SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION)

In the matter between:

THE ATTORNEY-GENERAL FOR THE EASTERN CAPE — appellant

and

NOLELE BLOM	1st respondent
THEMBILE BEVU	2nd respondent
CHRISTOF NYWEBA	3rd respondent
LULAMILE MJAVU	4th respondent
NONDOLOZA MERIKANA	5th respondent
MATTATI KLAAS	6th respondent

CORAM CORBETT, HEFER, GROSSKOPP, VIVIER JJA et VILJOEN AJA.

DATE OF HEARING 17 March 1988 DATE OF JUDGMENT 30 August 1988

J U D G MENT

CORBETT JA:

The respondents in this appeal made application to the Court a quo (the Eastern Cape Division), citing the present appellant, the Attorney-General for the Eastern Cape, as respondent and claiming, inter alia, an order declaring that the order made and signed by the appellant, which pur-ported to prohibit the release on bail or otherwise of each of the respondents in terms of sec. 30(1) of the Internal Security Act 74 of 1982 ("the Act"), was invalid and with-out force and effect. The Court a quo (per Mullins J, Jones J and Kroon J concurring) granted an order substan-tially in these terms and ordered the appellant, in his official capacity, to pay the respondent's costs, including the costs of two counsel. With leave of the Court a quo, the appellant appeals against the declaratory order granted and the order as to costs.

The facts of the matter are hardly in dispute and, where they are, the usual principles relevant to motion proceedings must be applied. These facts are as follows. The respondents were arrested by the police on 21 and 22 March 1986 in the Black residential township at Stutterheim on a charge of having contravened sec. 54(2)(f) of the Act, it being alleged that they had dug trenches across a road-way in the township in order to impede or endanger the free movement of traffic. After having been charged with this offence on 22 March 1986, they were remanded in custody pending further investigation of the case. On 11 April 1986 and in the Stutterheim magistrate's court the charges against the respondents were withdrawn by the prosecutor at the request of the investigating officer, W 0 Stander of the South African Police, and immediately thereafter Stander detained them in terms of sec 50 of the Act. According to Stander, the reason for the withdrawal of the charges was the fact that the Attorney-General had not given his written authority for the prosecution of the respondents under sec 64 of the Act.

On 23 April 1986 discussions took place between Stander and another representative of the police and the appellant and a member of his staff at the offices of the appellant in regard to the case against the respondents. It was decided to charge the respondents under sec 54(2)(a) of the Act, with alternative charges under sec 54(2)(c), sec 54(2)(e) and sec 54(2)(f). Stander raised with the appellant the question of restricting the grant of bail to the respondents in terms of sec 30 of the Act. The appellant indicated that he would consider doing so only if a "motivated application" for the necessary order were placed before him by the police.

On 25 April 1986 the respondents again appeared in the Stutterheim magistrate's court. Before the hearing Stander, acting on instructions from appellant, spoke to the respondents in an office at the court and told them (a) that their detention in terms of sec 50 of the Act was being terminated, (b) that they were being re-arrested on various alternative charges in terms of sec 54(2) of the Act by reason of their having dug the aforementioned trenches across the roadway, and (c) that an application in terms of sec 30(1) of the Act was to be laid before the appellant with a view to his making an order preventing their release on bail. At the hearing before the magistrate the case was postponed to 7 May 1986.

Thereafter Stander prepared an application asking that the appellant exercise his powers in terms of sec 30(1) of the Act and he presented this to the appellant personally at an interview on 29 April 1986. It consisted of an affidavit in which Stander described the factual averments against the respondents, sketched the security situation in the Black township at Stutterheim and concluded —

"Indien die beskuldigdes op borgtog vrygelaat sou word, sal die Wet en Orde in gevaar gestel word as gevolg van die feit dat hulle met hul bedrywighede sal voortgaan. Die beskuldigdes kan selfs vlug wat sal meebring dat hulle hul verhoor vryspring." At the interview there was a further full discussion of the need for

