

SOUTH AFRICA / JUDGMENT

**Omar and Others v Minister of Law and Order and
Another; Fani and Others v Minister of Law and Order
and Others; State President and Others v Bill (68/87)
[1987] ZASCA 66; [1987] 4 All SA 556 (AD) (29 June 1987)
[1987] ZASCA 66**

COURT

Supreme Court of Appeal

BEFORE

Rabie, Joubert, Viljoen, Hoexter, Boshoff

CASE / FILE NUMBER

68/87

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IN THE SUPREME COURT OF SOUTH AFRICA

1987-06- 29 (APPELLATE DIVISION)

In the matter between:

(1) ABDULLAH MOHAMED OMAR 1st Appellant

HOWARD SIKOLAKE MARAWU 2nd Appellant

MARCUS CHINNOSAMY SOLOMON 3rd Appellant

LESLIE ANDREWS 4th Appellant

DERRICK RABINDRANATH NAIDOO 5th Appellant

NEVILLE NAIDOO 6th Appellant

and

THE MINISTER OF LAW AND ORDER 1st Respondent

THE MINISTER OF JUSTICE 2nd Respondent

OFFICER COMMANDING,

VICTOR VERSTER PRISON 3rd Respondent

THE STATE PRESIDENT 4th Respondent

THE COMMISSIONER OF POLICE 5th Respondent

(2) MARJORIE FANI & OTHERS Appellants

THE MINISTER OF LAW AND ORDER 1st Responder

THE MINISTER OF JUSTICE 2nd Responder

THE OFFICER COMMANDING

ST ALBAN'S PRISON 3rd Responder

NORTHEND PRISON 4th Respondent

(3) THE STATE PRESIDENT 1st Appellant

THE GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA 2nd Appellant

THE MINISTER OF LAW AND ORDER 3rd Appellant

MARY CAMERON BILL Respondent

2 Coram: RABIE ACJ, JOUBERT, VILJOEN, HOEXTER JJA et

BOSHOFF AJA.

Heard: Delivered:

3 March 1987

JUDGMENT RABIE ACJ:

These three appeals were heard on the same day and can conveniently be dealt with in the same judgment. All three of the cases are concerned with the detention of persons in pursuance of regulations made by the State President in terms of the Public Safety Act, 1953 (Act No. 3 of 1953). The judgments given in the Courts below in the first and third of the cases have been reported: see Omar and Others v.

Minister/ 3.Minister of Law and Order and Others 1986(3) SA 306(C) and Bill v. State President and Others 1987(1) SA 265 (W).On 21 July 1985 the State President, acting in terms of sec. 2(1) of the aforesaid Public Safety Act, 1953 (hereinafter referred to as "the Act"), declared, in Proclamation R 120 of 1985, the existence of a state of emergency in a number of areas, including those in which the detainees in Fani's case resided. On the same date the State President, acting in terms of the powers vested in him by sec. 3(1)(a) of the Act, issued Proclamation R 121 of 1985, which contained regulations which were to apply in the said areas. On 26 October 1985, in Proclamation R 200 of 1985, the State President, acting in terms of sec. 2(1) of the Act, declared the existence of a state of emergency

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in a further number of areas, and the next day, in

Proclamation R201 of 1985, he declared that the aforesaid

regulations would also apply in these other areas as from 26 October 1985. One of these areas was the magisterial district of the Cape, in which the applicants

in Omar's case resided.

Sec. 2 of the Act (reading "State

President" for "Governor-General" and "Republic" for

"Union") provides as follows:

"2. (1) If in the opinion of the State

President it at any time appears

that -

(a) any action or threatened action

by any persons or body of persons in the Republic or any area within the Republic is of such a nature and of such an extent that the safety of the public, or the maintenance of public order is seriously threatened thereby; or (b)/.....

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(b) circumstances have arisen in the Republic or any area within the Republic which seriously threaten the safety of the public, or the maintenance of public order, and (c) the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order,

he may, by proclamation in the Gazette, declare that as from a date mentioned in the proclamation which date may be a date not more than four days earlier than the date of the proclamation, a state of emergency exists within the Republic or within such area, as the case may be.

