165/88

CASE NO 483/87

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

RONALD NORMAN VAN DER WESTHUIZEN NO APPELLANT

AND

THE UNITED DEMOCRATIC FRONT RESPONDENT

CORAM : RABIE ACJ, JOUBERT, HEFER, EKSTEEN, JJA et VILJOEN AJA.

HEARD : 14 NOVEMBER 1988.

DELIVERED : 30 NOVEMBER 1988.

J U D G M E N T

HEFER JA :

On 12 June 1986 a state of emergency was declared to exist in the Republic and on the same day regulations made by the State President in terms of sec 3(1)(a) of the Public Safety Act 3 of 1953 were published in Proclamation R109, 1986. The regulations were thereafter amended from time to time.

Reg 7(1)(bA) authorizes a Divisional Commissioner of Police to prohibit, for certain stated purposes, "any particular gathering, or any gathering of a particular nature, class or kind" within his division. The full text of the regulation will be quoted later.

The appellant is the Divisional Commissioner of Police for the Western Province. On 14 April 1987, acting in pursuance of the power conferred upon him by reg 7(1)(bA), he prohibited a public meeting which the respondent had arranged to be held in the Cape Town city hall on the evening of 15 April 1987. Upon becoming aware of the prohibition the respondent approached the Cape of Good Hope Provincial Division with an urgent

application to have it set aside. On 15 April 1987 a Full Bench of three judges heard the application. Indicating at the conclusion of the hearing that reasons would be furnished later, the court granted an order setting aside the prohibition and directing the appellant to pay the costs of the application. The appeal is directed at this order.

The court's reasons were subsequently prepared by BERMAN J and have now been reported in United Democratic Front (Western Cape Region) v Van der Westhuizen NO 1987(4) S A 926(C). The reasons proceed on the basis that the onus was on the appellant to prove the lawfulness of the prohibition and conclude with a finding that the onus was not discharged. How this conclusion was arrived at emerges from the final passage at 932 E-G of the report which reads as follows:

> "--------regard being had to the fact that the onus rests on respondent to justify the outright and total prohibition he imposed on the proposed public meeting, no more is

> required of a party in applicant's position than to state merely that he or it has organised a meeting and that respondent has prohibited it pursuant to the purported exercise of powers afforded by reg 7(1); this obliges respondent to satisfy the Court that the outright and total prohibition imposed by him on the holding of that meeting was justifiably imposed by him in the light of the duty upon him to exercise an objective discretion when having resort to such powers. Respondent failed to discharge this onus, and applicant was accordingly entitled to the order handed down by the presiding Judge at the conclusion of the hearing." (My emphasis.)

The court's ruling on the onus of proof was challenged in this court. Appellant's counsel submitted that the real issue was whether the appellant had properly exercised the discretion conferred upon him by reg 7(1) and that it was for the respondent to prove that he had not done so. Although this was the main ground for the attack on the court a quo's order I find it unnecessary to decide whether it was for the appellant to prove the lawfulness of the prohibition or for the respondent to prove the unlawfulness thereof. I say this because, assuming the court a quo's ruling to

be correct, it is clear, to my mind, that the court erred in other respects and that the order should not have been granted.

By way of introduction to the discussion I regret to say that I have not found it easy to discover in the court's reasons the grounds for its interference with the exercise by the appellant of a power which reg 7(1)(bA) undoubtedly confers upon him. Although there is a fairly lengthy recital in the reasons of the argument presented to the court on respondent's behalf, and although there are some indications that the whole argument was favourably received, one simply does not know whether all the submissions were in fact accepted. It may be that the recital was merely intended to reveal the shortcomings in the appellant's case and thus to justify the conclusion that he had not discharged the onus, but the nett result is that the reader of the reasons has largely been left in the dark as to the court's own views.

What does, however, appear reasonably clearly from the passage in the reasons cited above, is that the court a quo's conclusion was based on the premise that the appellant had the "duty-----to exercise an objective discretion". This somewhat confounding statement was presumably intended to convey that the exercise by the appellant of his powers under reg 7(1) was objectively justiciable in the sense in which that expression was used in South African Defence and Aid Fund and Another v Minister of Justice 1967(1) S A 31 (C) at 34-35. Counsel were agreed that this is how the passage is to be understood and I shall proceed on that basis.

It was pointed out in the South African Defence and Aid Fund case at 34 F-H that there are cases in which the exercise of a power is dependent upon the existence of certain so-called jurisdictional facts, i e facts or a state of affairs which must exist before the power may be exercised. What the jurisdictional facts

are, depends, of course, on the legislation in question, but they always fall into one of two categories which CORBETT J (as he then was) described as follows:

> "Upon a proper contruction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power----------.On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did."