withholding bail from the respondents. The appellant then indicated that he needed time to further consider the matter.
On 2 May 1986 the appellant again read through all the papers and, having done so, was satisfied that orders in terms of sec 30(1) of the Act should be made in respect of all the respondents. He accordingly, on the same day, signed (i) an authorization permitting the prosecution of the respondents in terms of sec 64 of the Act, and (ii) separate orders in terms of sec 30(1) of the Act prohibiting each of the respondents from being released on bail or on warning.
When the respondents appeared before the magistrate of Stutterheim on 7 May 1986 the case was once more postponed, this time to 21 May 1986. At the same time Stander told the respondents that an order had been granted in terms of sec 30(1) of the Act. At some stage there-after the respondents instructed an attorney, Mr van Heerden, to act on their behalf. On 16 May 1986 he approached the prosecutor with a view to obtaining bail for his clients, but was told that appellant had prohibited bail in terms of sec 30(1) of the Act.
Eventually, on 11 August 1986, the respondents were arraigned in court on a charge under sec 54(2)(a) and on various alternative charges. They pleaded not guilty.'
Their cases were remanded. On 25 November 1986 the aforementioned application for a declaration as to the validity of the appellant's order in terms of sec 30(1) was launched, The judgment of the Court a quo was delivered on 9 December 1986. At that stage the case against the respondents was due to commence in the Regional Court in King William's Town on 12 January 1987.
In the Court a quo counsel for the respondents advanced three grounds for the invalidity of the orders made in terms of sec 30(1). The Court concluded that the first ground was well-founded and did, therefore, not deem it necessary to deal with the other two. This first ground was, put briefly, to the effect that in exer-cising his powers under sec 30(1) an Attorney-General is obliged to observe the principle of audi alteram partem and that in the present case the appellant failed to do so. This was the main point argued before us on appeal and I turn now to consider it.
The maxim audi alteram partem pithily expresses a principle of natúral justice which is part of our law (see Perumal and Another v Minister of Public. Health and Others 1950 (1) SA 631 (A), at p 640; Pretoria City Council v Modimola 1966 (3) SA 250 (A), at p 261 C; S v Moroka en Andere 1969 (2) SA 394 (A), at p 398 B).

It has ancient origins. When Nicodemus, the Pharisee, asked "Does our law permit us to pass judgment on a man unless we have first given him a hearing and learned the facts?" he was obviously speaking rhetorically. (See New English Bible, John vii.51.) The principle (which for the sake of brevity I shall call "the audi principle") has been variously formulated by this Court. In R v Ngwevela 1954 (1) SA 123 (A) Centlivres CJ referred (at p 127 F) to —

" the numerous judicial decisions in which it has been held that, when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual, that individual has a right to be heard before action is taken against him, unless the statute expressly or by necessary implication indicates the contrary".

The learned Chief Justice went on (at p 131 H) to emphasize the importance of the audi principle and said —

"The maxim should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it".

This formulation appears to lay down that in the circumstances postulated, viz. a statutory power vested in a public official to give a decision prejudicially affecting the property or liberty of an individual, the individual has a right to be heard, unless the statute expressly or by implication excludes it or unless exceptional circumstances justify the court in not giving effect thereto. The formulation was adopted in Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A), at p 549; Minister of the Interior and Another v Mariam 1961 (4) SA 740 (A), at p 751 A; and Administrateur van Suidwes-Afrika en n Ander v Pieters 1973 (1) SA 850 (A), at p 860 F-H.

In South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 263 (A) Botha JA, delivering the main majority judgment, placed the audi principle upon a statutory implication, rather than a substantive right. He stated (at p 270 C) that the incorporation of the maxim audi alteram partem could only be implied where a statute empowered a public official to give a decision prejudicially affecting the property or liberty of an individual; and went on to explain (at p 270 F-G):

"The question whether Parliament has in any particular case either expressly or by clear implication excluded the incorporation of the maxim audi alteram partem can only arise where, upon the true construction of the enactment concerned, the incorporation of the maxim is implied, for, where it cannot be implied, there is obviously no need to exclude it. The first question to be determined must, therefore, always be whether the enactment concerned impliedly incorporates the maxim. The answer to that question must, as indicated above, primarily depend upon whether the enactment is one empowering a statutory official or body to give a decision affecting the rights of another".