(2) No proclamation issued under sub-section (1) shall remain in force for more than twelve months: Provided that nothing in this sub-section contained shall be construed as precluding the issue of another proclamation in respect of the same area at or before the expiration of the said period of twelve months. (3) The State President may at any time

and in like manner withdraw any proclamation

issued under sub-section (1)".

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The declaration of a state of emergency

by the State President by Proclamation R 120 of 1985 read as follows:

"Whereas in my opinion it appears that circumstances have arisen in the areas mentioned in the Schedule which seriously threaten the safety of the public and the maintenance of public order, and the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public and to maintain public order,

Therefore I, in terms of section 2(1) of the Public Safety Act, 1953 (Act 3 of 1953), hereby declare that as from 21 July 1985 a state of emergency exists within the areas mentioned in the Schedule.

The declaration of a state of emergency by Proclamation R 200 of 1985 was in the same terms as those/

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those contained in Proclamation R 120 of 1985, save

that the emergency was declared to exist as from 26 October 1985.

Sec. 3(1)(a) of the Act empowers the State President to make regulations in an area in which a state of emergency has been declared. It provides as follows (reading "State President" for "Governor-General")

"3. (1)(a) The State President may in any area in which the existence of a state of emergency has been declared under section two, and for as long as the proclamation declaring the existence of such emergency remains in force, by proclamation in the Gazette, make such regulations as appear to him to be necessary or expedient for

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providing for the safety of the public,

or the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency."

Regulation 3 of the regulations which were of application at the time of Fani's case and Omar's case read, in so far as relevant, as follows:

"3. (1) A member of a 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 maintenance of public order or the safety of the public or that person himself or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, (

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cause to be detained, any such person in custody in a prison.

(2) No person shall be detained in terms of subregulation (1) for a period exceeding 14 days from the date of his detention, unless that period is extended by the Minister in terms of subregulation (3).

(3) The Minister may, without notice to any person and without hearing any person, by written notice signed by him and addressed to the head of a prison, order that any person arrested and detained in terms of subregulation (1), be further detained in that prison for the period mentioned in the notice, or for as long as these Regulations remain in force.

(9)(a) The Minister of Justice may make rules to regulate the detention of persons in terms of this regulation.

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(10) No person, other than the Minister or a person acting by virtue of his office in the service of the State -

(a) shall have access to any person detained in terms of the provisions of this regulation, except with the consent of and subject to such conditions as may be determined by the Minister or the Commissioner of the South African Police; or

(b) shall be entitled to any official information relating to such person or to any information of whatever nature obtained from such person."

Subregulation (3), in the form quoted above,

was substituted for the subregulation as originally promulgated by Proclamation R 207 of 1985 (dated 31 October 1985), which made the new subregulation

retroactive/

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retroactive to 21 July 1985 in the case of the regulations promulgated by Proclamation R 121 of 1985, and to 26 October 1985 in the case of the regulations promulgated by Proclamation R 201 of 1985. The State President is empowered to make regulations with retrospective effect by sec. 3(2) (b) of the Act. Regulation 3(3) as originally promulgated did not contain the words "without notice to any person and without hearing any person", nor the words "or for as long as these Regulations remain in force."

The Minister of Justice, acting in terms of

regulation 3(9)(a), made certain rules relating to

the detention of persons detained in terms of regulations.

Rule/...

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Rule 5(1) and (3) of these rules (which were published in GN 2483 of 26 October 1985) provided as follows:

"5(1) No person detained under the Regulations shall during his detention be visited by any person, except with the permission of the person in command of the prison in question, acting with the concurrence of the Commissioner of the South African Police or any person acting on his authority: Provided that if a legal representative desires to visit such a detainee, the permission of the

Minister of Law and Order or the Commissioner of the South African Police shall be obtained for such a visit.

(2)

(3) The person in command of the prison shall ensure that no physical contact takes place between the detainee and a visitor and that the interview between the detainee and the visitor takes place within sight and hearing of a member of the Prisons Service."

Fani's case was an earlier case than

Omar's/ 13 Omar's case, but it will be convenient to deal with the latter case first.