It is the former type of case that BERMAN J must have had in mind when he spoke of the appellant's "objective" discretion and, I may add, it was Mr Gauntlett's submission on respondent's behalf that the present is indeed such a case. In my view, however, it is not.

As I said before, it depends upon the legislation in question whether a jurisdictional fact falls within the one or the other category. It obviously also depends upon the legislation whether jurisdictional facts are indeed required and, if so, what they are. I turn, therefore, to examine the legislation now under consideration.

Reg 7(1) originally read as follows:

"7. (1) The Commissioner of the South African Police or any person authorized thereto by him may, without furnishing reasons and without hearing any person, issue orders not inconsistent with these Regulations -

(a) relating to -

(i) the demarcation of areas;

(ii) the closing off of any particular area or part of such area in order to control entrance to or departure from such area or part thereof;

(iii) the control of entrance to or departure from any particular area or part of such area;

(iv) the control of traffic;

(v) the temporary closing of any public or private place or any business undertaking or industrial undertaking; or

(vi) the control of essential services and the security and safety of any installation and works connected therewith;

(b) whereby any person is prohibited from -

(i) bringing into any particular area any object or article specified in the order or being in possession thereof in such area;

(ii) performing any act or carrying on any activity specified in the order in any particular area;

(iii) being outside the boundaries of his residential premises in any particular area, at any time;

(iv) putting in motion or driving or being in upon any vehicle that is in motion in any particular area, at any time; or

(v) entering any particular area or part thereof if he is not normally resident in that area or part thereof;

(c) relating to the control, regulation or prohibition of the announcement, dissemination, distribution, taking or sending of any comment on or news in connection with any conduct of a Force or any member of a Force regarding the

maintenance of the safety of the public or the public order or the termination of the state of emergency; and

(d) relating to any other matter the regulating, control or prohibition o which in his opinion is necessary or expedient with a view to the safety of any member or members of the public or the maintenance of the public order, or in order to terminate the state of emergency, the generality of the powers conferred by this paragraph not being restricted by the provisions of the preceding paragraphs."

Reg 7 (1) was amended by Proclamation R140, 1986 of 1 August 1986 but this amendment is not presently material. By Proclamation R225, 1986 of 28 November 1986 it was amended again. New words were substituted for those preceding subreg (a) and two new subregulations, (bA) and (bB), were inserted after subreg (b). Subregs (a),(b),(c)and (d) were left intact with the result that reg 7(1) then read as follows:

"(1) The Commissioner may for the purpose of the safety of the public, the maintenance of public order or the termination of the state of emergency, and without prior notice to any person and without hearing any person, issue orders not inconsistent with these regulations -

(a [As before]

(b) [As before]

(bA) whereby any particular gathering, or any gathering of a particular nature, class or kind, is prohibited at any place or in any area specified in the order;

(bB) (i) prohibiting the holding of any particular gathering, or any gathering of a particular nature, class or kind, in any area specified in the order otherwise than in accordance with condition likewise specified, which conditions may include conditions requiring the Commissioner's prior approval for the time, date and place of the gathering, prescribing the hours of the day or the days of the week during which the gathering may or may not take place, limiting the number of persons who may attend the gathering and prohibiting persons not belonging to a specified category of persons from making speeches

at the gathering;

(ii) prohibiting persons from committing at a gathering referred to in subparagraph (i) any acts specified in the order, or from attending, or from remaining present at, a gathering in respect of which a condition specified in the order has not been or is not being complied with;

(iii) [Irrelevant]

(c) [As before]

(d) [As before] "

(In terms of the amended reg 1 "the Commissioner," for the purpose of applying the regulations in a police division, means the Commissioner of the South African Police or the Divisional Commissioner for the division in question. Henceforth when I refer to reg 7(1) the reference is to the amended version).

The difficulty that I have with the court a quo's reasons and with Mr Gauntlett's argument is to find anything in the wording of reg 7(1) (save, of course, the position which the repository of the power must hold) which can properly be said to be a

jurisdictional fact. It must be borne in mind that in the type of case postulated in the reasons and in Mr Gauntlett's argument there is always something apart from the exercise of the power itself which is capable of objective adjudication; there is in such cases always a fact or facts on which the exercise of the power depends and which may be adjudicated upon without enquiring into the exercise of the power itself. As explained in the South African Defence and Aid Fund case (supra) at 34H and later in Duncan v Minister of Law and Order 1986 (2) S A 805 (A) at 818 H-I, the power itself being a discretionary one, the repository may decide not to exercise it despite the existence of the jurisdictional fact; and, in the event of it being exercised, only the existence of the jurisdictional fact may be adjudicated upon objectively whereas the decision to exercise it is only assailable on the grounds mentioned in Shidiack v Union Government (Minister of the Interior) 1912 A D 642 at 651. In reg

7(1) there is nothing which can be adjudicated upon apart from the exercise of the power itself. What then is the jurisdictional fact?