This formulation differs, in form at any rate, from that adopted in R v Ngwevela, supra, and was founded largely on what was stated by Stratford ACJ in the case of Sachs v Minister of Justice 1934 AD 11, at p 38, where he indicated that where the audi principle had been invoked this had been justified on the ground that "the enactment impliedly incorporated it". In his dissenting judgment in the Defence and Aid case, supra, Williamson JA, having referred to this statement by Stratford ACJ, commented.(at p 276 H - 277 A);

"That does not necessarily mean that, before the maxim is applicable, the Court must seek and find an express or implied incorporation of the principle or maxim in the statute in question. If a deprivation of rights or of liberty is provided for, the enquiry commences, in my view, from the opposite angle; has there been express-ly or by necessary implication a removal of the basic right to know that a penalty is proposed and to make representations there-anent? That this is so is made clear, I think, by the remarks of CENTLIVRES CJ in Ngwevela's case quoted above after referring to this particular quotation from Sachs' case".

13

Nevertheless, in Winter and Others v Administrator-in-Executive Committee and Another 1973 (1) SA 873 (A) Ogilvie Thompson CJ (at p 888H - 889 A) adopted the implied incorporation formulation enunciated by Botha JA in the Defence and Aid case, supra. This was in contrast to a judgment delivered the same day in the case of Administrateur van Suidwes-Afrika en 'n Ander v Pieters, supra, in which Botha JA stated the audi principle thus (at p 860 G):

"Dit is egter algemeen gesproke duidelik dat waar n openbare liggaam of gesag statutêr gemagtig word om n be-slissing te gee wat die goed, vryhede of bestaande regte van n ander nadelig kan raak, of waar die beslissing bestaande regte kan aantas of regsgevolge vir andere mag inhou, daardie ander persoon of persone die reg het, tensy die teendeel uit die magtigende bepaling blyk, om toegelaat te word om sy saak te stel voordat daar so 'n beslissing teen hom geneem word".

Prior to this Rumpff JA had, in Publications Control Board v Central News Agency Ltd 1970 (3) SA 479 (A) formulated the audi principle in terms of a presumption. He said (at p 488 H - 489 A):

"It is, of course, firmly established in our law that when a statute gives judicial or quasi-judicial powers to affect prejudicially the rights of person or property, there is a presumption, in the absence of an express provision or of a clear intention to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of justice. One of these principles is that the person affected should be given an opportunity to defend himself or of being heard. If, how-ever, on a proper construction of the statute, it appears that the Legislature did not in-tend the person affected to have the right of being heard, the implied right will be held to be excluded".

With reference to the phrase "by necessary implication", appearing in the formulation of Centlivres CJ in Ngwevela's case, supra, Rumpff CJ said (at p 489 C-D):

"The words 'by necessary implication' con-vey a degree of inferential compulsion that goes further, linguisticaily at any rate, than an inference of clear intent. That, with respect, seems unwarranted. One begins with a presumption that the kind of statute referred to impliedly enacts that the audi alteram partem rule is to be observed and, because there is a presumption of an implied enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication."

(See also Winter's case, supra, at p 889 B-C.)

In the most recent decision of this Court on the audi principle it was accepted by Rabie ACJ that the principle embodied "a fundamental right"and that a subordinate legis-lator could not deprive the subject of such a right unless the legislator had been, either expressly or by necessary implication, empowered by the enabling statute to do so (see Omar and Others v Minister of Law and Order and Others 1987 (3) SA 859 (A), at p 893 E).

The differences between these various formulations of the audi principle are, in my opinion, ones of form rather than substance. Logically and in principle, however, I prefer the approach which holds that in the circumstances postulated, viz. a statute empowering a public official to give a decision which may prejudicially affect the property or liberty of an individual, there is a right to be heard, unless the statute shows, either expressly or by implication, a clear intention on the part of the legislature to exclude such a right. The "implied incorporation" formulation appears to contemplate an incorporation of the right by implication, followed by the possibility of the exclusion thereof by implication. It is true that, as I understand the position, the incorporation would be based merely on the circumstances postulated above and the exclusion by implication upon a consideration of the statutory enact-ment as a whole, but nevertheless I find this formulation logically less satisfactory.

I proceed now to consider the application of these principles to sec 30 of the Act. It reads as follows:

"30 (1) Whenever any person has been arrested upon a charge of having committed any offence referred to in Schedule 3, the attorney-general may, if he considers it necessary in the interests of the security of the State or the maintenance of law and order, issue an order that such person shall not be released on bail or on warning as contemplated in the Criminal Procedure Act, 1977 (Act No 51 of 1977).