Omar's case

The applicants in this case (now the appellants) were arrested during the last week of October 1985 in terms of reg. 3(1) of the aforesaid regulations. Thereafter, during the first week of November 1985, the Minister of Law and Order (herein-after referred to simply as "the Minister"), acting in terms of reg. 3(3), ordered that they be further detained for as long as the regulations remained in force. It is common cause that they were not notified of the Minister's intention to order their further

detention, and, also, that they were not given a

hearing/ 14 hearing of any kind before their further detention was ordered. They contended in the Court a quo, as they did in this Court, that reg. 3(3) was ultra vires the powers of the State President and that their detention was, therefore, invalid. They contended, also, that reg. 3(10) and rule 5 were invalid. As to the latter contention, it should perhaps be said that the appellants were not, in fact, denied access to their attorney. Their complaint was that they had to ask for permission to see him. They also complained about having to consult with him within sight and hearing of a member of the Prisons Service as provided for in rule 5(3). As

a/ 15 a result of their objection, they were allowed to consult with the attorney within sight, but not within hearing, of a member of the Prisons Service. Before dealing with the argument that reg. 3(3) was ultra vires the powers of the State President, I should say that counsel's first argument regarding this regulation was that it merely relieved the Minister of the obligation to give a person whom he intended detaining an opportunity of making oral representations to him,

and not of the obligation to allow such person to make written representations to him. Reg. 3(3), it was said, merely provided that the Minister could act "without hearing any person", and

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not that he could act without first having considered representations made to him in writing. The same argument was advanced in the Court a quo. It would seem, however, that counsel was rather doubtful of the validity of the argument. (See 1986(3) SA at 309 I-310 B.) In this Court he indicated that he now has rather more confidence in the argument than he had in the Court a quo. I think, however, that the diffidence with which the argument was advanced in the Court a quo was wholly justified. The same argument was advanced in the Court below in Fani's case. The Court (per Zietsman J, with whose judgment Cloete JP and Eksteen JA agreed) rejected the argument, and in the course of his judgment Zietsman J said:

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"... the words used must be interpreted in the context in which they are used. The phrase used here is 'without notice to any person and without hearing any person'. If the Minister is not obliged to give notice to the detainee of his intention to consider an extension of his period of detention I cannot see how it can be intended that he must nevertheless furnish the detainee with the opportunity of submitting representations to him before he can decide upon the possible extension of his detention period. In my opinion the words used in the subregulation, taken in their context, are unambiguous and mean that the need to observe the audi alteram partem rule is entirely excluded."

This was, in my opinion, a short and

effective answer to the argument. I would merely add that normally when one says that someone is entitled

to be heard before a decision which may be prejudicial

to/ 18 to him is taken, one does not refer only to the right to be heard in the literal sense of that word, but also to the right of making written representations. With regard to the appellants' argument that reg. 3(3) was invalid for excluding the need to observe the audi alteram partem rule, I find myself, in view of the considerations mentioned below, in agreement with the judgment of Vivier J, with which Munnik JP agreed. Sec. 2(1) of the Act, quoted above, states when a state of emergency may be declared. It will be observed that the decision as to whether circumstances in the country are such that a state of emergency should be declared, is that of the State President -

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and of the State President alone. It is important to note, too, that such a declaration may be made only if the State President is of the opinion that "the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or the maintenance of public order." This indicates that Parliament contemplated that the need to ensure the safety of the public or to maintain public order might necessitate the taking of extra-ordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by individuals.

Sec. 3(1)(a) of the Act, quoted above, confers on the State President the power to make regulations/

