

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ABRAHAM JOHANNES VISAGIE

Appellant

and

THE STATE PRESIDENT

1st Respondent

THE MINISTER OF LAW AND ORDER

2nd Respondent

THE COMMISSIONER OF SOUTH AFRICAN POLICE

3rd Respondent

CORAM: JOUBERT, HOEXTER, HEFER, VIVIER et
KUMLEBEN, JJA

HEARD: 8 May 1989

DELIVERED: 1 June 1989

J U D G M E N T

HOEXTER, JA

HOEXTER, JA,

Upon notice of motion in the Eastern Cape Division the appellant during December 1986 sought certain orders for relief against the three respondents. The second respondent, the Minister of Law and Order, resisted the application. After answering and replying affidavits had been filed the matter was argued before EKSTEEN, J (as he then was). The application was dismissed with costs. The appellant appeals, with leave of the Court below, against the whole of its judgment.

On 12 June 1986, and by virtue of the powers vested in him by the Public Safety Act, No 3 of 1953, the State President made regulations ("the regulations") providing, inter alia, for the arrest, detention and release of certain persons. The appellant is a minister of religion whose congregation is in Middelburg in the Cape Province. In terms of subreg 3(1) of the regulations the appellant was arrested on 13 June 1986 and there-
after.....

after he was detained in the cells at the Schoombee police station. On 23 June 1986, and in terms of subreg 3(3), the second respondent signed a written notice addressed to the station commander of the South African Police at Schoombee ("the station commander") ordering the appellant to be further detained "vir solank gemelde Regulasies van krag is." On 4 August 1986, and in terms of subreg 3(6), the second respondent signed a written notice to the station commander ordering the appellant to be released upon certain conditions ("the conditions of release") which were set forth in paragraphs (1) to (4) of an annexure to the notice. In terms of subreg 3(7) a copy of the said notice was duly delivered to the appellant.

In the annexure to the said notice it was stated that the appellant:-

".....mag nie sonder die skriftelike toestemming.....

ming van die Minister van Wet en Orde of die Afdelingskommissaris van die Suid-Afrikaanse Polisie vir die afdeling Suid-Westelike Distrikte, gedurende die tydperk vanaf die datum van sy vrylating, tot en met 11 Junie 1987 -

- (1) afwesig wees uit die landdrosdistrik van Middelburg (Kaap) nie;
- (2) op enige wyse deelneem aan die bedrywighede of sake van die volgende organisasies nie :
 - Middelands Raad van Kerke
 - United Democratic Front
 - Middelburg Youth Congress
 - Middelburg Residents Association
- (3) (i) enige publikasie soos omskryf in artikel 1 van die Wet op Binnelandse Veiligheid, 1982 (Wet 74 van 1982) op enige wyse hoegenaamd voorberei, saamstel, publiseer of versprei nie;
- (ii) op enige wyse hoegenaamd deelneem aan of hulp verleen by die voorbereiding, samestelling, publikasie of verspreiding van enige publikasie aldus omskryf nie;
- (iii) Op enige wyse hoegenaamd enige stof bydra, voorberei of saamstel vir publikasie in enige

publikasie.....

- publikasie aldus omskryf nie;
- (4) enige byeenkoms bywoon waar enige staats-vorm of enige beginsel of beleid van, of optrede of voorgenome optrede deur die regering van die Republiek van Suid-Afrika aangeval, of gekritiseer word nie."

In his notice of motion the appellant sought (a) an order declaring the conditions of release to be invalid and (b) an order that the costs of suit (including the costs of two counsel) be paid by the second respondent; and, in the event of opposition by the first or third respondents, that the costs be paid jointly and severally by those respondents so opposing.

On appeal the contention that the conditions of release were invalid rested on a number of separate arguments. The first argument ("the audi alteram partem argument") was to the effect that the second respondent had failed to observe the principles of natural justice. It was common cause that

prior.....

prior to his signature of the notice dated 4 August 1986

the second respondent had not given the appellant an opportunity of being heard in regard to the conditions of release therein set forth. It was submitted that the second respondent was legally obliged to afford the appellant such a prior opportunity. The second argument ("the extraneous factors argument") was that in deciding upon the conditions of release the second respondent had taken into account against the appellant irrelevant and impermissible considerations. The third argument ("the inflexible period argument") was that the conditions of release were ultra vires for the reason that they were made to apply not merely for the duration of the regulations but until 11 June 1987. The fourth argument ("the gross unreasonableness argument") was that the first and fourth conditions of release were so capricious, oppressive, uncertain and grossly unreasonable

that.....

that it was to be inferred that the second respondent had not applied his mind thereto properly or in good faith.