(2) (a) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (3), no person shall be released on bail or on warning contrary to the provisions of an order issued under subsection (1).

(b) Whenever any person arrested for an offence referred to in subsection (1) applies to be released on bail or on warning and the public prosecutor informs the judge, court or magistrate to whom or to which the application is made that the matter has been referred to the attorney-general concerned with a view to the issue of an order under subsection (1), such person shall, pending the decision of the attorney-general, not be released on bail or on warning; Provided that if no such order is issued within the period of fourteen days immediately following upon the date on which such judge, court or magistrate is so informed, such person may again apply to be released on bail or on warning and may, subject to the provisions of any law, be so released.

(3) The attorney-general may at any time before its expiration withdraw any order issued under subsection (l).

(4) Any telegraphic copy purporting to be a copy of an order under subsection (1) transmitted by telegraph shall for all purposes be <u>prima facie</u> proof of the facts set forth in such copy."

The offences listed in Schedule 3 to the Act are: sedition; contravention of the provisions of sec 13(l)(a)(iv) of the Act (taking part in the activities of an unlawful organization); any offence referred to in sec 34 (ie terrorism, subversion and sabotage) or sec 55 (ie offences relating to communism) of the Act; any conspiracy, incitement or attempt to commit any of these offences; and treason. In relation to these offences, the Attorney-General is given the power to prohibit the granting of bail (I shall ignore for present purposes release on warning) to an arrested person charged with one of these offences if he considers this necessary in the interests of the security of the State or the maintenance of law and order (sec 30(1)); and where such an order has been issued the person concerned may not be released on bail, either by the court or any other authority (sec 30(2)(a)). Moreover, prior to the issue of such an order, an application for bail can, in terms of sec 30 (2) (b) be effectively thwarted for a maximum period of 14 days pending the decision of the Attorney-General as to whether or not to issue an order under sec 30(1).

The question as to whether the audi principle applies to the decision of the Attorney-General to issue an order prohibiting the release of an arrested person on bail in terms of sec 30(1) has been decided in two divisions of the Supreme Court. In S v Baleka and Others 1986 (1) SA 361 (T) it was held by the Transvaal Provincial Division by a majority (per Eloff DJP, Preiss J concurring and Stegmann J dissenting) that in such circum-stances the Attorney-General is not required to observe the audi principle. And in Buthelezi and Others v Attorney-General, Natal 1986 (4) SA 377 (D) the Durban and Coast Local Division came to the opposite conclusion and held (per Kumleben J, Didcott J and Friedman J concurring) that the audi principle did apply to a decision to grant an order in terms of sec 30(1). Faced with these two conflicting decisions the Court a quo chose to follow that arrived at in Buthelezi's case, supra.

I have no doubt that a decision by the Attorney-General to make an order prohibiting an arrested person from obtaining bail is one which prejudicially affects the liberty of an individual and that, therefore, the audi principle applies unless the Act shows, either expressly or by implication, a clear intention that the individual's right to be heard is to be excluded. Nor did I understand appellant's counsel to argue otherwise. Indeed his argument was directed towards showing that such a clear intention to exclude was to be deduced from the Act by implication, there being no express provision to that effect.

Before this argument is considered, there is one general observation to be made. In the past, with certain minor exceptions, the power to grant bail has always been vested in the court, which naturally has heard both parties, ie the accused and the prosecutor, before deciding whether or not to grant bail. The audi principle was thus

