

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER
..... 1st appellant

THE COMMISSIONER OF THE SOUTH
AFRICAN POLICE 2nd appellant

THE COMMANDING OFFICER JOHN
VORSTER SQUARE 3rd appellant

and

MARIA BENITA PAVLICEVIC ... respondent

CORAM: CORBETT CJ, VAN HEERDEN, NESTADT, STEYN JJA,
et NICHOLAS AJA.

DATE OF HEARING: 2 May 1989

DATE OF JUDGMENT: 19 May 1989

J U D G M E N T

CORBETT CJ:

On 7 May 1987 the respondent's husband, Mr Michael Roussos (whom I shall call "the detainee"), was arrested and detained in terms of reg 3(1) of the so-

called Emergency Regulations, proclaimed on 12 June 1986 (and promulgated in Government Gazette No 10280 of that date). On 13 May 1987 his detention was extended in accordance with the provisions of reg 3(3). On 11 June 1987 his detention under the Emergency Regulations was terminated, but immediately thereafter he was again arrested and detained, this time in terms of sec 29(1) of the Internal Security Act 74 of 1982 ("the Act"). Soon thereafter the respondent made an urgent application to the Witwatersrand Local Division, citing the present appellants as respondents and praying for orders (i) declaring that the detainee's "purported" arrest and detention in terms of sec 29(1) of the Act were wrongful and unlawful and (ii) directing that he be released from custody. The matter came before Leveson J, who on 13 July 1987 granted the orders prayed for and directed the appellants to pay the costs of the application, including costs consequent upon the

employment of two counsel. The judgment of Leveson J has been reported (see Pavlicevic v Minister of Law and Order and Others 1988 (2) SA 295 (W)). With leave of the Court a quo the appellants appeal to this Court against the whole of the judgment and order of the Court a quo, including the order as to costs.

The relevant portions of sec 29(1) provide as follows:

"Notwithstanding anything to the contrary in any law or the common law contained..... any commissioned officer as defined in section 1 of the Police Act, 1958 (Act No 7 of 1958), of or above the rank of lieutenant-colonel may, if he has reason to believe that any person who happens to be at any place in the Republic -

- (a) has committed or intends or intended to commit an offence referred to in section 54(1), (2) or (4), excluding, in the case of an

offence referred to in section 54(4), such an offence which the suspect committed or intends or intended to commit in connection with a person suspected of having intended to commit or having committed the offence of sabotage; or

- (b) is withholding from the South African Police any information relating to the commission of an offence referred to in paragraph (a) or relating to an intended commission of such offence or relating to any person who has committed or who intends to commit such offence,

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

4 In the case of Minister of Law and Order and Others v Hurley and Another, 1986 (3) SA 568 (A), it was held

by this Court -

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- (a) that the words "he has reason to believe", appearing in sec 29(1), imply that there are grounds, or facts, which give rise to, or form the basis of, the belief of the police officer concerned (see p 577 I);
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- (b) that these grounds must be reasonable grounds, ie grounds on which he could reasonably have held the belief he did (see pp 578 B-F, 586 G);
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- (c) that the question as to whether a police officer who has arrested and detained a person in terms of sec 29(1) had the required belief, based upon reasonable grounds, is objectively justiciable (pp 578 G - 583 H);
- (d) that the jurisdiction of the Court to enquire into whether a police officer who has arrested and detained a person had reasonable

grounds for the belief which led him to take
this action is not ousted by sec 29(6) of the
Act (pp 583 I - 586 I); and

- (e) that where the lawfulness of the arrest and
detention are in issue the onus is upon the
police officer concerned to show that he ac-
ted in accordance with the powers granted un-
der the subsection and, therefore, that he
had reasonable grounds for his belief (pp 587
B - 589 H).

These are the basic principles pertinent to the adjudi-
cation of the present case.

In her founding affidavit the respondent a-
verred that the detention of the detainee "purportedly"
in terms of section 29 of the Act was wrongful and
unlawful for a number of reasons. In the course of
setting out these reasons she stated:

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".....any police officer purporting to effect an arrest in terms of section 29 of the Act could never properly have had 'reason to believe' that the detainee was a person falling within the terms of ^{sub-} paragraphs (a) and (b).....(of sec 29(1))".

