

156/88

N v H

THE MINISTER OF LAW AND ORDER, KWANDEBELE and OTHERS

versus

JACOBSON MATHEBE AND ANOTHER

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

The Minister of Law and Order,
KwaNdebele First Appellant

The Commissioner of the
KwaNdebele Police Force Second Appellant

The State President of the
Republic of South Africa Third Appellant

The Minister of Law and Order
of the Republic of South Africa Fourth Appellant

and

Jacobsohn Mathebe First Respondent

Rapu Sydney Molekane Second Respondent

CORAM: CORBETT, CJ, VAN HEERDEN,
SMALBERGER, KUMLEBEN, et
F H GROSSKOPF, JJA

HEARD: 4 September 1989

DELIVERED: 29 September 1989

J U D G M E N T

SMALBERGER, JA :-

It is common cause that in the early hours of
the morning of 18 November 1987 Messrs F Mathebe,

A Sefothlelo and H Nkuna ("the detainees") were taken into custody in their hotel rooms at Dawson's Hotel, Johannesburg. They were in Johannesburg to attend a national executive meeting of the South African Youth Congress. The four policemen who apprehended them were members of the KwaNdebele police force. They had been seconded to that police force from the South African police force. From Johannesburg the detainees were taken to KwaNdebele, where they were held in custody.

Consequent upon the foregoing the respondents brought an urgent application in the Transvaal Provincial Division for the release of the detainees. Their locus standi to do so has never been in issue. The matter came before SPOELSTRA, J, who granted the application. He held that the arrest and detention of the detainees were unlawful on the

ground that members of the KwaNdebele police force do not have powers of arrest beyond the territorial boundaries of KwaNdebele. The appellants were, however, granted leave by the judge a quo to appeal to this Court.

KwaNdebele is a self-governing territory, having been so proclaimed in terms of s 26 of the National States Constitution Act, 21 of 1971, with effect from 1 April 1981, by Proclamation R60 of 1981. It has its own police force established under the KwaNdebele Police Act, 11 of 1986. In terms of s 3(a) of that Act, persons seconded to the KwaNdebele police force became members of such force. When apprehending the detainees the policemen concerned purported to act in terms of regulation 3(1) of the regulations promulgated under Proclamation R96 of 1987 in terms of s 3 of the Public Safety Act, 3 of 1953

("the Emergency Regulations").

The essential issue that falls to be decided in the present appeal is whether, in the circumstances outlined above, and assuming that all the other prerequisites for a valid arrest were present, the policemen who arrested the detainees had the necessary authority to do so. At the hearing of the appeal it was common cause that, insofar as it was necessary to prove that the detainees were lawfully arrested and detained, the onus rested on the appellants. This would include the onus of proving that the policemen concerned had the requisite authority to arrest.

It can be accepted, for the purposes of the present appeal, that the arrest of the detainees would have been lawful if carried out by members of the South African police force acting as such. It was contended, on behalf of the appellants, that the

policemen who carried out the arrest were empowered to act in a dual capacity, i e both as members of the KwaNdebele police force and as members of the South African police force. This was so, it was argued, because their secondment had taken place in terms of s 14(3)(a) of the Public Service Act, 111 of 1984, which provides that "an officer" may, subject to the fulfilment of certain conditions, be placed "at the disposal of another government". "Officer" in terms of s 1 (the definition section) of the Public Service Act, read with the provisions of s 7(1)(a)(ii) and the definition of "the services", includes a member of the South African police force. Section 14(3)(b) specifically provides that, notwithstanding secondment, such officer remains subject to the laws applicable to officers in the public service. Accordingly, so the argument proceeded, in terms of the then applicable

provisions of the Public Service Act, seconded members of the South African police force remained subject to the provisions of the Police Act, 7 of 1958, and retained all their powers as members of such police force. The policemen who arrested the detainees therefore had a dual competence. Whatever limitations there may have been on their powers of arrest as members of the KwaNdebele police force, as members of the South African police force they had the necessary authority to arrest the detainees.

This argument, in my view, lacks foundation. The allegations in the respondents' founding and supporting affidavits, that the detainees had been arrested and taken from their hotel by members of the KwaNdebele police force, were never denied. The appellants, in their opposing affidavits, never claimed that the policemen concerned had also acted as members

of the South African police force. It is not without significance that when enquiries about the whereabouts of the detainees were directed at the South African police, the latter disclaimed all knowledge of their arrest and detention. Irrespective, therefore, of whether or not a seconded policeman in law is, or may be, clothed with dual authority, it was simply never the appellants' case in the court a quo that the arresting policemen acted as members of the South African police force. Nor is there any proper factual foundation to support such an argument in this Court. As the onus of proving the lawfulness of the detainees' arrest was on the appellants, it was incumbent upon them to establish that the policemen who arrested the detainees were members of the South African police force operating as such at the time. This they failed to do.