The correctness or otherwise of each of these four arguments is considered hereunder.

(1) The audi alteram partem argument:

In the course of his judgment EKSTEEN, J reviewed a number of decided cases dealing with the application of the audi alteram partem principle, and then observed:-

"From these authorities it appears that the rule of natural justice requires that whenever an act will affect the property or liberty of an individual adversely or prejudicially, then he must be afforded an opportunity of submitting representations in defence of his rights. Where, however, the proposed act will not affect him prejudicially or adversely, but would benefit or ameliorate his circumstances the same considerations would in all fairness seem not to apply

but.....

but in any event, even if it be held that the principle of audi alteram partem should apply, it seems to me that the applicant would always have the opportunity of making representations to the Minister after his release with a view to the amelioration of the conditions imposed. That this would in certain circumstances be an adequate compliance with the rule has been recognised in cases such as Everett v Minister of Interior 1981 (2) SA 453 (C) and Momoniati v Minister of Law and Order and Others 1986 (2) SA 264 (W). There is no allegation in the papers before me to suggest that the applicant has been denied such a right, or that the second respondent has refused to consider any representations the applicant may wish to make, and the circumstances of the present case seem to me to favour a subsequent rather than a prior opportunity being afforded. To hold that the second respondent, after having decided to release a detainee under certain conditions, should delay his release until he placed the detainee in possession of all the information which had prompted him to impose the conditions he had decided on, and then to give the detainee a reasonable time to assemble what he may regard to be relevant information and to prepare such representations as he may be advised, seems to me to import an unwarranted extension of the deprivation of that detainee's liberty. On the other hand to release the detainee forthwith

and.....

and to consider representations on the ambit of the restrictions afterwards, would seem to me to be in the general interest of the detainee himself. I do not think therefore, that this first objection can be sustained."

It is no doubt true that the conditional release of a detainee in terms of subreg 3(6) represents a lesser infraction of his right to liberty than that involved in his further detention under subreg 3(3). I am nevertheless unable to agree, with respect, with the suggestion contained in the first portion of the excerpt from the learned Judge's judgment quoted above to the effect that, since an order for conditional release represents an amelioration in the condition of a person detained, such detainee may in fact have no right at all to be heard in regard to the conditions for his release. The subject's liberty is his supreme right; and true liberty is liberty unimpaired. In the instant case the conditions of release involved very serious
invasions.....

invasions of the appellant's liberty. They drastically curtailed his right of freedom of movement; his rights of free association; and his right of free self-expression.

Subreg 3(3) expressly provides that in the case of a detainee who has been arrested and detained in terms of subreg 3(1) the Minister may -

"....without notice to any person and without hearing any person...."

order the further detention of such detainee. Subreg 3(6) reads:-

"The Minister may at any time by a notice in writing signed by him order that a person detained in terms of this regulation, be released on such condition or conditions, if any, as may in his discretion be determined by the Minister in such notice."

In contrast to subreg 3(3), subreg 3(6) embodies no specific negation or renunciation of the audi alteram partem principle.

Counsel for the appellant submitted that subreg 3(6), viewed in its contextual setting, indicated neither expressly nor by implication a clear intention on the part of the subordinate

legislator.....

legislator to exclude a detainee's right to be heard in relation to the matter of the conditions governing his release. See: 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 893E; Attorney-General, Eastern Cape v Blom and Others 1988(4) SA 645(A) at 662G/I. In my view this submission is well-founded.

Accepting then that the maxim audi alteram partem applied in this case, one turns to the next limb of the inquiry. This is to determine, with reference to the particular circumstances encountered in this appeal, what the ambit of the appellant's right to be heard was. The Court a quo considered that, even if the maxim did apply, a hearing after the detainee's release would represent sufficient recognition thereof. Counsel for the appellant,

on.....

on the other hand, forcibly argued that an application of the maxim usually required a prior rather than a subsequent hearing of the person affected; and that in the instant case the appellant should have been accorded a prior hearing.