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The main answering affidavit filed on behalf of the appellants was deposed to by Brigadier G N Erasmus, of the South African Police and officer commanding the security branch at John Vorster Square. ^{P/S JMA} He personally arrested and detained the detainee under sec 29(1). In answer to the above-quoted averment in the founding affidavit Erasmus stated:

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"Ek het die aangehoudene kragtens Artikel 29(1) van die Wet gearresteer en aangehou. Ek het die ondergenoemde vermoede bona fide en sonder vooroordeel geneem. Ek ontken enige bewering tot die teendeel. Ek het die aangehoudene gearresteer en aangehou omdat ek rede gehad het om te vermoed dat hy n persoon

".....any police officer purporting to effect an arrest in terms of section 29 of the Act could never properly have had 'reason to believe' that the detainee was a person falling within the terms of paragraphs (a) and (b)..... (of sec 29(1))".

The main answering affidavit filed on behalf of the appellants was deposed to by Brigadier G N Erasmus, of the South African Police and officer commanding the security branch at John Vorster Square Police Station, Johannesburg. He personally arrested and detained the detainee under sec 29(1). In answer to the above-quoted averment in the founding affidavit Erasmus stated:

"Ek het die aangehoudene kragtens Artikel 29(1) van die Wet gearresteer en aangehou. Ek het die ondergenoemde vermoede bona fide en sonder vooroordeel geneem. Ek ontken enige bewering tot die teendeel. Ek het die aangehoudene gearresteer en aangehou omdat ek rede gehad het om te vermoed dat hy 'n persoon

was wat op n plek in die Republiek -

- 19.3.1 n misdryf bedoel in Artikel 54(1)(b) en 54(1)(d) gelees met Artikel 54(2), 54(2)(a), (b), (c), (d), (e), (f), (i), (j) en (k) gepleeg het;
- 19.3.2 inligting met betrekking tot die pleeg van n misdryf soos in paragraaf 19.3.1 hierbo uiteengesit van die Suid-Afrikaanse Polisie weerhou òf inligting met betrekking tot n persoon wat so n misdryf soos in paragraaf 19.3.1 hierbo uiteengesit van die Suid-Afrikaanse Polisie weerhou."

After averring that the detainee was detained for interrogation and was in fact thereafter interrogated, Erasmus proceeded to elaborate his reasons, or grounds, for forming the belief that the detainee had committed the aforementioned offence) or was withholding information relating to the commission of this offence:

"19.6.1. n Onwettige staking deur sommige werkers van die Suid-Afrikaanse Vervoerdienste ("SAVD") het plaas-

gevind van ongeveer die 13de Maart 1987 tot die 5de Junie 1987. Daar- die staking was 'n onwettige staking en daar het nie 'n geskil bestaan tussen die werkgewer en 'n werknemer soos bedoel in die Wet op Arbeids- verhoudinge nie. Die staking het begin toe die SAVD 'n sekere werker, mnr Andrew Nedzamba, afgedank het omdat hy sekere gelde nie inbetaal het toe hy moes nie. Hy is daarna weer in diens geneem maar is 'n boe- te opgelê omdat hy die gemelde gel- de nie soos hy moes, inbetaal het nie. Sekere van sy mede-werkers het daarna in simpatie met hom ge- staak. Die staking het uitgebrei totdat duisende werkers van die SAVD onwettig gestaak het. Die Congress of South African Trade Unions ("Cosatu") en die South African Railways and Harbours Workers' Union ("SARHWU") het hulle met die staking bemoei. Die aan- gehoudene was voorheen 'n nasionale organiseerder van SARHWU. Hy was kort voor sy aanhouding die opvoed-

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kundige sekretaris van SARHWU en lid van verskeie komitees, insluitende n "Co-ordinating Committee". Ek verwys verder hieronder na die "Co-ordinating Committee". Die staking het gepaard gegaan met onwettige intimidasie, openbare onrus, saakbeskadiging en veral beskadiging van eiendom van die SAVD. Die staking is beëindig soos in die applikant se eedsverklaring uiteengesit toe daar n ooreenkoms plaasgevind het tussen die stakende werkers en die SAVD. Nadat die staking beëindig is deur die genoemde ooreenkoms het die stakende werkers behoorlik na hulle werk teruggekeer, en die onwettige openbare onrus, saakbeskadiging en geweld is beëindig. Soos in die applikant se eedsverklaring uiteengesit, eien SARHWU dit aan hom toe dat hy veroorsaak het dat die staking beëindig was.