Furthermore, in this regard, assuming the appellants to be correct that the Public Service Act regulates the question of secondment, the applicable provision would appear to be s 14(5)(a) rather than s 14(3)(a). Section 14(5)(a) provides:

"Notwithstanding anything to the contrary contained in any law, an officer or employee may, when the public interest so requires, with his consent and on the recommendation of the Commission and on such conditions as may be prescribed on the recommendation of the Commission, be transferred to the service of a Black authority."

(my underlining)

"Commission" in terms of s 1 means the Commission for Administration established under the Commission for Administration Act, 65 of 1984.

In terms of the definition section, "Black authority" means, inter alia, the government of a self-governing territory. Any secondment of the policemen

responsible for the arrest of the detainees would therefore have been "on such conditions as may be prescribed on the recommendation of the Commission". Whether there were any such conditions attaching to the secondment of the policemen concerned and, if so, what they were, is not known. Such conditions may conceivably have affected, or curtailed, their authority to act as members of the South African police force. The appellants' argument must accordingly also founder for lack of evidence on this point.

It is necessary, therefore, to proceed on the premise that the policemen who arrested the detainees were members of the KwaNdebele police force acting as such. Since the appellants rely upon the provisions of the Emergency Regulations to justify the arrest of the detainees, the question arises whether, under those Regulations, the powers of arrest of members of the

KwaNdebele police force extend beyond the territorial boundaries of KwaNdebele. In order to answer this question it will be convenient to first determine what jurisdictional limits exist on the normal powers of arrest of members of the KwaNdebele police force, before considering whether such powers of arrest have been extended in any way by the Emergency Regulations.

The status of a self-governing territory has been described as follows in the judgment of RABIE, CJ, in Government of the Republic of South Africa and Another v Government of KwaZulu and Another 1983(1) SA 164 (A) at 206 B - D:

"It is clear that, while it is not an entity that is completely severed from the State, it is also not a mere instrument, or representative, of the State in its government of KwaZulu, for, as KRIEK J pointed out in some detail in his review of what he termed 'the significant features' of the 1971 Act, Parliament has in certain

respects permitted it to act independently of the State. It is clear, too, that a self-governing territory such as KwaZulu is recognised by Parliament as a territory which is entitled to have its own flag and its own national anthem, and, also, as a territory which can conclude conventions, treaties and agreements with the South African Government. These are features which indicate that Parliament does not regard a self-governing territory created in terms of the 1971 Act as a mere instrument, or representative, of the State."

In terms of section 3(1)(a) of the National States Constitution Act the legislative competence of a legislative assembly is expressly limited to the area for which it has been established. The KwaNdebele Police Act was enacted by the KwaNdebele legislative assembly under the powers conferred upon it by s 30(1)(a) of that Act read with item 21B in Schedule 1 thereto. It established a police force for

KwaNdebele, and at the same time repealed the whole of the Police Act, 7 of 1958, and the amendments thereto. KwaNdebele is therefore a separate and largely independent political entity with its own police force, the powers and duties of which are governed by the provisions of the KwaNdebele Police Act. The police force owes its existence and powers solely to the legislative capacity of the KwaNdebele legislative assembly. That capacity is limited, as I have already pointed out, to the area for which the KwaNdebele legislative assembly was established. Logically and legally it would follow that the exercise by members of the KwaNdebele police force of their powers and duties, including the power of arrest, must be confined to within the territorial boundaries of KwaNdebele, i e within the area in respect of which legislative competence exists. This is in keeping with the

principle that statutes are presumed not to operate extra-territorially (cf. Le Roux v Provincial Administration (O F S) 1934 OPD 1 at 4; Bishop and Others v Conrath and Another 1947(2) SA 800 (T) at 804). That the powers and duties of members of the KwaNdebele police force are so confined is confirmed by certain provisions in the KwaNdebele Police Act - see e.g. s 6(a) and s 7(4). Where duties are to be performed outside KwaNdebele specific provision is made therefor (see s 7(9) and s 8). Leaving aside the Emergency Regulations, we were not referred to any statutory provision, nor am I aware of any, that authorises the members of the police force of a self-governing territory to exercise powers of arrest, or any other acts of authority, outside the territorial limits of such territory, nor would one expect to find such a provision. It would amount to an invasion of

territorial sovereignty and autonomy if members of the police force of one self-governing territory were permitted to exercise powers in another self-governing territory. A fortiori this would be the case if such powers were exercised in the Republic of South Africa. In the result, therefore, a member of the KwaNdebele police force would not, in the normal course, have the power to effect an arrest in Johannesburg, which is beyond the territorial limits of KwaNdebele.