automatically observed as part of the court's normal procedure. Sec 30 represents a radical departure from the traditional procedure in that, in the case of persons arrested upon certain charges, it effectively vests in the Attorney-General the power to decide whether or not bail should be granted. The charges in question all relate to offences involving the security of the State and it was, I presume, felt by the Legislature that the traditional system of leaving it to the courts to decide questions of bail would in such cases be likely to cause problems. Some of the information available to the Attorney-General relevant to the refusal of bail might well be of so sensitive a nature that he would not wish to reveal it, either in its entirety or at all, to the court. He would thus be placed in the invidious position of having possibly to weaken his opposition to the bail application by revealing too little or of having to prejudice State security by revealing too much. The solution hit upon by the Legislature was to give the Attorney-General himself the power in effect to decide whether or not bail should be granted. (I say "in effect" because of course the Attorney-General cannot himself grant bail, he can only prevent bail being granted by the court.) Whether the solution is a happy one need not be considered (see in this connection the remarks of Milne JP in S v Ramgobin and Others 1985 (4) SA 130 (N), at p 130-1); nevertheless I am of the view that the Legislature must not be understood to have intended to disturb the traditional procedure for the granting of bail more than was necessary to achieve the above-mentioned general purpose. In other words, the Legislature, having taken the power of decision concerning bail in such cases from the courts and giving it to the Attorney-General, must, in my view, not lightly be taken to have intended to abolish the audi principle as well.
Appellant's counsel prefaced his argument by emphasizing (i) that the basis of the audi principle is natural justice or fundamental fairness and that consequently a mere pretence of giving a person a hearing will not suffice; and (ii) that the audi principle involves informing the person concerned of the substance of the prejudicial allegations against him, giving him a reasonable opportunity to assemble the relevant information in order to state his case and allowing him to make his representations in writing. Counsel then proceeded to indicate various factors which would make it impractical or unpolitic for the Attorney-General to afford the arrested person such a hearing and argued that this showed an intention on the part of the Legislature to deny the arrested person a right of hearing.

Before I consider the various factors mentioned by counsel, it is appropriate to examine the general thesis that because circumstances might prevent an arrested person from being fully accorded his right to a hearing it must be inferred that no right at all was intended. This is sometimes referred to as "the all-or-nothing" argument. It was rejected by the Court in Buthelezi's case, supra, (see pp 380 B - 381 A) and by Stegmann J in Baleka's case, supra, (see pp 388 E - G, 390 C - 391 F). I am generally in agreement with what was said in those judgments in this regard. In Ngwevela's case, supra, at p 129 B - F Centlivres CJ quoted a passage from the judgment of Tindall ACJ in Minister of the Interior v Bechler and Others 1948 (3) SA 409 (A), at p 452, which included the following comment on the application of the audi principle:

"Exceptions may have to be made in very special circumstances, e.g. in the case of an emergency such as is referred to in de Verteuil v Knaggs and Another, 1918 A.C. 557, or possibly in a case where the disclosure of the information might result in the disclosure of its source and the disclosure of the source would be in conflict with public policy or de-trimental to the public interest. In such cases the proper way of putting it would be that, very exceptionally, the requirements of natural justice might be departed from, not that a weaker brand of fairness would still be legitimately describable as natural justice".

Commenting on this passage Centlivres CJ stated (at p 129 E-F):

"I do not read the remarks of TINDALL, A.C.J. as meaning that where the refusal to disclose information to a person likely to be affected is justified on ground of public policy that person is not entitled to be given an opportunity of stating his case before action is taken against him. In the hypothetical case I am now considering he would not have in his possession the information on which the public official proposes to act but he might be able to satisfy that official that action should not be taken against him."

This interpretation of what was stated by Tindall ACJ was questioned by Ogilvie Thompson CJ in Winter's case, supra, at p 890 A. With great respect to the latter, I incline to the view that the interpretation of Centlivres CJ is correct. Be that as it may, the above-quoted passage from the judgment in Ngwevela's case (which inciden-tally was concurred in by Greenberg, Schreiner and Hoexter JJA and De Beer AJA) seems to me to constitute clear authority destructive of the "all-or-nothing" line of argument. And on general principle it seems to me that the argument must be unsound. The relevant points were well expressed by Kumleben J in Buthelezi's case when he stated (at p 380 E-H):

"If these considerations are borne in mind there is little to be said for the 'all or nothing' argument in the construction of s 30. It appears to me to be both unreasonable and illogical to conclude that the law-maker would wish to deprive an individual of a fundamental right in all cases simply because in certain cases it may not be possible for it to be exercised fully. Even if for reasons of State security no information can be furnished to an accused he may, as the illustrations in S v Baleka and Others 1986 (1) SA 361 (T) at 391 C-G show, have other facts at his disposal which bear upon the issue and which would be helpful to the Attorney-General in reaching a just decision. When all is said and done the application of the rule in any particular case involves balancing the interests of the individual against the interests of the State. If its application or partial application is in the interests of the former, and cannot conceivably prejudice the latter, there can be no sound reason for not acknowledging it. After all at a court hearing of a bail application it often happens that the Attorney-General opposes the grant of bail and states that he relies upon certain information which cannot be disclosed. In such a case the court, with this restriction, continues to observe the rule. It does not discard it and terminate the hearing. It is not unreasonable to suppose that the Legislature intended the Attorney-General to do likewise".

