

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER.....First Appellant

THE COMMISSIONER OF THE SOUTH
AFRICAN POLICE.....Second Appellant

and

THE ARGUS PRINTING AND PUBLISHING
COMPANY LIMITED.....First Respondent

SOUTH AFRICAN ASSOCIATED NEWSPAPERS
LIMITED.....Second Respondent

CORAM: Corbett CJ, Botha, Smalberger, Vivier et
F H Grosskopf JJA.

DATE OF HEARING: 10 November 1989

DATE OF JUDGMENT: 28 November 1989

J U D G M E N T

CORBETT CJ:

This appeal is concerned with the legal validity
of an order made by second appellant, the Commissioner of
the South African Police ("the Commissioner"), on 8 January

1987 in terms of the powers vested in him by reg 7(1) of the Regulations published under the Public Safety Act 3 of 1953' ("the Act") by Proc R109 of 1986, as amended.

In terms of sec 2 of the Act, as amended from time to time, the State President is empowered in certain circumstances to declare by proclamation that a state of emergency exists within the Republic of South Africa or within an area within the Republic. Unless withdrawn such a declaration remains in force for not more than twelve months, but may be renewed by proclamation at or before the expiration of the period of twelve months. By sec 3 of the Act the State President is further empowered to promulgate regulations (generally referred to as "emergency regulations") for, in general, dealing with the state of emergency.

In July 1985, acting in terms of these sections of the Act, the State President declared a state of emergency

in certain areas (comprising magisterial districts) within the Republic and promulgated a set of emergency regulations. In March 1986 the proclamation of a state of emergency was withdrawn and the regulations lapsed. In mid-1986, however, a state of emergency was again declared by Proc R108 of 12 June 1986 and by Proc R109 of the same date a new set of emergency regulations was promulgated. These included reg 7(1) which provided (in its original form) 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 an 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 or 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 of 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."

One of the prescribed methods of promulgation of an order by the Commissioner, such as was referred to in this sub-regulation, was by publication by notice in the Government Gazette (reg 8(a)). The same set of regulations contained provisions relating to the prohibition (without the Commissioner's permission) of the making of any film, photograph or drawing of public disturbances, of persons present at such disturbances or of the conduct of members of "a Force" (which included the South African Police, the Railways Police, the South African Defence Force and the Prisons Service) with regard to the maintenance of the safety of the public or of the public order or for the termination of the state of emergency (reg 9); to the penalization of making, possessing or disseminating

subversive statements (reg 10); to the seizure of copies of a publication considered to contain subversive statements or, other information detrimental to the safety of the public, the maintenance of the public order or the termination of the state of emergency (reg 11); and to, in effect, the temporary closing down of publications, including newspapers and magazines, considered to contain or to have contained material of a subversive nature and the seizure and confiscation of such publications (reg 12). Failure to comply with any order issued in terms of the regulations was made an offence (reg 13), punishable by a fine not exceeding R20 000 or imprisonment for a period not exceeding ten years or to such imprisonment without the option of a fine (reg 14). In reg 1 there was a fairly lengthy definition of the term "subversive statement".

During their currency these regulations were amended from time to time. In this regard attention may be

directed to Proc R225 of 28 November 1986 and Proc R224 of 11 December 1986. In terms of Proc R225 reg 7(1) of the original regulations was amended by the introduction of the words -

".... for the purpose of the safety of the public, the maintenance of public order or the termination of the state of emergency"

as a qualification upon the power of the Commissioner to issue orders; and, in addition, there were inserted after paragraph (b) of reg 7(1) two new paragraphs, numbered (bA) and (bB), dealing, broadly speaking, with the prohibition and regulation of gatherings. Under Proc R224 of 11 December 1986 a new set of regulations was promulgated, which dealt generally with the control of publications, the presence of journalists and the taking of photographs at unrest situations, the making, publishing, etc of subversive statements (defined comprehensively in reg 1), the seizure

of certain publications or recordings and the temporary prohibition of the production, importation or publication of certain periodicals. The regulations further provided that the contravention of certain of the regulations constituted an offence, punishable by a fine not exceeding R20 000 or imprisonment for a period not exceeding 10 years or to that imprisonment without the option of a fine. In the definitions contained in reg 1 the regulations promulgated by proc R109 of 12 June 1986, as amended, were styled the "Security Regulations". (It will henceforth be convenient to so refer to them; and to call the regulations promulgated under proc R224 the "Media Regulations".) In reg 10 of the Media Regulations the Security Regulations were amended by the definitions of "subversive statement", "publication" and "statement", appearing in the Security Regulations, as well as regs 7(1)(c), 9, 10, 11 and 12 of the Security Regulations, being deleted therefrom.