. There is no answer to this question in the court *a quo's* reasons but according to Mr Gauntlett the jurisdictional fact is that the action taken in terms of reg 7(1) must be necessary or expedient for the purpose of the safety of the public or the maintenance of public order or the termination of the state of emergency. In developing the argument he pointed out that reg 7(1)(d) which authorizes the Commissioner to issue orders in relation to matters the control, regulation or prohibition of which is in his opinion necessary or expedient for one of the stated purposes, was declared invalid in Natal Newspapers (Pty) Ltd and Others v State President of the Republic of South Africa and Others 1986(4) S A 1109 (N). Shortly after the judgment had been handed down reg 7(1) was amended in Proclamation R225, 1986 and subregs (bA) and (bB) were inserted

without a reference therein to the Commissioner's opinion. Mr Gauntlett submitted that this omission evinces a clear change of intention and justifies the inference that the intention no longer was to entrust the necessity or expediency of prohibitions to the subjective discretion of the Commissioner, probably because it was realized that it would not be competent for the State President to do so.

I do not agree. Mr Gauntlett's argument is based on the assumption that before the amendment the Commissioner had no power to prohibit gatherings save under reg 7(1)(d). This is not so; reg 7(1)(b)(ii) authorized him to prohibit any person from performing any act or carrying on any activity in any particular area. The submission relating to the probable reason for a changed intention is equally unacceptable. As appears from 1127 B-I of the judgment in the Natal Newspapers case reg 7(1)(d) was declared invalid, not on account of the Commissioner's subjective discretion per

se, but on account of the generality and the extremely wide ambit of the matters which were entrusted to his discretion. It appears, moreover, from 1125 G- 1126 H that, when it came to specific powers like those mentioned in subregs (a) and (b), the court had no objection to an "unfettered discretion to take executive action" being conferred on the Commissioner. The new subregs (bA) and (bB) contained specific powers relating specifically to gatherings and were formulated on the lines of subreg (b). This is significant for two reasons. Firstly, the validity of subreg (b) had been tested and established. Secondly, the court had expressly indicated that the conferment upon the Commissioner of an unfettered discretion in specific matters like those mentioned in subregs (a) and (b) would be unobjectionable. There was thus every reason to assume that the State President could validly confer such a discretion on the Commissioner in the specific terms of the two new subregulations in relation to a

matter comparable to the matters mentioned in subregs (a) and (b).

Mr Gauntlett advanced a further argument to the effect that, quite apart from what may be inferred from the way in which reg 7(1) was amended, subregs (bA) and (bB) must, in any event, be interpreted in such a way that the powers thereby conferred may only be exercised if, objectively speaking, it is necessary or expedient to do so for the purpose of the safety of the public or the maintenance of public order or the termination of the state of emergency. The basis for this submission is (a) the absence of words like "in his opinion" or "to his satisfaction" or one of the other similar expressions often used when a power entailing the exercise of a purely subjective discretion is conferred, and (b) the unlikelihood of an intention on the part of the State President to entrust the decision to exercise a power which seriously impinges upon the freedom of assembly to the subjective discretion of the

Commissioner. The freedom of assembly, he submitted, is an important right jealously protected by the courts and the only protection against the arbitrary exercise of the powers conferred by subregs (bA) and (bB) lies in the constrution for which he contended.

Again I do not agree. As to (a) it need hardly be stated that a purely subjective discretion may be conferred without expressly consigning the question of necessity or expediency to the opinion of the repository of the power. The same result is achieved when a discretionary power is conferred unreservedly and in unqualified terms, unless there is reason to believe that such a result could not have been intended. The only limitations on the exercise of the powers in Reg 7 (1) are that they may only be exercised for the purposes stated and that no order in terms thereof may be inconsistent with the regulations. And as to (b), without derogating in any way from the importance of the freedom of assembly, but taking into account matters

such as the nature and purpose of the powers, the status of those on whom they were conferred, and the fact that they were conferred and are to be exercised in a declared state of emergency, there is every reason to believe that the intention was to constitute the Commissioner the sole arbiter of the necessity or expediency of exercising his powers. What was said in the Natal Newspapers case (supra) in connection with subregs (a) and (b) applies with equal force to subregs (bA) and (bB). At 1125 G-H of the judgment it was said:

> "Now, one has only to look at the topics listed in reg 7(1)(a) and (b) to realise that they are pre-eminently the sort of precautionary measures that may well have to be adopted during any state of emergency. By their very nature one would also not expect the State President to take these measures himself but to leave the actual details and implementation to others so authorised."

