

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between:

CURTIS EPHRAIM NKONDO AND 7 OTHERS Appellants

and

MINISTER OF LAW AND ORDER AND ANOTHER Respondents

ARCHIBALD JACOB GUMEDE AND 5 OTHERS Appellants

and

MINISTER OF LAW AND ORDER AND ANOTHER Respondents

MINISTER OF LAW AND ORDER Appellant

and

EDITH GUMEDE AND 6 OTHERS Respondents.

Coram: RABIE, CJ, TRENGOVE, HOEXTER, BOTHA et VAN HEERDEN, JJ

Heard:

Delivered:

1986-03-20

18 February 1986.

J U D G M E N T

RABIE, CJ:

RABIE, CJ:

This judgment is concerned with three appeals which were argued in this Court on the same day. The judgments given by the Courts a quo in the three matters, which came before them by way of urgent applications, have all been reported. See -

- (1) Nkondo and Others v. Minister of Law and Order and Another, 1985(2) S.A. 720 (W);
- (2) Gumede and Others v. Minister of Law and Order, 1985(2) S.A. 529 (N); and
- (3) Gumede and Others v. Minister of Law and Order and Another, 1984(4) S.A. 915 (N).

The issue in the first and third of these cases was the validity of notices which the Minister of Law and

Order/.....

Order, purporting to act in terms of sec. 28(1) of the Internal Security Act, No. 74 of 1982, had caused to be served on the various applicants. In both these cases an order setting aside the notices and ordering the release of the applicants from detention was sought. (The second respondent in these cases was the member of the Prison Service who was in charge of the prison in which the applicants were detained.) In the second case the applicants challenged the validity of notices which the Minister had issued under the provisions of sec. 28(1) of the Act, but which had not yet been served on the persons for whom they were intended. The order sought in that/.....

that case was that the notice be set aside.

The applicants in the first and third cases have long since been released from detention, but it remains necessary to decide whether the notices which were issued in those cases - and also the notices in the second case - were validly issued and, depending on the outcome of the appeals, to make appropriate orders as to costs.

Sec. 28(1) of the aforesaid Act reads as follows:

"28(1) Notwithstanding anything to the contrary in any law or the common law contained, the Minister may -

- (a) if in his opinion there is reason to apprehend that a particular person will commit an offence referred to in section 54(1), (2) or (3);
- (b) if he is satisfied that a particular person engages in activities which endanger or are calculated to endanger

the/.....

the security of the State or the maintenance of law and order or that he propagates or promotes or is likely to propagate or promote such activities or

- (c) if he has reason to suspect that a particular person who has been convicted of an offence specified in schedule 2, engages or is likely to engage in activities which endanger or are calculated to endanger the security of the State or the maintenance of law and order, or propagates or promotes or is likely to propagate or promote such activities,

by a written notice signed by him and addressed to a member of the Prisons Service, as defined in section 1 of the Prisons Act, 1959 (Act No 8 of 1959), who is in charge of a prison referred to in section 20(1)(a) of the said Act, direct that the said person be detained in that prison."

Subsec. 2 of the section provides that a notice issued

under subsec. (1) shall be deemed to be a warrant as referred

to/.....

to in sec. 27(2)(e) of the Prisons Act, No. 8 of 1959,
and that the person to whom the notice relates "shall be
detained, in accordance with the provisions of regulations
made by the Minister of Justice, in the prison in question
for the period during which the notice is in force."

Sec. 28(3)(a) provides that a copy of a notice issued
by the Minister under sec. 28(1) is to be delivered or
tendered by a police officer to the person concerned, and
that it "shall serve as a warrant for his arrest and
removal to the prison in question by that police
officer." The copy of the notice that is served on a
person has to be accompanied by a written statement
by the Minister as provided for in subsec. (3)(b) of

sec/.....

sec. 28, which reads as follows:

"(3)(b) A copy referred to in paragraph (a) shall be accompanied by a written statement by the Minister setting forth the reasons for the detention of the person concerned and so much of the information which induced the Minister to issue the notice in question as can, in the opinion of the Minister, be disclosed without detriment to the public interest."