On 8 January 1987 there was published in Government Gazette no 10584 of that date a notice containing an order issued by the Commissioner, purportedly under the powers vested in him by reg 7(1) of the Security Regulations, in the following terms:

"1. No person who holds office as editor of a newspaper, magazine or other periodical or who otherwise has control over the matter which may be published in that periodical or which may be distributed in or as an addendum to such periodical, shall allow, permit or direct, or authorize any other person to allow, permit or direct, the publication in that periodical or the distribution in or as an addendum to that publication of any advertisement or report calculated -

(a) to improve or to promote the public image or esteem of an organization which is an unlawful organization under the Internal Security Act, 1982 (Act 74 of 1982); or

(b) to commend, to defend, to explain

or to justify any action, policy or strategy of such an organisation, of resistance against or subversion, of the authority of the State.

2. This order shall apply in the Republic including any territory declared under section 26 of the National States Constitution Act, 1971 (Act 21 of 1971), to be a self-governing territory."

In reaction to this order first respondent, the Argus Printing and Publishing Company, and second respondent, South African Associated Newspapers Limited - each of them being the proprietor and publisher of a number of leading newspapers circulating in the Republic - filed an urgent application in the Witwatersrand Local Division, citing as respondents the Minister of Law and Order (first appellant before us) and the second appellant and claiming, inter alia, an order declaring the order of the Commissioner of 8 January 1987 (quoted above) to be void and of no force and effect in law. In the same proceedings a similar

declaration of nullity was sought in respect of a notice promulgated by the Commissioner simultaneously (ie on 8 January 1987) in terms of powers vested in him by par (a)(ix) of the definition of "subversive statement" appearing in reg 1 of the Media Regulations.

The matter came before Daniels J, initially on 14 January 1987. The application was then not ripe for hearing and a postponement was granted. Thereafter Daniels J heard full argument on the case on 23 and 26 January 1987 and delivered judgment on 29 January 1987. The learned Judge held that the order under reg 7(1) of the Security Regulations was invalid and made a declaratory order to that effect. The notice issued in terms of par (a)(ix) of the definition of "subversive statement" appearing in reg 1 of the Media Regulations was, on the other hand, held to be valid and the declaration sought in regard thereto was refused. The appellants were ordered to pay respondents'

costs, save that in respect of the hearing on 14 January 1987 no order as to costs was made.

With leave granted by this Court (it having been refused below) appellants now appeal against that portion of the judgment and order of the Court a quo in terms whereof the order of the Commissioner of 8 January 1987 issued under reg 7(1) of the Security Regulations was declared invalid. The question of the validity of the notice under the Media Regulations does not arise on appeal.

It is the Commissioner's case that he was empowered to issue the order in question either by reg 7(1)(b)(ii) or by reg 7(1)(d) of the Security Regulations. In the Court below it was held that neither of these provisions provided a valid basis for the order. As regards reg 7(1)(b)(ii), Daniels J focused on the words "in any particular area" (Afrikaans text: "in n bepaalde gebied") appearing in that sub-paragraph and, having considered them in

their context, concluded as follows:

"The only logical conclusion to be reached is that the words "any particular area" as used in sub-regulation 7(1)(b)(ii) must mean an area to be singled out and distinguished from others and in that context to mean at least something less than the Republic of South Africa. It seems to me that the State President intended to authorise the Commissioner to deal with contingencies which may arise from time to time in a particular area and not to give him carte blanche to issue such orders which would be effective throughout the Republic."

It followed, therefore, that by decreeing that the order should apply in the whole of the Republic, including the self-governing territories, the Commissioner exceeded the powers granted to him by reg 7(1)(b)(ii). The learned Judge added these further remarks, which must be regarded as obiter:

" However, I should add that I hold the prima facie view that the order is also void by reason of the fact that I am not convinced that it was intended that sub-regulation (1)(b)(ii) should be utilised for the purpose of imposing some or other form of censorship on the media.

It is of some importance to note, firstly, that regulation 7(1)(c), which, to a limited extent, dealt with censorship and the prohibition and control of comment and news concerning the action and conduct of the Force, was deleted on 11 December 1986. A new set of Regulations were promulgated, specifically dealing with censorship and the control of the media. It appears to me inconsistent with the scheme of the Regulations, and again reading sub-regulation 7(1)(b)(ii) in context to extend to the Commissioner the power to exercise some form of control over the media in terms of (b)(ii) where the State President specifically promulgated a new set of Regulations to cater for that particular contingency.