The audi alteram partem principle is a malleable one. As has been stressed by H Corder, "The content of the audi alteram partem Rule in South African administrative law" 1980 THRHR 156 at 159:-

".....it is well-nigh impossible to lay down any rigid rules as regards the content of audi alteram partem, as practical circumstances vary so much from case to case."

In practice our Courts have recognised that in certain situations the precepts of natural justice may have to be accommodated by giving an affected party a hearing only after the prejudicial order has already been made. In the case cited in the judgment of the Court below, Everett v

Minister.....

Minister of the Interior (supra), FAGAN, J points out
(at 458D/E) that such a situation may arise where time is
of the essence and prompt action is necessary -

"The more usual application of the rule in
quasi-judicial decisions is for a hearing to
take place, or representations to be received,
prior to the decision being arrived at. But
that is not always the position. Where expe-
dition is required, it might be necessary not
to give the affected person the opportunity
of presenting his case prior to the decision,
but only after. He thus obtains the oppor-
tunity of persuading the official to change
his mind."

Counsel for the appellant urged upon us that in the circum-
stances of the present case there had been no real need
for expedition. I cannot assent to that proposition.

Subreg 3(6) creates a procedural device for the release from
prison of persons who have been summarily detained without
trial. There can, I consider, be few examples of a
ministerial order in which the need for expedition would

be.....

be more pressing than it is in the situation contemplated by subreg 3(6). Prompt implementation of the ministerial order so manifestly promotes both the public good and the welfare of the detainee concerned that the contrary argument must be rejected as unrealistic. In so saying I do not overlook that upon the detainee's conditional release the conditions imposed become immediately effective; and (see subreg 3(8)) that non-compliance with them renders the detainee liable to prosecution. Making full allowance for these substantial factors, it nevertheless appears to me that where the Minister has decided to make an order in terms of subreg 3(6), whether for unconditional or conditional release, the speedy setting free from prison of the detainee is a matter of paramount importance. Any construction of subreg 3(6) which encumbers and retards its procedure for conditional release by requiring that

the.....

the Minister's order should be preceded by a hearing of the detainee would, in my opinion, be alien to the purview and spirit of its provisions. It would involve, in the words of the Court a quo "an unwarranted extension of the deprivation of that detainee's liberty."

It follows, in my judgment, that when the Minister orders the conditional release of a detainee in terms of subreg 3(6) the detainee cannot assert any legal right to a prior hearing. The requirements of fairness are sufficiently met by a hearing afforded the detainee after the notice in question has been delivered to him. In my view the Minister is at that stage legally obliged to give due consideration to such representations as the conditionally released detainee may wish to make in regard to the conditions of release imposed. In the instant case the appellant preferred not to avail himself of that right. Inasmuch as the right to a hearing was thus

circumscribed.....

circumscribed, it follows that the audi alteram partem argument was rightly rejected by the Court below.

(2) The extraneous factor argument:

This argument was based on certain averments in the answering affidavit filed by the second respondent ("the answering affidavit"), and for a proper assessment of the argument it is necessary to quote at some length from the answering affidavit. Paragraphs 3, 4, 5 and 6 of the answering affidavit are quoted hereunder, and for the sake of easy reference three of the sub-paragraphs in paragraph 3 have been underlined by me:-

"3. Voordat ek die voorwaardes in die bylae tot die skriftelike kennisgewing vervat, bepaal het, het ek deeglik oorweging geskenk aan die feite wat toepaslik was en wat aan my voorgelê is. Die volgende feite is aan my voorgelê en deur my oorweeg:

3.1 Dat.....

- 3.1 Dat die Applikant die voorsitter van die Middellandse Raad van Kerke is en dat hy as voorsitter die dryfveer agter die Middellandse Raad van Kerke is;
- 3.2 Dat die Middellandse Raad van Kerke fondse, wat afkomstig was van die Suid-Afrikaanse Raad van Kerke, deur middel van die Applikant se leiding gekanaliseer het na "alternatiewe strukture" soos die De Aar Residents Association en die Cradock Advice Office, welke "alternatiewe strukture" as doel het die diskreditering van bestaande gemeenskapsorganisasies wat as regeringsinstellings beskou word;
- 3.3 Dat die Middellandse Raad van Kerke verskeie aksies koördineer wat daarop gemik is om die beleid van die huidige regering te diskrediteer;
- 3.4 Dat die Applikant n organiseerder van die United Democratic Front is en dat hy as sulks betrokke is by die beplanning en loodsing van United Democratic Front-aksies wat gemik is op die omverwerping van

die.....

die huidige staatsbestel in Suid-Afrika;

3.5 Dat die Applikant gereeld toegelaat het dat die Middelburg Residents Association by sy huis vergader en by sulke vergaderings leiding gegee het;

3.6 Dat die Middelburg Residents Association verantwoordelik is vir agitatie betreffende kwessies soos hoë huishuur; die teenwoordigheid van die Suid-Afrikaanse Polisie en die Suid-Afrikaanse Weermag in swart woonbuurte; en afdreiging van verbruikersboikotte;

3.7 Dat die Applikant 'n organiseerder van die Middelburg Youth Congress is, welke organisasie gereeld by die Applikant se woning vergader het.

3.8 Dat die Middelburg Youth Congress 'n organisasie is wat deur middel van geweld, intimidasie, brandstigting, verbruikersboikotte, skoolboikotte, ens. die owerheid teenstaan;

3.9 Dat die Middelburg Youth Congress by verskeie voorvalle van onrus en geweldpleging betrokke was;

3.10 Dat.....

3.10 Dat die Middelburg Youth Congress vanaf die Middellandse Raad van Kerke finansiële steun kry, welke finansiële steun deur die Applikant belowe is en deur hom aan die Middelburg Youth Congress gekanaliseer is;

3.11 Dat die Applikant groot aansien en status as predikant van die N G Sendingkerk geniet en dat hy van sy aansien misbruik maak om organisasies en mense te beïnvloed teen die huidige staatsbestel in Suid-Afrika.

4. In my destydse hoedanigheid as Minister van Wet en Orde is ek gereeld op hoogte gehou en in kennis gestel van al die tersaaklike inligting betreffende die onrustoestand wat in groot dele van die land geheers het voor en na afkondiging van die noodtoestand op 12 Junie 1986. Ek was te alle tersaaklike tye bewus van die intimidasie, geweld, georganiseerde verset-aksies en ander algemeen georganiseerde optredes wat dit uitsluitlik ten doel gehad het om die staatsgesag te ondermyn en mettertyd met geweld omver te werp. Die aard en intensiteit van die onrustoestand is ook gereeld gemonitor. Ek was ook daarvan bewus dat die onrustoestand ook in die swart woongebiede van Middelburg (Kaap) en omringende dorpe posgevat het en dat daar georganiseerde intimidasie, geweld en verset-

aksies,.....

aksies, (soos wegbly-aksies), boikot-aksies, ens.) plaasgevind het.

5. Ek het al die bogenoemde inligting in die konteks van die tersaaklike omstandighede sorgvuldig oorweeg en tot die gevolgtrekking gekom en die oordeel gevorm dat dit noodsaaklik is vir die handhawing van die openbare orde, vir die veiligheid van die publiek en vir die beëindiging van die Noodtoestand om die voorwaardes, waarna hierbo verwys word, vir die Applikant se vrylating te bepaal.
6. By die neem van die besluit om gemelde voorwaardes te bepaal, het ek onafhanklik opgetree, my diskresie behoorlik en bona fide uitgeoefen nadat ek alles deeglik oorweeg het."

In paragraph 3 of the answering affidavit the second respondent says that before imposing the conditions of release he considered the facts submitted to him. These facts are catalogued in the eleven sub-paragraphs in paragraph 3. The contention advanced on behalf of the appellant is that the facts set forth in sub-paragraphs 3.2, 3.3, and 3.11 represent matters quite improper for the second respondent's consideration.

The gist of the submission made in this connection in the Court below was summarised thus by EKSTEEN, J in his judgment:-

"Mr Selikowitz submitted that there was nothing unlawful in anyone setting out to discredit the government or any of its institutions or even the prevailing constitutional system. This was after all the democratic right of any law-abiding citizen. In relying on these irrelevant considerations, he submitted, the second respondent had failed properly to apply his mind to the matter under consideration."