Subsec. (9) of the section provides that a person who has been detained by virtue of a notice issued by the Minister may make representations and submit information to the Minister. It reads as follows:

"(9) Any person detained by virtue of the provisions of subsection (2) may at any time within a period of fourteen days as from the date upon which the ~~the~~ copy of the notice in question, referred to in subsection (3), was

delivered/.....

delivered or tendered to him, make representations in writing to the Minister relating to his detention or release, and may within the said period in writing submit to the Minister any other information relating to the circumstances of his case."

Subsec. (10) provides that the Minister may at any time withdraw a notice issued by him in terms of subsec. (1).

The statements by the Minister which accompanied the notices in issue in the first and second case mentioned above were, save for the names of the persons concerned, all in the same terms. They read as follows:

"STATEMENT BY THE MINISTER OF LAW AND ORDER IN
TERMS OF SECTION 28(3)(b) OF THE INTERNAL SECURITY
ACT, 1982 (ACT 74 OF 1982)

(a) REASON FOR THE DETENTION OF (name of
person) IN ACCORDANCE WITH A NOTICE ISSUED
IN TERMS OF SECTION 28(1) OF THE INTERNAL

SECURITY/.....

SECURITY ACT, 1982:

I am satisfied that the said (name of person) engages in activities which endanger the maintenance of law and order.

(b) INFORMATION WHICH INDUCED ME TO ISSUE THE SAID NOTICE:

By acts and utterances the said (name of person) did himself and in collaboration with other persons attempt to create a revolutionary climate in the Republic of South Africa thereby causing a situation endangering the maintenance of law and order.

No other information can, in my opinion, be disclosed without detriment to the public interest."

The statements in issue in the third case were the same as in the first and second case, save that they did not contain the final sentence thereof, viz. "No other information can, in my opinion, be disclosed without detriment to the public interest."

Mr/.....

Mr Mahomed, who appeared for the appellants in the first two appeals and for the respondents in the third appeal - i.e. for all the persons against whom notices of detention were issued by the Minister - attacked the notices issued by the Minister on several grounds.

The first of these grounds - a ground which pertains to all three of the appeals - is that the statement by the Minister which accompanied each of the notices issued by him did not comply with the provisions of sec. 28(3)(b) and that the notices were accordingly invalid. Counsel for the Minister conceded that if the Minister's statement which accompanied the notices did not comply with the requirements of sec. 28(3)(b), the notices would be invalid. The concession was, in my opinion, rightly made. Sec.28

(1) confers very wide powers on the Minister. He can, under paragraph (b) of sec. 28(1) - the paragraph in issue in this case - order the detention of a person if, in his judgment, that person is a person as described in the said paragraph, and it is to be noted that he can issue such an order without first giving the person concerned an opportunity of answering accusations that might have been made against him. That no duty of audi alteram partem rests on the Minister, appears clearly, in my opinion, from the opening words of sec. 28(1), and also from the fact that sec. 28(9) provides for the making of representations to the Minister only after a person has been detained under a notice issued by the Minister. In the light of these considerations it should be concluded, in my view, that it is the intention of the Legislature that when the

Minister/.....

Minister issues a notice of detention in the exercise of the powers conferred on him by sec. 28(1), he must comply with what sec. 28(3)(b) requires him to do, and that his failure to do so will render the notice ineffective in law.

As was said by Centlivres, C.J., in R. v. Sachs, 1953(1) S.A. 392 (at p. 400 C-D), a case in which an order by the Minister of Justice under sec. 9 of the Suppression of Communism Act, No. 44 of 1950, was in issue -

"... the Courts will treat as invalid the act of persons to whom powers are entrusted when they have not observed the procedure prescribed by ^{the} statute which confers such powers."

See also Sachs v. Minister of Justice, 1934 A.D. 11 (a case to which fuller reference will be made below), where Stratford, A.C.J., after stating (at p. 37) that -

"In/.....