It may, however, be argued that the terms of sub-regulation 1(b)(ii) are wide

enough to cover the situation envisaged."

In regard to the other possible basis for the order, reg 7(1)(d), Daniels J, following the decision of the Full Bench of the Natal Provincial Division in the case of Natal Newspapers (Pty) Ltd and Others v State President of the Republic of South Africa and Others 1986 (4) SA 1109 (N), at 1126 J - 1128 B, held that reg 7(1)(d) was ultra vires and could, therefore, not provide the necessary foundation for the issue of the order.

In reg 16(3) of the Security Regulations it was provided as follows:

"(3) No interdict or other process shall issue for the staying or setting aside of any order, rule or notice issued under these Regulations or any condition determined thereunder, and no such order, rule, notice or condition shall be stayed on the grounds of an appeal against a conviction under these Regulations."

Daniels J held that this so-called "ouster clause" did not preclude the Court from pronouncing upon the validity of an order made by the Commissioner under reg 7(1) of the Security Regulations, even where the order was challenged on the ground that it was invalid because of vagueness or uncertainty.

On appeal before us the issues raised before Daniels J - and some others - were fully debated. While I agree that the words "any particular area" ("n bepaalde gebied") could not have been intended to have reference to the whole of South Africa (for reasons which I shall mention later) and while I think that there is much to be said for the view that reg 7(1)(d) was ultra vires (it was, incidentally, omitted from the new set of Security Regulations promulgated on 11 June 1987), I do not find it necessary to evaluate completely the grounds upon which Daniels J held the Commissioner's order to be invalid.

This is because, in my opinion, neither reg 7(1)(b)(ii) nor reg 7(1)(d) was ever intended to empower an order such as that made by the Commissioner on 8 January 1987.

As I have said, the words "any particular area" ("n bepaalde gebied") appearing in reg 7(1)(b)(ii) - and for that matter in other sub-paragraphs of reg 7(1)(a) and (b) - cannot be interpreted to mean the whole of the Republic. It would seem that to some extent (it is not necessary to decide how far) paragraphs (a) and (b) of reg 7(1) must be read together. Thus, it seems unlikely that the Commissioner was empowered to issue an order (in terms of reg 7(1)(a)(i)) relating to "the demarcation of areas" as an end in itself. Clearly the intention was to empower the Commissioner to so demarcate areas in order to enable him to exercise the powers accorded him under, for instance, reg 7(1)(a)(ii) or (iii) or reg 7(b)(i) or (ii) or (iii) or (iv) or (v) in respect of a particular area or particular areas

of those so demarcated. This alone indicates that a particular area would not comprise the whole of the Republic. Certain of the sub-paragraphs of reg 7(1)(a) and (b) reinforce this view. Thus, it seems unlikely, to say the least, that the regulation was intended to empower the Commissioner to issue an order "closing off" an area comprising the whole of the Republic in terms of reg 7(1)(a)(ii); or an order prohibiting any person from bringing into the Republic any specified object or article, in terms of reg 7(1)(b)(i); or an order prohibiting throughout the Republic any person from being outside the boundaries of his residential premises at any time, in terms of reg 7(1)(b)(iii); or an order prohibiting, in effect, a peregrinus from entering the Republic, in terms of reg 7(1)(b)(v). Accordingly, in my view, "any particular area" ("n bepaalde gebied") in reg 7(1) referred not to the whole of the Republic, but to a demarcated area within the Republic.

This view has some bearing on the validity of the order of 8 January 1987. In the first place, assuming that the control of what is published in the Press (by which term I include newspapers, magazines and other publications) was proper subject-matter for an order in terms of reg 7(1)(b)(ii), it means that the order of 8 January 1987, which purported to apply to the whole of the Republic, did not relate to a "particular area" and was accordingly ultra vires as far as that sub-paragraph was concerned. Secondly, this interpretation of "particular area" indicates, to some extent, that it is improbable that reg 7(1)(b)(ii) was intended to cover measures to control what is published in the Press. Many newspapers, magazines and other publications have a Republic-wide circulation and a prohibition such as that contained in the order of 8 January 1987 or a similar measure to control the Press would be largely ineffectual if confined, as it would have to be, to

a particular area or areas.