- 19..6.2 Die aangehoudene was betrokke by die stigting van die "Co-ordinating

Committee" en was n lid daarvan. Die aangehoudene was teenwoordig en deel van die "Co-ordinating Committee" toe die "Co-ordinating Committee" besluit het dat vyf persone wat van hul werksplekke verwyder is en na Cosatu-huis geneem is, vermoor moet word. Vier persone is wel vermoor en aan die brand gestee. Hulle liggame is deur die polisie gekry. Die polisie het inligting dat dae teen daardie persone te Cosatu-huis plaasgevind het en objektiewe bewys daarvan is gekry toe Cosatu-huis deursoek was op die 29ste April 1987. Die aangehoudene was teenwoordig op n vergadering toe daar besluit is dat persone wat nie aan die staking deelgeneem het nie, van hul werksplekke ontvoer moes word en na Cosatu-huis geneem moes word waar hulle geslaan moes word ten einde hulle te intimideer sodat die persone nie weer moes terugkeer na hul werksplekke nie. Ook dat sekere persone wat nie aan die staking

deelgeneem het nie van hul werks-
 plekke ontvoer moes word en na
 Cosatu-huis geneem moes word waar
 hulle op bevel van die aangehoudene
 aangerand is en geforseer is om le-
 de van SARHWU te word. Die aange-
 houdene het persone aangestel in
 sleutelposisies wie opdragte van
 die "Co-ordinating Committee" aan
 die stakende werkers op die grond-
 vloer van Cosatu-huis moes oordra.
 Volgens hierdie persone sou dit in
 opdrag van die "Co-ordinating
 Committee" gewees het dat treine
 gebrand moet word, spore losgemaak
 moet word en dat sinjaalkaste aan
 die brand gestee word.
 Hierdie opdragte is afkomstig van
 die "Co-ordinating Committee" waar-
 op die aangehoudene gedien het.
 Die aangehoudene het volgens een
 van die "Co-ordinating Committee"-
 lede gesê dat geen persone van
 SARHWU treinkaartjies mag koop of
 van vervoerdienste gebruik mag maak
 nie.

19.6.3 Sekere subversiewe handelinge het

wel plaasgevind en het ingesluit dat treine gebrand is, spore is losgemaak, sinjaalkaste is gebrand, treindienste is lamgelê, persone is geïntimideer, persone is ontvoer en aangerand en persone is gedood.

19.6.4 Die aangehoudene het vier swart SARHWU lede na Oos-Londen gestuur om onwettige stakings aldaar te organiseer aangesien werkers van die SAVD nie op daardie stadium daar gestaak het nie. Nadat hierdie persone in opdrag van die aangehoudene op die 22ste April 1987 SARHWU-lede te Oos-Londen toegesprek het, was daar 'n onwettige staking vanaf die 23ste April 1987. Die genoemde vier persone meld dat die aangehoudene hulle wel vir daardie doel gestuur het en dat hy die stakings geïnisieer het.

19.6.5 Die aangehoudene het opdrag gegee dat pamflette versprei moes word om die vervoer staking wat op die Witwatersrand uitgebreek het, aan te stig.

19.6.6 Die lede van die "Co-ordinating

Committee" waarvan die aangehoudene n lid is het deel gehad in die opsweping van skares stakendes by Cosatu-huis gedurende April en Mei 1987.

19.6.7 In opdrag van die "Co-ordinating Committee" is onwettige volkshowe gehou te Cosatu-huis waartydens persone wat nie aan die stakings deelgeneem het nie, verhoor en gevonnissen is, welke 'vonnisse' uitgevoer is te Cosatu-huis.

19.6.8 Die bogenoemde is misdrywe volgens Artikel 54(1)(b) en Artikel 54(1)(d) gelees met Artikel 54(2), 54(2)(a), (b), (c), (d), (e), (f), (i), (j) en (k). Daardie misdrywe is gepleeg deur die aangehoudene, lede van die "Co-ordinating Committee" en ander."

It is common cause that the agreement of settlement which ^{term} brought the strike ~~to an end~~ (referred to at the end of para 19.6.1) was signed on 5 June 1987 and that by 15 June the entire labour force of the

South African Transport Services ("SATS") was back at work. The agreement of settlement made provision for the re-employment (subject to certain exceptions) of certain ex-employees of SATS whose services had been terminated during the strike; stipulated that ex-employees who were re-employed would be entitled to participate in "the democratic structures in SATS through free elections"; and recorded that SATS had decided to effect certain improvements in hostel facilities for the benefit of its employees.