"In this division, at all events, no decision affirms the right of a Court to interfere with the honest exercise of a duly conferred discretion."

went on to say:

"For the sake of greater caution I should perhaps add, that in exercising a conferred discretion, the procedure laid down in terms of its grant must, of course, be observed as essential conditions of its exercise."

In submitting that the statement by the Minister which accompanied the notices issued by him did not comply with the provisions of sec. 28(3)(b), Mr Mahomed contended that the "reason" furnished therein for the detention of the persons concerned did not constitute "reasons" within the meaning of that term in sec. 28(3)(b). He contended, also, that the "information" set out in the Minister's

statement/.....

statement was not "information" within the meaning of that term in sec. 28(3)(b). The "reason" set out in the statement counsel submitted, was merely a statement of the statutory ground on which the Minister purported to act when he issued the notices, and not a statement of his reasons for issuing the notices. It was, counsel also submitted in this regard, merely the Minister's "conclusion" that the person concerned was a person as described in sec. 28(1)(b), and not the Minister's reason, or reasons, for ordering such person's detention. It is common cause between the parties that, in issuing the notices with which we are concerned in these appeals, the Minister purported to act in terms of the provisions of sec. 28(1)(b) of the Act.

Sec./.....

These provisions, it will be recalled, empower the Minister to order the detention of a person if he is "satisfied" that such person "engages in activities which endanger or are calculated to endanger the security of the State or the maintenance of law and order or that he propagates or promotes or is likely to propagate or promote such activities", and it is clear that the Minister, in setting forth the "reason" for each of the detentions ordered by him in the cases with which we are here concerned, followed part of the wording of sec. 28(1)(b). Counsel for the Minister contended that the word "reasons" in sec. 28(3)(b) of the Act should be given its ordinary grammatical meaning, and that, when the Minister informed the persons concerned that he was detaining them because he was satisfied that they engaged/.....

engaged in activities which endangered the maintenance of law and order, he was stating his reason, within the ordinary grammatical meaning of that word, for ordering their detention, and not merely his "conclusion" concerning them, or the statutory ground on which he issued the notices. Counsel contended, furthermore, that even if the "reason" furnished by the Minister could be said to be a "conclusion", or statutory ground, as submitted by Mr Mahomed, there was no reason why it could not also be regarded as the "reason" for the detention of the persons concerned as envisaged by sec. 28(3)(b), particularly since the Minister indicated on which of the several grounds mentioned in paragraphs (a), (b) and (c) of sec. 28(1) he issued the notices.

To/.....

To determine the meaning of sec. 28(3)(b), and, more particularly, of the word "reasons" occurring therein, one must examine the wording of sec. 28 and have regard to the purpose and scheme of preventive detention as they appear therefrom. (See Rossouw v. Sachs, 1964(2) S.A. 551 at p. 563H-564A). Sec. 28 provides, briefly put, for the detention of persons in prison in order to prevent the commission of certain offences or the endangering of the security of the State or the maintenance of law and order. The power to detain persons for the purposes mentioned was conferred by Parliament upon the Minister of Law and Order. He was entrusted with vast powers. He can order the detention of a person without first giving that person an opportunity of being heard.

It/.....

It is not difficult to conceive of circumstances in which it might, for reasons of security, be unwise to let it be known to a person that the Minister was considering the possibility of taking action against him under sec. 28(1), but the fact remains that a person may, by the issue of a detention order under sec. 28(1), be deprived of his freedom without having had an opportunity of answering allegations against him. The Minister cannot, of course, act arbitrarily or capriciously. He must make his decision on the basis of information laid before him. This not only speaks for itself, but it also appears clearly from sec. 28(3)(b), which provides that the Minister must furnish the person whom he has decided to detain with

so/.....

so much of the information which induced him to order the detention as can, in his opinion, be disclosed without detriment to the public interest. (See also sec. 38 (2)(b), which requires the Minister to submit to the board of review established under sec. 35 of the Act "all information" which induced him to issue the detention order under review.) Sec. 28(9) provides that a person who has been served with a copy of a notice of detention (which copy must be accompanied by the Minister's statement as referred to in sec. 28(3)(b)) may make "representations in writing to the Minister relating to his detention or release". These provisions show, in my view, that the Legislature intended that the person on whom a notice

has/.....