From the tenor of the judgment of the Court a quo it would seem that EKSTEEN, J dealt with the extraneous factors argument on the footing that the facts mentioned in the aforementioned three sub-paragraphs might not have been germane to the second respondent's decision to impose conditions of release. EKSTEEN, J considered, however, that, in the light of the further facts detailed in paragraph

3 of the answering affidavit, the matters whereof the appellant complained paled into insignificance; and, accordingly, that it could not be said that the second respondent's decision had been substantially affected thereby.

Mr Gauntlett contended that in so reasoning the Court below had erred by substituting its own opinion (namely, that the facts stated in 3.2, 3.3 and 3.11 were of trivial significance) for the opinion of the second respondent. I do not propose to consider this particular objection any further for the reason that in my view there is a fatal flaw to the whole extraneous factors argument.

It is trite, of course, that the second respondent, as the person to whom the duty was delegated, could not exercise his discretion under subreg 3(6) in an arbitrary or capricious fashion. He had to apply his mind to the issue before him (whether to release the appellant, and, if

so,

so, whether to do so conditionally or unconditionally) honestly and in good faith. In the answering affidavit the second respondent said that he had done so; and counsel for the appellant disavowed any imputation of mala fides on the part of the second respondent. It is to be noticed at once, however, that subreg 3(6) prescribes no rules for the guidance of the Minister in the exercise of his discretion. His discretion is a general one. In a situation such as this, so it seems to me -

"It is quite beyond the powers of a Court of Law to say on what evidence the Minister should be satisfied and on what he should not."

(per STRATFORD, JA in Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 237.)

As long as the Minister bona fide considers a
fact

fact to be relevant no Court may disturb his exercise of discretion simply because the Court itself regards that fact as being unhelpful or indeed entirely irrelevant. Whether in the result, in the instant case, the second respondent exercised the discretion entrusted to him wisely or unwisely is a matter with which the Court has no concern. It seems to me that in terms of subreg 3(6) it is for the Minister, and for him alone, to ponder and weigh those facts which appear to him in the honest exercise of his discretion, to bear upon a particular detainee's case. A succinct statement of the legal principle here involved is to be found, I think, in the following passage in the judgment of LORD BRAMWELL in Allcroft v Lord Bishop of London; Lighton v Lord Bishop of London 1891 Appeal Cases 666 HL(E) at 678 -

"Then it was said that there was something

he.....

he had considered which he ought not have considered, and something he had not considered which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed. I am clearly of the opinion that it cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him."

In my view the extraneous factors argument cannot succeed.

There is nothing on the affidavits before us to show that the second respondent failed to apply his mind to the issue before him, or that he improperly exercised the discretion entrusted to him in terms of subreg 3(6).

(3) The inflexible period argument:

There is no merit in this argument, and it cannot be sustained. The regulations were promulgated in terms of sec 3(1) (a) of the Public Safety Act No 3 of 1953. Sec 3(1)(a)

reads.....

reads as follows:-

"The Governor-General may in any area in which the existence of a state of emergency has been declared under section two, and for as long as the proclamation declaring the existence of such emergency remains in force, by proclamation in the Gazette, 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 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."

In rejecting the inflexible period argument EKSTEEN, J

remarked as follows:-

"Once the state of emergency is terminated the regulations automatically fall away, and once the regulations fall away the authority of the second respondent to enforce the conditions imposed in terms of those regulations ceases. I cannot agree with Mr Selikowitz's submission that the restrictions imposed on the applicant may apply for a longer period than the duration of the state of emergency
.....
as I have indicated, the conditions cannot,

as.....

as a matter of law, endure beyond the period of the state of emergency. This objection to the validity of the conditions cannot, therefore, at this stage when the state of emergency still exists, be sustained."

Suffice it to say in regard to the inflexible period argument that I agree with both the reasoning and the conclusion reached by the learned Judge.

(4) The "grossly unreasonable" argument:

In his founding affidavit the appellant says,

inter alia:-

"I say that in framing the first condition of my release, the Second Respondent manifestly failed to apply his mind, or to act within his powers, and acted capriciously and grossly unreasonably and oppressively.