Although a number of points were raised in the founding affidavit, argued in the Court below and put forward in the heads of argument submitted to this Court, there is one central and decisive issue. It was with reference to this issue that Leveson J decided the matter; and in this Court counsel confined their oral argument to this issue. The issue may be stated thus: whether or not the evidence of Erasmus

discharged the onus bearing upon the appellants of establishing that when Erasmus arrested and detained the detainee under sec 29(1) he believed that the detainee had committed an offence referred to in para (a) of sec 29(1) or was withholding information relating to the commission of such an offence; and that Erasmus had reasonable grounds for holding that belief. Or, as it is sometimes put, whether or not the jurisdictional fact or facts requisite to the exercise of the power of arrest and detention were shown to have existed.

As appears from paras 19.3.1 and 19.6.8 of Erasmus's affidavit, the offence which he believed the detainee to have committed and relating to which he believed the detainee was withholding information was described, somewhat curiously, as being one in terms of sec 54(1)(b) and 54(1)(d), read with sec 54(2), 54(2(a), (b), (c), (d), (e), (f), (i), (j) and (k), of

the Act. Why I say "somewhat curiously" emerges from the provisions of sec 54 itself, the relevant portions of which read as follows:

"(1) Any person who with intent to -

- (a) overthrow or endanger the State authority in the Republic;
- (b) achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic;
- (c) induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint; or
- (d) put in fear or demoralize the general public, a particular population group or the inhabitants of a particular area in the Republic, or to induce the said public or such population group or inhabitants to do or to abstain from doing any act,

in the Republic or elsewhere -

- (i) commits an act of violence or threatens or attempts to do so;
- (ii) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to per-

form such act;

- (iii) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (i) or act referred to in paragraph (ii), or to aid in the commission, bringing about or performance thereof; or
- (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.

- (2) Any person who with intent to achieve any of the objects specified in paragraphs (a) to (d), inclusive, of subsection (1) -

- (a) causes or promotes general dislocation or disorder at any place in the Republic, or attempts to do so;
- (b) cripples, prejudices or interrupts at any place in the Republic any industry or undertaking, or industries or undertakings generally, or the production, supply or distribution of commodities or food-stuffs, or attempts to do so;

- (c) interrupts, impedes or endangers at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service, or attempts to do so;
- (d) endangers, damages, destroys, renders useless or unserviceable or puts out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building, or attempts to do so;
- (e) prevents or hampers, or deters any person from assisting in, the maintenance of law and order at any place in the Republic, or attempts to do so;
- (f) impedes or endangers at any place in the Republic the free movement of any traffic on land, at sea or in the air, or attempts to do so;
- (g)
- (h)
- (i) in the Republic or elsewhere performs any act or attempts, consents or takes any steps to perform any

act which results in or could have resulted in or promotes or could have promoted the commission of any of the acts or the bringing about of any of the results contemplated in paragraphs (a) to (h), inclusive;

- (j) conspires with any other person to commit, bring about or perform any of the acts or results contemplated in paragraphs (a) to (h), inclusive, or any act contemplated in paragraph (i), or to aid in the commission, bringing about or performance thereof; or
- (k) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or result,

shall be guilty of the offence of subversion and liable on conviction....."

Despite the way in which the offence is described in the affidavit, it appears that what Erasmus had in mind was an offence consisting of the categories of conduct listed in the various paragraphs of sec 54(2) mentioned by him, such conduct having been

accompanied by an intent to achieve the objects specified in paras (b) and (d) of sec 54(1). Accordingly, the offence would have been more properly described as a contravention of sec 54(2)(a), (b), (c), (d), (e), (f), (i), (j) and (k), read with paras (b) and (d) of sec 54(1). Furthermore, thus put, the averment appears to comprehend a large number of offences, not one; and indeed counsel for the appellants conceded that the various permutations of intent inherent in paras (b) and (d) were manifold. In his affidavit Erasmus did not give any greater particularity than this.