has been served should have a fair opportunity of dealing with the reasons furnished by the Minister for his detention and of persuading the Minister that the issue of the order was unjustified. Merely to be informed of the statutory ground on which the Minister found against him would hardly give the person concerned a fair opportunity of making representations to the Minister as envisaged by sec. 28(9). In the written statement which accompanied each of the notices issued by the Minister in the three cases with which we are here concerned, the Minister informed the person concerned on what statutory ground he had ordered his detention, but in doing that he did not, in my opinion, inform that person of his reasons for doing so, as required by sec. 28(3)(b).

My /.....

My aforesaid view is, I think, supported by the judgment of this Court in Sachs v. Minister of Justice, 1934 A.D. 11. Two statutory provisions were in issue in that case, viz., subsections (12) and (13) of sec. 1 of the Riotous Assemblies and Criminal Law Amendment Act, No. 27 of 1914. (Both subsections were inserted in the Act as originally passed by sec. 1 of the Riotous Assemblies (Amendment) Act, No. 19 of 1930.) The Minister of Justice, acting in terms of the provisions of sec. 1(12), caused a notice to be served on Sachs which prohibited him from being in certain areas for a period of one year. The subsection read as follows:

"1.(12) Whenever the Minister is satisfied that any person is in any area promoting feelings of hostility between the European inhabitants of the Union on ^{the} one hand and any other section of the inhabitants of the Union on the other hand/.....

hand, he may by notice under his hand, addressed and delivered or tendered to such person prohibit him, after a period stated in such notice being not less than seven days from the date of such delivery or tender, and during a period likewise stated therein, from being within any area defined in such notice:

Provided that the Minister may at any time withdraw or modify any such notice or grant such person permission in writing to visit temporarily any place where he is not permitted to be in terms of such notice."

Sachs, relying on the provisions of sec. 1(13), thereupon

requested the Minister to furnish him with the reasons

for the notice and with a statement of the information

which induced the Minister to issue the notice. Sec.

1(13) read as follows:

"1/....."

"1.(13) If any person to whom a notice has been delivered or tendered under sub-section (12) requests the Minister in writing to furnish him with the reasons for such notice, and with a statement of the information which induced the Minister to issue such notice, the Minister shall furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue such notice as can, in his opinion, be disclosed without detriment to public policy."

The Minister furnished Sachs with five reasons why he issued the notice, but refused to furnish him with the information which induced him to issue the notice, saying that it would in his opinion be detrimental to the public interest to disclose any of that information.

The Minister later amplified his reasons and supplied

Sachs/.....

Sachs with some information. Sachs petitioned the
Transvaal Provincial Division for an^{order}/setting aside the
notice, and it was contended on his behalf that the
reasons and information furnished by the Minister did
not comply with the provisions of sec. 1(13). See
Sachs v. Minister of Justice, 1933 T.P.D. 141. Tindall,
J., said the following in his judgment (at p. 162) as
to the meaning of the words "reasons" and "information"
in sec. 1(12):

"The Legislature has not defined the two
terms 'reasons' and 'information', and they
have to be interpreted in the light of the
context. There is no difficulty about the
meaning of the expression 'information which
induced ... (etc).'

The Minister, in such
matters acts on information (either oral or
documentary/.....

documentary or both) laid before him. The information is what he has been informed; in other words, the evidence conveyed to the Minister and its source. The 'reasons for such notice' are the reasons for the conclusion that the person is promoting feelings of hostility. Accordingly, a mere reiteration of the finding that the person is promoting feelings of hostility would not be sufficient to constitute reasons. On the other hand, the word 'reasons' does not imply an enumeration of all the details of the person's conduct; such details would be covered by the word 'information which induced the Minister to issue such notice.'"

Applying this view as to the meaning of the terms "reasons"

and "information" in sec. 1(13), Tindall, J., found that

the Minister had complied with the provisions of the sub-

section. (De Waal, J.P., in a separate judgment, came

to/.....

to the same conclusion. Barry, J., agreed with them.