What next falls to be considered is whether or not the Emergency Regulations have brought about any change to this situation. Three questions were debated: (1) Did the State President have the power to make the Emergency Regulations applicable to KwaNdebele; (2) if so, did he exercise such power, and extend their operation to KwaNdebele; and (3) in the event of both (1) and (2) being established, did the

State President in terms of the Emergency Regulations confer upon the members of the KwaNdebele police force the power to effect arrests outside KwaNdebele's territorial limits?

I shall assume, for the purposes of the present appeal, that the State President, in terms of s 30(3) of the National States Constitution Act, had the necessary power to make the Emergency Regulations applicable to KwaNdebele, and that he duly exercised that power. What remains to be considered is whether the Emergency Regulations confer extended powers of arrest upon members of the KwaNdebele police force.

Regulation 3(1) deals specifically with the arrest and detention of persons. It provides:

"A member of a security force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the

safety of the public or the maintenance of public order, or for the safety of that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a security force, detain or cause to be detained any such person in custody in a prison."

In terms of regulation 1 (the definition provision), "security force" includes "any police force established by or under a law of a self-governing territory". Consequently the provisions of regulation 3(1) are applicable to any member of the KwaNdebele police force.

In interpreting regulation 3(1) in relation to the present matter one must, in my view, take as the starting point the fundamental fact that the normal powers of arrest of members of the KwaNdebele police force are limited to within the territorial boundaries

of KwaNdebele. To extend their powers beyond such territorial limits would constitute a radical departure from the norm. Any such departure would have to be authorised in clear terms. In the case of doubt the norm must prevail. There is no apparent reason why the State President should have wanted to extend the powers of arrest and detention by members of the police force of a self-governing territory beyond recognised and accepted boundaries to throughout the Republic. There are no clear, or sufficiently clear, indications in the Emergency Regulations that such was his intention, as might have been the case had words such as "at any place in the Republic" been inserted in regulation 3(1). The omission of those words, or words to the same effect, strongly suggests that it was not the State President's intention to extend powers of arrest and detention extra-territorially. A further

indication of this being so is to be found in the definition of "Commissioner" in regulation 1. While for the purposes of the application of the Emergency Regulations the Commissioner of the South African police is given authority in a self-governing territory, his counterpart in such territory is not given corresponding authority elsewhere in the Republic. By implication the powers conferred by regulation 7 on a Commissioner of police of a self-governing territory can only be exercised within such territory. It would be somewhat anomalous if the powers of a Commissioner were restricted to normal territorial limits, but certain powers of the members of his force were extended beyond such limits. The fact that the definition of "security force" in regulation 1 provides for a combination of forces takes the matter no further. It does not follow that because joint

operations are envisaged all participants must necessarily be clothed with additional powers. No more may be envisaged than co-operation between forces with recognition of the limits of territorial jurisdiction. At best for the appellants there is considerable doubt whether the State President intended regulation 3(1) to confer extra-territorial powers of arrest on members of the police force of a self-governing territory. As there is a presumption against interference with an existing state of affairs, in the absence of clear language to the contrary regulation 3(1) must be interpreted in a manner consonant with the normal position that members of the KwaNdebele police force do not possess extra-territorial powers of arrest (Steyn: Die Uitleg van Wette : 5th Ed, p 98; Protective Mining and Industrial Equipment Systems (Pty) Ltd (Formerly Hampo Systems (Pty) Ltd) v Audiolens (Cape) (Pty) Ltd

1987(2) SA 961 (A) at 991 J - 992 A). Their functions under regulation 3(1) must therefore be limited to the area where they can effectively exercise their powers. Accordingly the policemen who arrested the detainees were not empowered by the Emergency Regulations to do so, and their arrest was therefore unlawful.

The provisions of regulation 2(1) do not detract from this conclusion. It provides:

"Whenever any member of a security force is of the opinion that the presence or conduct of any person or persons at any place in the Republic endangers or may endanger the safety of the public or the maintenance of public order, he shall in a loud voice in each of the official languages order such person or persons to proceed to a place indicated in the order, or to desist from such conduct, and shall warn such person or persons that force will be used if the order is not obeyed forthwith."