This, in my view, sums up the position admirably. I turn now to the various factors which, so it was contended by appellant's counsel, militated against the notion that an arrested person was intended to have a right to be heard before the Attorney-General issued an order under sec 30(1). The first was that there would be many instances where it would be prejudicial to the interests of both the State and the public for an Attorney-General to disclose details of his information in regard to the accused, or the source of such information, or both. Having regard to the nature of the offences to which sec 30(1) relates (as listed in Schedule 3) and the criteria upon which the Attorney-General would rest a decision to grant an order in terms of sec 30(1) - viz. necessity in the interests of the security of the State or the maintenance of law and order, it must be accepted that in many instances an Attorney-General would not wish, for reasons of State security, to reveal certain of the information available to him. Secrecy in regard to matters of security should, however, not be allowed to become a fetish. And in many instances, 1 would think, it would be possible to reveal to an arrested per-son much of the information available to the Attorney-General which is relevant to the question of bail being withheld. (Indeed the affidavit which was laid before the appellant by Stander on 29 April to "motivate" his "application" for an order under sec 30(1) seems, on the face of it, to contain little or no information which could not have been revealed to the respondents or their legal adviser.) Where it would genuinely not be in the public interest to reveal certain information, then naturally the Attorney-General would be not only entitled, but also under a duty not to disclose it to the arrested person. Each case would depend on its own facts. Where relevant information prejudicial to the arrested person, in the sense that it prima facie provided grounds for making an order in terms of sec 30(1), could not be dis-closed then, pro tanto, full effect would not be given to the audi principle, but this would not justify a total denial of the right to be heard — for the reasons stated when the all-or-nothing argument was considered.

The second factor relied on by appellant's counsel was that, so it was submitted, the provisions of sec 30(1) constitute a measure of "preventive justice" and that the section contemplates prompt and unfettered action on the part of the Attorney-General. Observance of the audi principle would cause delay and would consequently frustrate the intention of the Legislature or reduce or defeat the cardinal purpose of prompt and preventive action. Ergo the audi principle was not intended to apply. There is, in my view, no substance in this line of argument. As was pointed out by Stegmann J in Baleka's case, supra, at p 386 E, the concept of preventive justice relates to a legislative measure directed not to the punishment of offences committed, but to restraining a man from committing a crime he may commit but has not yet committed or from doing some act injurious to members of his community which he may do but has not yet done (Sachs v Minister of Justice, supra, at p 36). Sachs's case, which concerned a notice issued by the Minis-ter of Justice in terms of sec 1(12) of the Riotous Assemblies Act 27 of 1914, as amended, prohibiting a person from being in specified areas for a defined period, on the ground that his presence there would create feelings of hostility between races, provides a typical example of such a legislative measure. In such a case observance of the audi principle before the notice is issued would "defeat the cardinal purpose of prompt and preventive action" (per Stratford ACJ at p 38). But under sec 30(1) of the Act the position is different. The individual concerned is, ex hypothesi, incarcerated and not able to commit the kind of crime or do the kind of injurious act which an order under sec 30(1) is designed to prevent. The question is whether the arrested person should be released on bail. Delay in deciding this question cannot prejudice preventive justice because in the meanwhile the arrested person remains in custody. More-over the Attorney-General need not be placed under undue pressure while considering his decision. In practice there is usually a substantial lapse of time between an accused person's arrest and the making of an application for bail (in the present case, after the arrest of the respondent, nearly two months passed before Mr Van Heerden broached the question of bail); and when a bail application is made the Attorney-General can in terms of sec 30(2)(b) ensure that he has a further 14 days within which to make his decision. Should he nevertheless find that there is insufficient time for him to give the arrested person an opportunity to be heard before making his decision, he can simply apply to the court hearing the bail application for the further postponement of the matter for this purpose. In such circumstances it is difficult to conceive of the arrested person not agreeing to a reasonable request in this regard or of the court refusing to grant such a postponement. (Cf remarks of Kumleben J in Buthelezi's case, at p 382 E-G.)