The judgments delivered in the Transvaal Provincial

Division also appear at pp. 12-29 of the 1934 A.D. report.)

On appeal to the Appellate Division, Stratford, A.C.J.,

dealing with counsel's argument that the reasons and

information furnished by the Minister did not comply with

the provisions of sec. 1(13), said inter alia (at p. 40):

"The last point raised necessitates an appreciation of the meaning of the words 'reasons' and 'information' which are used in sub-sec. (13). On this subject TINDALL, J., expressed himself thus: 'The information is what he has been informed; in other words, the evidence conveyed to the Minister and its source. The 'reasons for such notice' are the reasons for the conclusion that the person is promoting feelings of hostility.' I agree with this, if the words 'and its source' are omitted. The source of the information is not, in my view, part of the information."

It/.....

It follows from this that in Sachs' case this Court approved of the view of Tindall, J., that the "'reasons' for such notice are the reasons for the conclusion that the person is promoting feelings of hostility", and that "a mere reiteration of the finding that ~~a~~ person is promoting feelings of hostility would not be sufficient to constitute reasons."

There is a general similarity between the power which sec. 1(12) of Act 27 of 1914 conferred on the Minister of Justice and the powers which sec. 28(1) of Act 74 of 1982 confers on the Minister of Law and Order. In relation to the duty of the Minister concerned to furnish "reasons" for an order made by him in the exercise of his powers, there is a striking similarity

between/.....

between the language employed by the Legislature in sec.

1(13) of Act 27 of 1914 and sec. 28(3)(b) of Act 74

of 1982. In these circumstances I am of the opinion that,

unless good grounds exist for holding otherwise, the view

expressed in Sachs' case as to the meaning of "reasons" in

sec. 1(13) of Act 27 of 1914 should be held to be of applica-

tion to the term "reasons" in sec. 28(3)(b) of Act 74 of 1982.

Counsel for the Minister, arguing that each Act must be

considered in the light of its own context, contend that

there are indeed good reasons why the reasoning of the

Court in Sachs' case should not be followed in interpreting

sec/.....

sec. 28(3)(b). In sec. 1(12) of Act 27 of 1914, they submit, there was only one ground on which the Minister could act against a person, and a mere repetition by him of the wording used in the subsection when furnishing his "reasons" could, therefore, not qualify as "reasons" within the meaning of the subsection. In sec. 28(1) of Act 74 of 1982, however, so it is argued, each of its paragraphs sets out several grounds on which the Minister can issue a notice. When, therefore, counsel submit, in the three cases with which we are here concerned the Minister let it be known to the persons concerned that he had ordered their detention under sec. 28(1)(b), and not under sec. 28(1)(a) or sec. 28(1)(c), and, furthermore,

with/.....

with regard to sec. 28(1)(b) that he was satisfied that they were engaged in activities which endangered the maintenance of law and order and not e.g. that they were engaged in activities which were calculated to endanger the maintenance of law and order, he did not merely repeat the terms of/^{the}subsection which empowered him to issue the notices, but set out the reason why he issued the notices. In advancing this argument, counsel adopted the reasoning of Nestadt, J., in the first of the three cases mentioned above, and of Van Heerden, A.J.P., in the second case: see 1985(2) S.A. 720 at p. 724 F-H and 1985(2) S.A. 529 at p. 536 H-I. I do not agree with these views.

Paragraphs (a), (b) and (c) of sec. 28(1) set out various grounds on which the Minister can act, and I cannot accept

the/.....

the proposition that if the Minister acts on one of these grounds and informs the person concerned of that fact by repeating the relevant words in the relevant paragraph, that ground thereby assumes the character of "reasons" within the meaning of that term in sec. 28(3)(b).

In view of the foregoing I am of the opinion that the "reason" furnished by the Minister in paragraph (a) of the statement which accompanied each of the notices issued by him, viz. "I am satisfied that the said ---- engages in activities which endanger the maintenance of law and order", did not constitute "reasons" within the meaning of that term in sec. 28(3)(b) of the Act.

