken to Victor Verster Prison in Paarl. Whilst I was being

> booked in at the said prison, I was for the first time informed by the prison authorities that I was being detained in terms of Regulation 3(1) of the Emergency Regulations issued in terms of the Public Safety Act of 1953. I am not a lawyer and did not understand the ambit of the reference: I was not given a copy of Regulation 3(1), nor was it read to me. I was accordingly unable to make representations or to take other steps in this regard."

This evidence is not disputed and has to be accepted. Lieutenant Erasmus confirms in his affidavit that he did not inform the appellant that he was arresting him in terms of reg 3. This curious lapse is not explained. After the arrest, he says, he took the respondent to Wynberg police station and later to Victor Verster Prison. When he took him to prison he must have been in possession of the order for respondent's detention in terms of reg 3(1). He must at least at that stage have been aware of the fact that the arrest had been made and that the detention would be in terms of the emergency regulations. Yet he failed to reveal it to the respondent. Captain Rust's affidavit

is equally uninformative. Nowhere does he say why the respondent was not informed of the reason for his arrest, and in the result the court has been left completely in the dark as to why it was left to some unknown prison official, who knew even less than lieutenant Erasmus about the matter, to inform the respondent.

Assuming for the moment (although I am not altogether convinced that I am correct in doing so) that the information given to the respondent by the prison official can be taken into account, the position is that prima facie there was ample opportunity for the respondent to be informed much sooner and no conceivable reason for the police to refrain from doing so. In the absence of an explanation the conclusion is accordingly unavoidable that he was not informed as soon after his arrest as was reasonably possible. Second appellant's counsel candidly conceded this whilst first appellant's counsel admitted that he could not in all conscience try to persuade us that the

respondent was informed timeously.

Relying on a passage in the judgment in Ngqumba's case second appellant's counsel submitted that the respondent's detention, although unlawful until the time when he was informed in prison of the reason for his arrest, became lawful when he was so informed. The relevant passage reads as follows:

> "Indien 'n mens sou aanvaar - wat na my mening nie gedoen kan word nie - dat Fuzile en Osteridge vroeër van die rede vir hulle arrestasie verwittig kon gewees het as wat gebeur het en dat dié versuim die geldigheid van hulle aanhouding geaffekteer het, dan sou die geldigheid daarvan na my mening herstel gewees het toe hulle, terwyl hulle nog steeds onder arres was, die rede vir hulle arrestasie en aanhouding meegedeel is."

This remark does not assist the appellants. Elsewhere in the judgment RABIE ACJ explained that the two detainees referred to were taken to a police station after their arrest and that they were there informed of the reason for their arrest by the policemen who had arrested them. At that

stage they were still in police custody. The factual situation in the present case is so entirely different that the acting Chief Justice's remark cannot be applied. The remark is in accordance with the trial court's reasoning in Nggumba's case which has been reported as Nqumba and Others v State President and Others 1987(1) S A 456 (E). The relevant passage appears at 470 C-H and reads as follows:

> "What effect does the failure to inform the applicants of the cause of their arrest have on their subsequent detention? I am unable to agree with the submission that it vitiates the legality of the detention. Had one of the applicants escaped from the custody in which he was after the time had passed when he should have been told the cause of his arrest and before he had been told of it, he would not be criminally liable because his detention in custody would have been unlawful. The cases to which we have been referred deal with the situation where the person arrested had not been told at all for what reason he had been arrested. In Christie and Another v Leachinsky (1947) 1 All ER 567 (HL), which was heavily relied on by the applicants' counsel, the plaintiff in an action for false imprisonment

> had never been told the true reason why he was being arrested and detained. In R v Markoes 1929 CPD 41 the accused escaped from custody having been arrested by a private individual. There was no evidence that he had been informed of the reason for his arrest which was thus not proved to have been lawful and his conviction was set aside on review. What if an arrested person submits to custody and is not told the reason for his arrest until some time later and he thereafter escapes? In my view it could not be argued that he was not in lawful custody at the time. The requirement that a person should be advised of the cause of his arrest immediately is intended to ensure that his arrest is legally effective as soon as possible after his submission to custody. In my view, if he is informed later, but while still in custody, his arrest becomes lawful from that time. Thus when the applicants were informed of the reason for their arrest under reg 3(1), as for present purposes it must be accepted that they were, the arrests became lawful. It has not been suggested that the orders for detention in terms of reg 3(1) were signed before the reasons for their arrest had been conveyed to them. Thus it cannot be said that their detention is illegal on this ground."

It need hardly be stated that a situation where the detainee is informed of the reason for his arrest by an out-

sider while he is no longer in police custody is entirely different.

It follows, therefore, that the submission that the respondent was never properly arrested and not lawfully detained must be upheld. It is unnecessary to consider the question whether the information given to him in prison sufficiently informed him of the reason for his arrest.

This conclusion also renders it unnecessary to consider the validity of SELIKOWITZ AJ's reasoning in the court _a quo_, although I must say that my _prima facie_ impression is that it cannot be supported.

Finally there is the question of counsel's fees. Respondent's counsel asked for the costs of two counsel in the event of the appeal being dismissed. My view is that the request should not be acceded to. Neither the facts nor the questions of law arising therefrom are complicated; it is really quite a simple matter. Mr _Gauntlett_

prepared the original heads of argument himself and it was only in putting forward the submission which eventually succeeded, that he enlisted Mr Rose-Innes's assistance. That submission was even less complicated than the ones made in the original heads. The services of two counsel cannot reasonably be justified.

The appeal is accordingly dismissed with costs.

J J F HEFER JA.

JOUBERT JA)
VIVIER JA)
STEYN JA) CONCUR.
VILJOEN AJA)