I submit that condition four is similarly invalid. I submit that it is in the first instance void for vagueness, in that it lacks any substantial core of certainty. Furthermore, it is grossly unreasonable,

harsh.....

harsh and oppressive, and the Second Respondent could never have properly applied his mind in making the condition....."

The first condition prohibits the appellant from absenting himself from the magisterial district of Middelburg without the written consent of the second respondent or the Divisional Commissioner of the SAP for the South-Western Districts. Although the appellant's congregation is in Middelburg some members of his flock live beyond the magisterial district. The appellant occupies various ecclesiastical offices in the Dutch Reformed Church circuits of Middelburg, Cradock, Steynsburg, Molteno, Aliwal North, Adelaide and Bedford, and his clerical duties require his presence from time to time beyond the Middelburg magisterial district. The appellant suffers from a heart condition known as hypertrophic cardiomyopathy and this requires him to pay regular visits to his cardiologist who practices in

Cape.....

Cape Town.

It is not difficult to imagine that observance of the first condition of release, to an appreciable extent, dislocated the appellant's work as a cleric; and that in other respects it caused him to suffer frustration and inconvenience. From the affidavits filed it appears, however, that the appellant on more than one occasion did in fact seek and obtain from the SAP permission to travel far beyond the confines of the Middelburg magisterial district. In the judgment of the Court a quo the whole history of the appellant's applications to the SAP for permission to travel elsewhere, and the manner in which the SAP responded thereto, is carefully explored.

The appellant's personal circumstances are fully detailed in the affidavits before us. Suffice it to say that upon an examination of the full circumstances of the

appellant's.....

appellant's case it cannot be said, in my judgment, that in determining the first condition of release the second respondent failed to apply his mind to the matter. Nor, in my view can it be said that in its operation the first condition is grossly unreasonable and oppressive. I think that EKSTEEN, J was right in concluding that the objection to the first condition of release could not be sustained.

I turn to a consideration of the fourth condition of release. For the sake of convenience I quote again here (but without recapitulation of the preamble) the terms of that condition:-

"(4) ...enige byeenkoms bywoon waar enige staatsvorm of enige beginsel of beleid van, of optrede deur die regering van die Republiek van Suid-Afrika aangeval, of gekritiseer word nie."

Stressing that any breach of the conditions of release

entailed.....

entailed penal consequences, and that the subject should not be put in peril for ambiguity, counsel for the appellant attacked the fourth condition as being so vague and uncertain in its terms as to be legally void. It need hardly be said, of course, that conditions of release should be stated in plain and intelligible language; and that a detainee conditionally released should not be exposed to the risk of criminal liability without knowing with certainty how and to what extent his daily existence is constrained thereby. It seems to me, however, that the fourth condition of release cannot be declared void for uncertainty unless upon an interpretation of its terms this Court is quite unable to reach any conclusion as to what was in the mind of its draftsman. Such a declaration would involve a finding that the meaning of the prohibitions therein contained cannot be determined at all. In my view the prohibitions listed in the.....

the fourth condition, although they are extremely broad in their compass, do not defy construction; and they have an ascertainable meaning. Accordingly the complaint based upon their vagueness and uncertainty is not well-founded.

This last conclusion does not, however, end the inquiry. Although the Minister's discretion under reg 3(6) is a general one, this does not mean that he enjoys an uninhibited freedom of choice to impose whatever conditions of release may take his fancy. The power conferred upon the Minister is not an unlimited one. It is a limited power conferred only for the statutory purposes stated in sec 3(1) of Act 3 of 1953. The conditions of release imposed by the Minister must be fairly and reasonably referable to those statutory purposes. The conditions must relate either to the safety of the public, or to the maintenance of public order, or to the ending of the state of.....

of emergency. It is with these fundamental considerations in mind that the propriety or otherwise of the prohibitions set forth in the fourth condition of release must be scrutinised.

The Court below considered that the restrictions in the fourth condition seemed to be directed to the maintenance of public order and to the termination of the emergency; and that they could not be said to be ultra vires. For the reasons which follow I am, with respect, unable to share that view. In my judgment the scope of the prohibitions in the fourth condition is so manifestly extravagant that the condition is legally impeachable in its entirety.