Appellant's counsel further submitted that it was unlikely that the Legislature would have intended that the Attorney-General should hold a hearing, even in a limited sense, when it took away the right of the court to entertain applications for bail in such cases. Had the Legislature merely wished to provide for secrecy (while retaining the idea of hearing both sides) it could have enacted that the application be heard in camera. I do not agree. Even if a hearing is in camera the information which the Attorney-General might wish to keep secret would, if disclosed to the court, necessarily be revealed to a range of persons, including the arrested person. This presumably would be contrary to the object sought to be achieved by the Legislature. Ac-ordingly it does not follow that because the Legislature, instead of providing for in camera hearings, vested in the Attorney-General the power in such cases to decide whether or not an arrested person should be granted bail, it intended at the same time to exclude the audi principle.

Next it was argued that it would be "unrealistic" to conclude that the Legislature contemplated that an accused person should be given a limited hearing by an Attorney-General because of the "notional possibility" that this may have some effect; and in this regard reference was made to what was stated by Eloff DJP in Baleka's case, at pp 407 J - 408 B. I am by no means convinced that the arrested person's right to be heard is as illusory as counsel seemed to suggest, even where much of the prejudicial information at the disposal of the Attorney-General could not be revealed. (Cf. the remarks of Stegmann J in Baleka's case at p 391 B-D.) Nor is it possible, in my view, given the infinite variety of cir-cumstances which individual cases may produce, to so generalize about the arrested person's right of hearing and and to draw inferences therefrom as to the intention of the Legislature.

Appellant's counsel made the further point that an accused would, in any event, always have the right to make representations after the issue of the order by the Attorney-General and he referred in this connection to the provisions of sec 30(3) of the Act. In my opinion, the point is devoid of merit. If the correct interpretation of sec 30(1) is that the arrested person has no right to be heard before the Attorney-General makes his decision, what basis is there for concluding that the Legislature intended that he has such a right subsequent to the making of such a decision? In my view, none. Indeed several of the earlier arguments raised by appellant's counsel would, if sound, be just as subversive of a right to be heard after the decision as of one before the decision. And, in any event, a right to be heard after the event, when a decision has been taken, is no adequate substitute for a right to be heard before the decision is taken. There is, as Van Winsen J pointed out in Davies and Others v Administrator, Cape Province and Another 1973 (3) SA 804 (C), at p 809 B a "natural human inclination to adhere to a decision once taken". (See also Buthelezi's case, supra, at p 383 C-E.)

Appellant's counsel also referred to the pro-visions of sec 61 of the Criminal Procedure Act 51 of 1977 and argued that in relation to the offences covered by that section the audi principle was clearly excluded, once the Attorney-General objected, in terms of sec 61(1), to the grant of bail. I do not propose to con-sider whether, in relation to sec 61(1), there is a total exclusion of the audi principle for I fail to see what relevance this has to the interpretation of sec 30(1) of the Act, which, significantly, is in totally different terms and relates to different offences. The argument carries appellant's case no further.

Finally, appellant's counsel submitted that this Court should have regard to the Report of the Commission of Enquiry into Security Legislation, whose investigations shortly preceded the passing of the Act, in order to ascertain the intention of the Legislature; and that the report supported appellant's contention as to the meaning of sec 30(1). Relevant extracts from the report were attached to counsel's heads of argument. In this connection counsel refer-red to the judgment in the case of Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at pp 562 H - 563 A and the minority judgment of Galgut AJA in S v Mpetha 1985 (3) SA 702 (A), at p 712 H - 713 E. In the former judgment I referred to certain English cases of high authority in which it had been held that —

"...in construing a statute where the words are not clear and unambiguous the Court may have regard to the report of a Royal Commission or committee appointed by the Government which shortly preceded the pas-sing of the statute in order to ascertain the mischief aimed at and the state of the law as it was then understood to be, but not to determine the meaning attached by the commission or committee to any draft bill recommended in the report which formed the basis of the statute passed by Parliament."

The judgment referred to certain South African and other authorities and then proceeded:

"In my opinion, our Courts too are entitled, when construing the words of a statute which are not clear and unambiguous, to refer to the report of a judicial commission of en-quiry whose investigations shortly preceded the passing of the statute in order to ascertain the mischief aimed at, provided that there is a clear connection between, on the one hand, the subject-matter of the enquiry and recommendations of the report and, on the other hand, the statutory pro-visions in question."