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regulations in any area in which a state of emergency has been declared under sec. 2. It authorizes him, as stated in sec. 3(1)(a), to make such regulations "as appear to him to be necessary or expedient" to achieve the purposes stated in the section. The power is a most extensive one. It entitles the State President to prescribe the methods or means to be employed for the achievement of the purposes stated in the section. See the judgment of this Court in *State President and Others v. Tsenoli* 1986(4) SA 1150 at 1182 C-E. It gives him, as was said in that case (at 1182 E-F), quoting from the judgment of Lord Radcliffe in *Attorney-General for Canada and Another*

v. Hallett & Carey Ltd

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and *Another* 1952 AC 247 at 448, "the amplest possible discretion in the choice of method." It will be observed that the power which sec. 3(1)(a) confers on the State President to make regulations for the achievement of the purposes stated in the section is a power not only to make such regulations as he considers to be necessary for those purposes, but also to make such regulations as appear to him to be expedient for achieving the said purposes. The test of what is expedient is obviously a less stringent one than that of what is necessary. This illustrates how wide the discretion is which the Act confers on the State President. It is clear from the terms of the section that the State President is empowered to make such

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regulations for achieving the purposes mentioned in the section as appear to him, i.e. in his subjective judgment, to be necessary or expedient. It follows from this that it is not open to a Court, when considering a regulation, to substitute its assessment of what would be necessary or expedient to achieve the purposes mentioned in the section for that of the State President and to hold that the regulation is invalid because the State President could, in its judgment, have dealt with the matter in issue in another, less harsh way. This does not mean, of course, that the exercise by the State President of the powers conferred upon him by the Act is immune from attack. It need hardly be said that

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he must apply his mind to whatever matter may be in issue, that he must act bona fide and that he must exercise the powers conferred on him by sec. 3(1)(a) of the Act for the purposes mentioned in the section. See Tsenoli's case, supra, at 1187 B-C. Counsel for the appellants contended that reg. 3(3) was ultra vires because it was unrelated to the tenor and policy of the Act, and served none of the purposes mentioned in sec. 3(1)(a) of the Act. I do not agree with this contention. It is true, as stated above, that the State President must, when he makes regulations, do so with a view to achieving the purposes mentioned in sec. 3(1)(a), but, as I

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indicated above, the Act confers upon him the power to decide on the means and methods to be adopted to achieve the said purposes. Furthermore, and in any event, I do not think it can be said that reg. 3(3) is not related to the said purposes.

Counsel argued, next, that reg. 3(3) must be held to be ultra vires because it is so grossly unreasonable that it must be concluded that Parliament

could not have authorized it, wide though the powers

are which the Act confers on the State President. The

regulation, counsel submitted, quoting from a passage

in *Kruse v. Johnson* (1898) 2 QBD 91 which was approved

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of in *Rex v. Abdurahman* 1950(3) SA 136 (A) at 143 C-E, involves such "oppressive and gratuitous interference" with the rights of the subject as can find "no justification in the minds of reasonable men", and that it should accordingly be said that Parliament could not have intended to give the State President authority to make it. Counsel also referred us to the judgment of Van den Heever JA in *Rex v. Pretoria Timber Co. (Pty) Ltd and Another* 1950(3) SA 163 (A) at 182 A. There is no doubt that reg. 3(3) is a drastic provision, but I nevertheless find myself unable to accede to counsel's argument. I am of the opinion that when proper regard is had to the fact that the regulation was made as an emergency measure which was to be of

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application in an emergency situation in which - to use the words of sec. 2(1)(c) of the Act - "the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public or to maintain public order", it cannot be said that the regulation is so grossly unreasonable as to justify the conclusion that Parliament could not have intended to authorize it.

Counsel contended also, referring to *R v. Slabbert and Another* 1956(4) SA 18(T) at 21 G-H and *R v. Heyns and Others* 1959 (3) SA 634 (A) at 637 D-E (see also *Mandela v. Minister of Prisons* 1983 (1) SA 938 (A) at 959 G-A), that the audi alteram partem rule embodies a fundamental right and that a subordinate

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legislator - such as the State President in the present case - cannot deprive the subject of such a right unless he has expressly, or by necessary implication, been empowered by the enabling statute to do so. The submission contains a correct statement of the law, but I cannot accept the argument that sec. 3(1)(a) of the Act does not empower the State President to make reg. 3(3). It is, as I said above, an emergency measure that was intended to apply in an emergency situation where "the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order" (sec. 2(1)), and in my opinion it falls within the power