I proceed, therefore, on the basis that what Erasmus acted on was an offence, or offences, consisting of the contravention of sec 54(2), ie subversion, in the respects specified by him. An examination of sec 54(2) shows that the offences which it creates consist essentially of two elements: (i) conduct falling

within one or other of the categories listed in paras (a) to (k) inclusive - "the conduct element" - and (ii) an accompanying intent to achieve any of the objects specified in paras (a) to (d) inclusive of sec 54(1) - "the mental element". The coincidence of both elements is obviously essential for the commission of the crime of subversion.

With reference to the mental element appellant's counsel submitted that the "intent" referred to in the opening words of sec 54(2) could include the common law concept of dolus eventualis. The argument, as I understood it, was that a person would be guilty of the offence of subversion if he committed one or other of the acts listed in paras (a) to (k) of sec 54(2), not with the aim or intention of achieving one of the objects specified in one or other of paras (a) to (d) of sec 54(1), but merely with the realisation

that his conduct might have that result and being reckless as to whether that result ensued or not. In my view, this argument is unsound. One is here not dealing with the concept of mens rea, which is a necessary ingredient of common law crimes and of most statutory offences, but with an expressly prescribed element in a statutory offence. And the wording of the section, in my view, clearly excludes the idea of some sort of dolus eventualis. It decrees that the offence is only committed if the person concerned did one of the listed acts "with intent to achieve" any of a number of specified objects (or, as the Afrikaans text, the signed one, puts it, "met die opset om enige van die doelstellinge.... te bereik").

Whatever the position may be where a person commits such an act with intent to achieve both a proscribed object and one which is not, I am satisfied that the section does not cover the case where the person

commits the act, not with the intention of achieving a proscribed object, but merely with the knowledge that his conduct may have that result. To hold otherwise would amount to flying in the face of the express language of the section. In this connection it must be borne in mind that sec 54(2) creates a very serious offence, punishable with a maximum sentence of twenty years imprisonment (in certain circumstances twenty-five years imprisonment); that consequently even if the language is ambiguous (which I do not think it is) the less onerous interpretation should be adopted (see Rex v Milne and Erleigh (7) 1951 (1) SA 791 (A), at 823 A - F); and that this approach would lead to a rejection of the argument of appellant's counsel.

Some support for my conclusion concerning dolus eventualis may, I think, be derived by way of analogy from a series of cases in which it has been held with reference to sec 29(1) of the Black Adminis-

tration Act 38 of 1927, which penalises conduct "with intent to promote any feelings of hostility between Bantu and Europeans" (Afrikaans: "met die doel om vyandige gevoelens tussen Swartes en blanke te bevorder"), that for the State to succeed in a prosecution under this section it is not sufficient to show that an accused possessed a constructive intention (ie dolus eventualis); the State has to prove the actual intention of promoting such hostility (see S v Singh and Another 1975 (1) SA 330 (N), at p 335 C-F, and the cases there cited; see also S v Mbiline and Another 1978 (3) SA 131 (E), at p 134 C - 135 A).

I turn now to consider whether it has been shown that Erasmus formed the belief that the offence, or offences, referred to by him had been committed by the detainee and whether there were reasonable grounds for such a belief. There is no doubt that on the information referred to by Erasmus in the passages from

his affidavit which I have quoted above he had reasonable grounds for believing that, in the course of the SATS strike, acts had been committed which fell within one or more of the categories listed in the paragraphs of sec 54(2) relied upon by him. There is thus no problem about the conduct element. Problems do arise, however, in regard to the mental element.

In the first place, there is no indication in Erasmus's affidavit that he gave consideration to the mental element. He does not mention it specifically, unless one can regard his references to sec 54(1)(b) and (d) as conveying an implied allusion thereto. Moreover, having regard to the wide terms of paras (b) and (d) - (b) covers constitutional, political, industrial, social and economic aim or change - and the many possible permutations (previously referred to), one wonders what his thinking on the subject could have been. It seems unlikely that

he would have considered all these permutations and come to the conclusion that they all applied. And it seems likely that had he properly applied his mind to the question of the mental element he would have been far more selective in his description of the offence, or offences, which he believed to have been committed.

Be that as it may, the main problem is the absence from Erasmus's affidavit of any express indication of the grounds upon which he believed the mental element of the offence to have existed. No doubt there may well be cases in this kind of situation where it is not necessary for the detaining officer to spell out the grounds upon which he came to the belief that the mental element was present. The very facts themselves or the nature of the conduct in question, considered in the light of the surrounding circumstances, may proclaim that the acts constituting the conduct

element were done with the intent to achieve one or more of the objects listed in paras (a) to (d) of sec 54(1); and it may be equally clear that this is what the detaining officer relied on in forming his belief concerning the mental element. But that is hardly the position here.