It is clear that this Court approved of reference to the report of a judicial commission of enquiry, in the circumstances postulated, only in order to ascertain the mischief aimed at by the statutory enactment in question. It did not approve of such a report being used in order to determine the meaning attached by the commission to any draft legislation recommended in the report, which formed the basis of the statute passed by Parliament. Indeed the English authorities referred to in the judgment expressly dis-approve of a report being used for this latter purpose; and I agree with that approach. I have read the extracts from the report attached to counsel's heads of argument. As I see it, counsel is endeavouring to use the report in order to demonstrate the interpretation placed by the Commission upon the draft sec 30 — and its predecessor, sec 12A of the Internal Security Act 44 of 1950 (as amended by secs 6 and 8 of the Internal Security Amendment Act 79 of 1976) — as an aid to the construction of sec 30 of the Act, as passed by Parliament. This is precisely the purpose for which such a report may not be used. This argument, therefore, falls to the ground.

To sum up the position, I do not find in the factors advanced by appellant's counsel, or indeed in any of the matters mentioned in the majority judgment in the case of S v Baleka, supra, taken either individually or collectively, any clear indication that Parliament intended to exclude the right of an arrested person to be heard before the Attorney-General makes an order in terms of sec 30(1) of the Act denying him the grant of bail. I, therefore, conclude that the audi principle applies to sec 30(1). It may well be that in individual cases constraints imposed by the time factor and/or the sensitive nature of the information, prejudicial to the arrested person, which is in the possession of the Attorney-General will result in the arrested person's right to be heard being more attenuated than is normally the case where the audi principle applies, but the residual right remains and must be respected.

In the present case the respondents were not allowed to be heard before the appellant made orders in terms of sec 30(1). Indeed in his opposing affidavit the appellant specifically denied the existence of any such right.

It follows that the Court a quo correctly made the declaratory order referred to at the beginning of this judgment and the appeal against that order must fail. I would just add that in view of this finding it is not necessary to examine the alternative grounds upon which it was contended by respondents that the orders under sec 30(1) made by appellant in this case were invalid.

Appellant appeals also against the order as to costs, contending that, even if the declaratory order was correctly made, the appellant, a public official, should not be mulcted in costs since his attitude, though mistaken, was bona fide. Appel-lant's counsel relied for this contention on the case of Coetzeestroom Estate and Gold Mining Company v Registrar of Deeds 1902 TS 216 at p 223.

On this aspect the judgment of the Court a quo reads as follows:

"In regard to the question of costs, despite respondent having acted in goodfaith and in his official capacity, the Court nevertheless has a discretion to award costs against him. Applicants have succeeded in establishing an important principle relating to their possible release from custody. Respondent was further presumably aware of the aforementioned decisions when the decided to oppose this application. The applicants have succeeded in establishing an important principle relating to their liberty. We are therefore disposed, in the exercise of our discretion, to award the applicants their costs".

In awarding costs the court of first instance exercises a judicial discretion and a court of appeal will not readily interfere with the exercise of that discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The court of appeal cannot interfere merely on the ground that it would itself have made a different order. (See Protea Assurance Co Ltd v Matinise 1978 (1) SA 963 (A), at p 976 H; Minister of Prisons and Another v Jongilanga 1985 (3) SA 117 (A), at p 124 B and the authorities cited in these two cases.)

I am not convinced that the rule laid down in the Coetzeestroom case, supra, in relation to appli-cations against the Registrar of Deeds arising on matters of practice is applicable to a case such as the present one; and in any event the rule should not be elevated into a rigid one of universal application which fetters the judicial discretion (see Potter and Another v Rand Townships Registrar 1945 AD 277, at pp 292-3; Commissioner for Inland Revenue v Ropes and Mattings (SA) Ltd 1945 AD 724, at p 731-2; Die Meester v Jou-bert en Andere 1981 (4) SA 211 (A), at p 218 B-H).

In my view, no good ground has been advanced for interfering with the Court a quo's exercise of discretion in regard to the costs of the application.

The appeal is dismissed with costs.

M M CORBETT

HEFER JA)

GROSSKOPF JA) CONCUR

VIVIER JA)

VILJOEN AJA)