The following passage appears at 1126 F:

> "But, even if he [the Commissioner] was given an unfettered discretion to take executive action, this is so obviously a matter for

> delegation, in circumstances where the delegatus is enjoined to act on the exigencies of the moment, that such a discretion, in our view, is reasonably implied."

It follows that the court a quo erred in its conclusion that the appellant's decision to prohibit the meeting was objectively justiciable. This does not mean, of course, that it could not be assailed on the grounds stated in the Shidiack case (supra). But, although all these grounds were relied upon in the respondent's founding affidavit (deposed to by Mr W A Hofmeyr) Mr Gauntlett expressly abandoned them in this court. His decision to do so was a proper one for there was not a shred of evidence to substantiate Mr Hofmeyr's allegation that the appellant had failed to apply his mind to the correct criteria for a prohibition, had taken irrelevant or extraneous factors into account, and had acted grossly unreasonably, mala fide and for an ulterior purpose. There is no need for me to deal with the factual

allegations in his affidavit and in the supporting affidavits but I do wish to say that it cannot be inferred from anything said therein that the appellant's decision to prohibit the meeting was tainted in the way in which Mr Hofmeyr alleged it to have been. The impression created in the founding affidavit was that every meeting which the respondent had organised in the past had been peacefully conducted. What the affidavit did not reveal, but what was revealed in the appellant's opposing affidavit, is that some of its meetings had been marked by violence, damage to property, and even murder.

Since, for these reasons, the appeal must succeed it is not necessary to deal with the other submissions made on appellant's behalf or even to state what they were. But since costs will be awarded to the appellant there are two matters affecting the costs which have to be raised. Mr Griessel and Mr Louw who prepared the original heads of argument for the

appellant were not available for the hearing of the appeal. Mr Visser and Mr Le Roux, who took their place, elected to file their own heads and discarded the original set. There is no reason why the respondent should pay the costs of the discarded set.

Then there is Mr Visser and Mr Le Roux's own heads of argument. There is a growing tendency in this court for counsel to incorporate quotations from the evidence, from the court a quo's judgment and from the authorities on which they rely, in their heads of argument. I have no doubt that these quotations are intended for the convenience of the court but they seldom serve that purpose and usually only add to the court's burden. What is more important, is the effect which this practice has on the costs in civil cases. Although counsel himself is not allowed a separate fee for the preparation of heads of argument his instructing attorney and his opponent's instructing attorney are both entitled to fees in respect thereof, and their fees

are directly related to the length of the heads. Superfluous matter should therefore be omitted and, although all quotations can obviously not be eliminated they should be kept within reasonable bounds. Counsel will be well advised to bear in mind that Rule 8 of the Rules of this court requires no more than the main heads of argument.

In the present case Mr Visser and Mr Le Roux's heads of argument comprise 85 pages and their list of authorities 7 further pages. The heads abound with unnecessary quotations from the record and from the authorities. They reveal, moreover, another disturbing feature which is that the typing on many pages does not cover the full page. Page 10 e g covers only 17 of the available 40 lines, page 17 only 11, page 81 only 7 and page 23 only 4 lines. This is quite improper in view thereof that the number of pages forms the basis of the attorney's fees for perusing the heads. Had the heads been properly drawn and typed I do not think more

than 20 pages would have been required. The costs cannot be permitted to be increased in this manner and an order will therefore be made to ensure that the respondent does not become liable for more than what was reasonably necessary.

The following order is made:

1. The appeal is allowed.

2. The order of the court a quo is set aside. Substituted for it is an order that the application is dismissed with costs, including the costs of two counsel.

3. The respondent is directed to pay the costs of appeal which shall include the costs of two counsel but

   (a) shall not include any costs relating to the heads of argument prepared by Mr Griessel and Mr Louw, and

   (b) shall be taxed on the basis that the heads of argument prepared by Mr Visser and Mr Le Roux comprise 20 pages excluding the list of authorities.

4. Appellant is directed to pay the wasted costs occasioned by Mr Griesel and Mr Louw's heads of argument.

J J F HEFER JA.

RABIE ACJ)
JOUBERT JA)
EKSTEEN JA) CONCUR.
VILJOEN AJA)