In this case the conduct relied on by Erasmus occurred within the context of an industrial strike, which originated in the treatment of a particular SATS employee. Erasmus himself describes it as a sympathy strike, which later spread and resulted in thousands of SATS workers becoming involved. By no stretch of imagination can the object of such strike action be brought within the ambit of sec 54(1)(b) or (d). It is true that in the course of the strike there was apparently illegal intimidation of workers, public unrest, unlawful and serious damage to property, particularly property belonging to SATS; some workers who

did not heed the strike were intimidated, assaulted, tried and sentenced by illegal people's courts ("volks-howe"); and in certain instances, it would seem, they were murdered. All this, however, was ephemeral.

On 5 June 1987 the settlement agreement was signed and in accordance therewith the strikers returned to work on 15 June, apparently satisfied with the settlement. All was peace again.

The violence and criminal conduct which accompanied this strike should not, however, be minimized; and appellant's counsel sought to persuade us that this factor, together with the magnitude of the strike, showed that it was not a normal case of industrial action about workers' grievances and that certain of the strikers' conduct, instigated by the "Coordinating Committee" (of which the detainee was a member), was pursued with the intent to achieve one or more of the objects referred to in paras (b) and (d)

of Sec 54(1).

In my view, this argument fails for a number of reasons. Firstly, Erasmus, with whose decision we are primarily concerned, never stated in his affidavit that this was an inference which he drew. As far as his thinking, and the grounds for his belief, are concerned, the argument thus amounts to pure speculation. In fact, as I have previously emphasized, Erasmus described it as a strike in sympathy with the grievances of a particular worker who had been disciplined. Secondly, I do not think that purely on the information supplied by Erasmus in his affidavit such an inference could reasonably be drawn. Strikes, or industrial action as they are sometimes more euphemistically described, are in the present age matters of frequent occurrence in this country and elsewhere in the world. It is, I think, notorious that a strike may originate on a small scale with some minor or in-

significant issue, but later escalate, very often through sympathetic action, into something very much larger, sometimes embracing a whole industry. It is, in my view, also notorious that strikes are often accompanied by intimidation of workers, physical violence and destruction of property, particularly the employer's. Save that the physical violence was unusually extreme, the pattern of conduct in the SATS strike does not appear to have been any different. And I see no basis in all this for an inference that the strikers, or some of them, had in mind any of the objects listed in paras (b) and (d) of sec 54(1). Thirdly, the strike lasted less than three months and, in terms of the settlement, which appeared to satisfy all concerned, all that was ostensibly achieved was the re-employment of certain workers who had been dismissed during the strike and, seemingly, the improvement of hostel facilities. This seems to negative the suggestion that

the strike had other objectives falling within the ambit of paras (b) and (d) of sec 54(1).

In the course of his argument appellants' counsel was asked to specify what conduct on the part of the strikers justified the reasonable inference that it occurred with the intent required by the mental element and at the same time to specify which of the various objects listed in paras (b) and (d) was applicable. In reply counsel concentrated on (i) the evidence, at the end of para 19.6.2 of Erasmus's affidavit, that the detainee forbade members of SARHWU to buy train tickets or to make use of the transport services provided by SATS, and (ii) the evidence in para 19.6.7 concerning the activities of the illegal people's courts. Counsel suggested that it was to be inferred that the conduct under (i) above was undertaken in order to control the transport system and therefore with the intent to achieve industrial change

in the Republic; and that the conduct under (ii) above was undertaken with the object of changing the system of courts, ie bringing about constitutional change in the Republic. In the context of the evidence as a whole I find these suggestions fanciful: no such inferences could, in my opinion, reasonably be drawn. It is not necessary, or indeed desirable, in this case to analyse what is meant by the objects of achieving, bringing about or promoting constitutional, political, industrial; social or economic change in the Republic within the terms of sec 54(2), read with para (b) of sec 54(1). In a very general sense, however, it seems

Ref to J.S. 1974 to me that the kind of change contemplated by the Legislature is characterized by criteria of relative universality within the Republic and relative permanence.