The first limb of the prohibition forbids attendance at any gathering at which "enige staatsvorm" is subjected to attack or criticism. Prima facie, so it seems

to.....

to me, "staatsvorm" does not refer to the "staatsvorm" of the Republic of South Africa. Had that been the intention of the draftsman the word "staatsvorm" would hardly have been preceded by the word "enige", since the Republic of South Africa has now, and had on 4 August 1986, but one "staatsvorm". Upon a literal construction of the fourth condition the words "enige staatsvorm" would seem to signify the abstract notion of any constitutional system of any state at any time, whether past, present or future. Due observance of the terms of the fourth condition would therefore have prevented the appellant's attendance at a purely academic constitutional law lecture devoted to a critical analysis of such a topic as, for example, the forms of government in ancient Greece, or in mediaeval Italy, or in modern Switzerland; and this would have been the consequence despite the fact that in the course of

the.....

the lecture there was made not the slightest reference, however oblique, to the constitutional system in South Africa or the government.

It is apparent at once, I consider, that a prohibition having such an effect represents a glaring absurdity. It is at once entirely repugnant to ordinary common sense and wholly unrelated to any of the statutory purposes envisaged by sec 3(1) of Act 3 of 1953.

The second leg of the prohibition is in my opinion likewise objectionable. It prohibits attendance at any gathering at which any principle or policy or action of the government of the Republic of South Africa is subjected to attack or criticism. A moment's reflection will show, I think, that few if any topics of commonplace and daily discussion do not directly or indirectly touch

upon.....

upon either the principles or the policies or the actions of the government. To require a clergyman with a congregation to observe a condition such as this is to consign him to an existence of intolerable and near-monastic seclusion. So drastic an inhibition of the appellant's rights of freedom of association and freedom of expression cannot, I consider, be fairly and reasonably related to the aforementioned statutory purposes of sec 3(1) of Act 3 of 1953. In my view the inordinate latitude of the fourth condition of release vitiates it. An examination of its sweeping and indiscriminate terms sustains the clear inference that in framing it the second respondent overlooked the tenor and policy of the statute which gave him his discretion under subreg 3(6). In formulating the fourth condition the second respondent was no doubt honestly acting in what he conceived to be the interests of.....

of public security; but the fact remains that instead of exercising his discretion for a proper purpose he abused it by an insupportable abridgement of the appellant's rights.

In framing the condition of release in excessively wide terms the second respondent travelled beyond the precincts of his legitimate powers. See: Broadway Mansions Ltd v

Pretoria City Council 1955(1) SA 517(A) per VAN DEN

HEEVER, JA at 522B. Such an exercise of discretion is in breach of the law and impeachable in our Courts. It follows that the fourth condition of release was bad in law and void. To this limited extent the appeal must succeed.

In the Court below the appellant attacked the validity of all four conditions of release. The appellant's complaint has been sustained in regard to the fourth condition only. It remains to consider, in the light

of.....

of the appellant's limited success on appeal, what order of costs would be fair and appropriate.

In the Court below either side was represented by two counsel. On appeal Mr Gauntlett alone appeared for the appellant. Although the appellant's success on appeal is a relatively modest one, his case concerns a matter of importance, the liberty of the subject; and it raises issues of some difficulty. In all the circumstances it seems to me that justice will be met by awarding the appellant the costs of the appeal but only one half of the costs of the application in the Court below.

In the result the following orders are made:-

- (1) The appeal succeeds. The costs of the appeal will be paid by the second respondent. The appellant will pay the costs of the application for condonation.

(2) The

(2) The orders made by the Court a quo are set

aside and the following orders are substituted therefor:-

- "(a) The application succeeds to the limited extent that the fourth condition of release imposed by the second respondent on the applicant is declared void.
- (b) Save that the applicant will bear the wasted costs on Friday 5 December 1986 the second respondent is ordered to pay one-half of the costs of the application, including the costs consequent upon the employment of two counsel."

G G Hoexter

G G HOEXTER, JA

JOUBERT, JA	)	
HEFER, JA	)	
VIVIER, JA	)	Concur
KUMLEBEN, JA	)	