There/.....

There is one further point to consider in connection with the question whether the Minister furnished "reasons" as required by sec. 28(3)(b). Mr Mahomed, in the course of an argument in which he submitted that the Minister appears to have been confused as to the meaning of the concepts "reasons" and "information" in sec. 28(3)(b) and that this confusion indicates that the Minister could not properly have applied his mind to the matters he had to decide, suggested that paragraph (b) of the Minister's statement could perhaps be regarded as "reasons", but not as "information", and that the Minister therefore did not furnish information as required by sec. 28(3)(b). I should add that I did not understand counsel to submit in this Court that the "information"

supplied/.....

supplied by the Minister in fact constituted "reasons",

whatever submissions he might have made in any of the Courts

a quo (cf. 1985(2) S.A. at p. 537 B-C), but be this as it

may. If the "information" furnished by the Minister in

paragraph (b) of his statement could possibly qualify as

"reasons", the question would arise whether it could be

said that the statement, read as a whole, furnished reasons

as required by sec. 28(3)(b). For easy reference I

repeat paragraph (b) of the statement:

"Information which induced me to issue the
said notice: By acts and utterances the said
(name of person) did himself and in collaboration
with other persons attempt to create a revolutionary
climate in the Republic of South Africa thereby
causing a situation endangering the maintenance
of law and order."

It is clear that the Minister did not consider the

"information"/.....

"information" supplied by him in paragraph (b) of his statement to be "reasons". He stated that it was "information" which induced him to issue the notices.

Furthermore, the words "No other information can, in my opinion, be disclosed without detriment to the public interest", which appeared in the statement in the first and second case mentioned above, clearly related to his statutory duty to supply the information on which he acted, save for such information as would, if disclosed, in his opinion be detrimental to the public interest. My view of the matter is that, quite

irrespective/.....

irrespective of the fact that the Minister intended that paragraph (b) should set out "information" and not "reasons", the paragraph cannot be said to set out "reasons" within the meaning of sec. 28(3)(b). The Minister did not therein inform the persons concerned why he ordered their detention. What he did, was to inform them - in every vague and general terms - that at some time in the past (note the use of the past tense) they "did attempt to create a revolutionary climate in the Republic of South Africa thereby causing a situation endangering the maintenance of law and order". What the Minister did not do, was to set forth the reasons for their detention. The purpose of a detention order is to prevent the commission of certain crimes, or the endangering of the maintenance of law and order, etc., as set out in

sec/.....

sec. 28(1), and the Minister did not inform the persons against whom he issued notices in the cases with which we are here concerned why he had ordered their detention on the ground of what they had said or done at some unspecified time in the past.

In view of all the foregoing I hold that the Minister did not furnish the persons against whom he issued notices of detention with reasons for their detention as required by sec. 28(3)(b), and that the notices were accordingly invalid. It is therefore unnecessary to decide whether the "information" supplied by the Minister was "information" within the meaning of sec. 28(3)(b). It is also unnecessary to set out and discuss the other

grounds/.....

grounds on which Mr Mahomed attacked the notices issued by the Minister.

The following orders are made:

(A) In the first appeal (A.D. Case No. 350/84):

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

(2) The order of the Court a quo is set aside and the following order is substituted therefor :

"(a) The orders of detention issued by the Respondent against the Applicants are declared to be invalid.

(b) The Respondent is to pay the Applicants' costs, including the costs of two counsel."

(B) In the second appeal (A.D. Case No. 484/84):

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

(2) The order of the Court a quo is set aside and the following order is substituted therefor :

"(a)/.....

"(a) The notices of detention issued by the Respondent are declared to be invalid.

(b) The Respondent is to pay the Applicants' costs, including the costs of two counsel.'

(C) In the third appeal (A.D. Case No. 439/84)

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

P J RABIE

CHIEF JUSTICE.

TRENGOVE, JA.

HOEXTER, JA.

BOTHA, JA.

VAN HEERDEN, JA.

Concur.