There is, however, a more fundamental reason why, in my opinion, reg 7(1)(b)(ii) cannot be construed to empower what I have, for convenience, called the control of that which is published in the Press. And this reason applies to reg 7(1)(d) as well (assuming its validity). Both reg 7(1)(b)(ii) and reg 7(1)(d) were cast in extremely wide, general terms. The former referred to an order whereby any person was prohibited from performing any act or carrying on any activity specified in the order in any particular area. At the time when the order of 8 January 1987 was issued this had, of course, to be read subject to the provision in the opening words of reg 7(1) - introduced by Proc R225 of 28 November 1986 - to the effect that the order had to be for the purpose of the safety of the public, the maintenance of public order or the termination of the state of emergency. The latter (reg 7(1)(d)) referred to

an order relating to any other matter the regulating, control or prohibition of which was in the opinion of the Commissioner necessary or expedient with a view to the safety of any member of the public or the maintenance of the public order or in order to terminate the state of emergency.

Ignoring, for the moment, the problem arising from the words in "any particular area", the provisions of reg 7(1)(b)(ii), literally interpreted, were certainly wide enough to cover an order controlling what is published in the Press, such as the order of 8 January 1987; and this also applies to the wide language of reg 7(1)(d). There were, however, in the Security Regulations, as originally promulgated, certain specific and, on the whole, circumscribed provisions impinging on what the Press might publish. These were to be found in reg 7(1)(c) - quoted above - empowering the Commissioner to issue orders

relating, inter alia, to the control, regulation or prohibition of the distribution of comment on or news in connection with the conduct of a Force or any member of a Force regarding the maintenance of the safety of the public, etc; and in regs 9, 10 and 12, the general import of which has been described above. And here it is to be noted that certain powers of proscription granted, for example, in terms of regs 11 and 12 were vested in the Minister of Law and Order and not in the Commissioner. Were regs 7(1)(b)(ii) and 7(1)(d) to be interpreted to cover orders dictating what might be published in the Press, then, bearing in mind the wide and uninhibited language of those sub-regulations, the specific provisions of regs 9, 10 and 12 would pro tanto have been rendered redundant. Moreover, whatever limitations or safeguards might have been contained in regs 9, 10 and 12 would have been overridden by the generality of the powers conferred by regs 7(1)(b)(ii) and

7(1)(d); and powers specifically vested in the Minister of Law and Order would have been exercisable by the Commissioner. Such an interpretation would consequently, in my opinion, have led to glaring absurdity and a result manifestly contrary to the intention of the Legislature, as shown by the context. There is thus good ground for departing from the literal meaning of the words used (see Protective Mining & Industrial Equipment Systems (Pty) Ltd (Formerly Hampo Systems (Pty) Ltd) v Audiolens (Cape) (Pty) Ltd 1987 (2) SA 961 (A), at p 991 G - 992 A and the authorities there cited). Furthermore, the well-known principle that, if possible, a statute should be construed in such a way as not to render superfluous any clause, sentence or word (see S v Weinberg 1979 (3) SA 89 (A), at p 98 D-G) points in a similar direction. There are thus very cogent grounds for limiting the generality of the language used in reg 7(1)(b)(ii) and reg 7(1)(d) and for confining

the application of those sub-regulations to spheres other than the control of what is published by the Press, and for that matter by other persons too.

By the time that the order of 8 January 1987 was issued the Security Regulations had been amended by the Media Regulations in the manner already indicated. The intention underlying these amendments seems to have been to collect in the Media Regulations all the prohibitions and controls affecting what may be published. The arguments against reg 7(1)(b)(ii) and reg 7(1)(d) being so interpreted as to give the Commissioner carte blanche to prohibit or control what may be published in the Press would seem to apply with even greater force to the position as it was after these amendments.

It is not necessary in this case to define with any degree of precision what the ambit of the powers conferred by reg 7(1)(b)(ii) and reg 7(1)(d) was. It is

sufficient to hold, as I do for the reasons stated, that they did not include the competence to make an order, such as that of 8 January 1987, prescribing what may or may not be published in newspapers, magazines and other periodicals. The order of 8 January 1987 was accordingly ultra vires.

It was not argued by appellants' counsel that the ouster clause (reg 16(3)) precluded the Court from setting aside the order of 8 January 1987 upon the ground that it was ultra vires for this reason. Relying upon the majority decision of this Court in the case of Staatspresident en Andere v United Democratic Front en 'n Ander 1988 (4) SA 830 (A), it was merely contended that reg 16(3) prevented the Court nullifying the order on grounds of vagueness or uncertainty.

The appeal is accordingly dismissed with costs, including the costs of two counsel


M M CORBETT

BOTHA	JA)	
SMALBERGER	JA)	
VIVIER	JA)	CONCUR
F H GROSSKOPF	JA)	