The inferred object of the conduct described under (i) and (ii) above had none of these characteristics. It was obviously localized within a particular industry

and ephemeral, designed merely to promote the strike.

Counsel also suggested that it was to be inferred that certain of the strike action, particularly the intimidation, was undertaken with the object of putting in fear or demoralizing a particular population group or the inhabitants of a particular area in the Republic or to induce such population group or such inhabitants to do or abstain from doing acts, within the meaning of para (d) of sec 54(1). When asked what population group he had in mind counsel indicated the workers employed by SATS. As I read the evidence about the strike furnished by Erasmus, the intimidation was directed not at the entire body of SATS workers, but only at those who did not or were reluctant to participate in the strike. But, in any event, having regard to what was said by this Court in S v Radebe 1988 (1) SA 772 (A), at p 777 B - I, about the meaning of the words "a particular population group" and "the

inhabitants of a particular area" I do not think that even the entire body of SATS workers would constitute either of these concepts. There is accordingly, also no substance in this line of argument.

It was further argued by appellants' counsel, in the alternative, that the respondent was not entitled on the papers to take the point that there was insufficient evidence to show that Erasmus formed a belief in regard to the mental elements or that he had reasonable grounds for such a belief and in this connection counsel referred to the decision of this Court in the case of Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A). There is, in my view, no validity in this submission. The point concerning the mental element was raised in argument in the Court a quo by respondent's counsel, apparently without objection from appellants or any attempt on their part to supplement their evidence, and it formed the basis

of the decision of the Court a quo. Objection to the raising and consideration of the point was not made one of the grounds upon which leave to appeal was sought.

The objection is thus very much of an afterthought.

In any event, the founding affidavit, as I have indicated, alleges that the police officer arresting the detainee could never have had reason to believe that the detainee was a person falling within paras (a) and (b) of sec 29(1). This puts in issue, fairly and squarely, the lawfulness of the decision of the detaining officer and the adequacy of the grounds upon which he reached his decision. The onus being on the detaining officer, it was incumbent upon him, if he wished to discharge that onus, to deal fully with all the elements of his decision and the grounds therefor. This included the mental element of an offence under sec 54(2). Accordingly, respondent upon being apprised, by way of Erasmus's affidavit, of the basis of the

of the decision to detain, was perfectly entitled to take the point that, in regard to this mental element, the appellants had failed to discharge the onus.

The Dempsey case, supra, is not in point.

It related to a detention in terms of reg 3(1) of the Emergency Regulations, not sec 29(1) of the Act. Without going into detail, I would point out that the nature and grounds of the decision to arrest and detain under that regulation and the onus of proof in regard thereto are quite different from those under sec 29(1). The factual situation in Dempsey's case and the grounds upon which the arresting officer's decision was there challenged are also not in pari materia.

Finally, I would add that appellants' counsel made no special point about sec 29(1)(b) of the Act. In other words, he appeared to accept (in my view correctly) that if there were no reasonable grounds disclosed in Erasmus's affidavit for a belief that the

detainee had committed an offence described in sec 29(1)(a), then there were equally no reasonable grounds disclosed for a belief that the detainee was withholding information relating to the commission of such an offence.

For these reasons, I am of the view that even if Brigadier Erasmus did advert to the mental element of the offence or offences said to have been committed by the detainee under sec 54(2), the facts recounted by him in his affidavit do not disclose reasonable grounds for believing that this mental element was present when the conduct said to give rise to the offence or offences took place. In the result the appellants failed to discharge the onus of proving the lawfulness of the arrest and detention. It follows that the Court a quo came to a correct decision (see p 301 F - H of the reported judgment) and that the appeal against the judgment on the merits must fail.

There is also an appeal against the order of costs made by the Court a quo on the ground that the learned judge ought not to have granted the costs of two counsel. The question as to the costs of two counsel was raised in the Court a quo (see p 301 J to 302 B). Leveson J considered it and gave what appear to me to be sound reasons for his decision to allow the costs of two counsel. No good ground for interfering with the exercise of his discretion in this regard has been advanced. There is no merit in this aspect of the appeal.

The appeal is accordingly dismissed with costs, such costs to include those occasioned by the employment of two counsel.

M M CORBETT

VAN HEERDEN JA)
 NESTADT JA)
 STEYN JA) CONCUR
 NICHOLAS AJA)