(my underlining)

At first blush it would seem that the words underlined authorise a member of the KwaNdebele police force to act extra-territorially in relation to matters falling within the purview of regulation 2(1). If this were so it would create an anomalous situation, for logically there could be no reason why a member of the KwaNdebele police force should enjoy extra-territorial powers in relation to matters pertaining to the maintenance of order in terms of regulation 2(1), but not in respect of the arrest and detention of persons in terms of regulation 3(1). The answer, however, would appear to be that the words "at any place in the Republic" were never intended to signify the territorial limits within which every member of a security force could exercise the powers conferred by regulation 2(1). They relate, in my view, to the words immediately preceding them - "the presence or

conduct of any person or persons" - and were presumably introduced to render the provision linguistically capable of better understanding.

Presence, at least, must relate to a given place, and regulation 2(1) makes it clear that it is only the presence or conduct of any person or persons "at any place in the Republic", with the envisaged consequences, that would justify action in terms of regulation 2(1). The presence or conduct of persons beyond the borders of the Republic would not. In my view the words "at any place in the Republic" do not signify a departure from the fundamental principle that the powers of members of the KwaNdebele police force are limited territorially. The powers conferred by regulation 2(1) must therefore also be exercised within normal territorial limits.

The final contention advanced on behalf of the appellants was that even if the arrest of the detainees was unlawful, their detention was not, the reason being that their detention, in contradistinction to their arrest, actually took place in KwaNdebele. The detainees were purportedly arrested in terms of the Emergency Regulations. Regulations 3(1) and (3) envisage three distinct steps : the arrest of a person, the detention of such person following arrest (for a period not exceeding 30 days - regulation 3(2)), and the extension of the period of detention by the Minister of Law and Order. There cannot be a lawful extension of the period of detention by the Minister without a preceding lawful arrest and detention (Minister of Law and Order and Another v Swart 1989(1) SA 295 (A) at 298 H - I; Radebe v Minister of Law and Order and Another 1987(1) SA 586 (W) at 597 B).

By parity of reasoning there cannot be a lawful detention of any person in terms of regulation 3(1) if there has not been a preceding lawful arrest. An arrest in terms of regulation 3(1) is only authorised where the detention of the person arrested is, in the opinion of the arrestor, necessary for one of the stated purposes. It is only the person so arrested whom the arrestor may detain or cause to be detained. Even though arrest and detention are separate steps there is a strong correlation between the one and the other. If the arrest is tainted by illegality, the detention will be as well. In my view the Emergency Regulations clearly postulate a lawful arrest under regulation 3(1) before there can be a lawful detention.

The decisions in Abrahams v Minister of Justice and Others 1963(4) SA 542 (C) and Nduli and Another v Minister of Justice and Others 1978(1) SA 893

(A), on which the appellants sought to rely, are not in point. The facts and principles involved in those cases differ from the present. I do not consider it necessary to deal with them. In both cases, whatever improper or unlawful conduct preceded them, the arrests were lawful as they were made within the arrestor's competence. The statement in Abraham's case (at 545 H) that once there is a lawful detention, the circumstances of an accused person's arrest and capture are irrelevant, is founded upon the principle that once an accused person is brought before a court of competent jurisdiction the court will not enquire into the circumstances giving rise to his appearance. It does not apply to a situation such as the present where the lawfulness of the detention is dependent upon the lawfulness of the arrest. It follows that not only the arrest, but also the detention of the detainees was

unlawful. The court a quo was accordingly correct in ordering their release from custody.

This judgment deals specifically with the position of members of the KwaNdebele police force. It does not follow of necessity, because the members of such police force do not have extra-territorial powers of arrest, that members of the South African police force do not have powers of arrest in self-governing territories. Their position may be different having regard to the provisions of the Criminal Procedure Act, 51 of 1977, the Police Act, 7 of 1958 and the Emergency Regulations. I deliberately refrain from expressing any view on the extent of their powers of arrest, as it is not necessary to do so for the purposes of the present appeal.

The appeal is dismissed, with costs, such costs to include the costs consequent upon the employment of two counsel.

JUDGE OF APPEAL

J W SMALBERGER

CORBETT, CJ)
VAN HEERDEN, JA)
KUMLEBEN, JA) CONCUR
F H GROSSKOPF, JA)