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given to the State President to make such regulations as appear to him to be necessary or expedient to achieve the ends mentioned in sec. 3(1)(a) of the Act. Counsel's final argument with regard to reg. 3(3) is founded in a passage on the affidavit made by the State President in which he states why he amended reg. 3(3) - a matter to which I referred above - and made it retrospective as set out in Proclamation R 207 of 1985. The passage (which is quoted in the judgments given in the Court a quo but which I repeat for the sake of easy reference) read as follows:

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"Ek was van oordeel dat onder gegewe omstandighede voldoende feite vasgestel mag wees of omstandighede mag bestaan om die voortgesette aanhouding van 'n persoon te magtig sonder dat hy die geleentheid gegee sou word om gehoor te word. Ek is verder van mening dat die bekendmaking van inligting aan 'n aangehoudene met betrekking tot die rede vir sy verdere aanhouding tot gevolg mag hê dat die bron van die inligting bekend mag word, en dit sal na my mening nie in belang van die veiligheid van die publiek, die handhawing van die openbare orde of die beëindiging van die noodtoestand wees nie."

The argument is that this passage shows that the State President did not properly apply his mind to the matter in issue, or that he had regard to improper or irrelevant considerations, or that he acted with

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gross unreasonableness. The result is that reg. 3(3) is invalid. Thus the argument. The first sentence of the passage shows, as counsel correctly said, that the State President realized that there might be individual cases where the exclusion of the audi alteram partem rule would not be necessary, but I do not agree with the submission that the

State President's decision nevertheless to make reg.

that 3(3) in the form/he did, shows that he acted improperly

in the respect, or respects, suggested by counsel. He could reasonably have thought, in my opinion,

that in view of the emergency situation seen as a

whole it would be advisable to authorize the Minister

to/ 31 to exclude the rule in all cases, i.e. whenever the Minister considered that it should be done. With regard to the State President's statement that "die bekendmaking van inligting aan 'n aangehorede met betrekking tot die rede vir sy verdere aanhouding tot gevolg mag hê dat die bron van die inligting bekend mag word", and that such disclosure would not be "in belang van die veiligheid van die publiek, die handhawing van die openbare orde of die beëindiging van die noodtoestand," I find myself quite unable to agree with the suggestion that it was not a proper consideration to take into account. It may be, as

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counsel argued, that a hearing given to someone whose detention is being considered need not necessarily, or always, result in the disclosure of the source of information that ought not be disclosed, but this is no justification for saying that the State President went beyond the powers given to him by the Act when he decided to make a regulation which was designed to avoid all danger of the disclosure of potentially harmful information.

I turn now to the appeal against the decision of the majority of the Court a quo that reg. 3(10)(a) and rule 5(1) and (3) of the rules published under reg.

3(9)(A)/

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3(9)(a) are not ultra vires. Friedman J, having found that reg. 3(3) was invalid and that the detainees were, on that ground, entitled to their release from detention, did not deal with the question of the validity of reg. 3(10)(a) and rule 5(1) and (3). Counsel for the appellants commenced his argument on this part of the case by saying that if reg. 3(10)(a) is to be construed as including a reference to legal advisers, then it is ultra vires. The regulation it will be recalled, provides that "No person", save the Minister or a person acting by virtue of his office in the service of the State, "shall have access to

any/ 34 any person detained in terms of the provisions of this regulation" except with the consent of and subject to such conditions as may be determined by the Minister or the Commissioner of the South African Police. While submitting that the right of the individual to have access to his legal adviser has been described by this Court as a fundamental right which cannot be interfered with save where interference is authorised in express language or by necessary implication (see *Mandela v. Minister of Prisons*, supra, at 957 D and 1959 G-H), counsel did not contend in specific terms, if I understood him correctly, that the regulation does not apply to legal advisers. Nor could it

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have been so argued, for even if one accepts what has been said in the cases about the taking away of a fundamental right, it cannot validly be said that the words "No person" should be taken to mean "No person except a legal adviser". See *Bloem and Another v. State President of the Republic of South Africa and Others* 1986(4) SA 1064(0), at 1093 H-I. It may be pointed out, too, that rule 5 was made on the basis that access to detainees by legal advisers is prohibited save when permitted by the Minister or the Commissioner of Police.

Counsel contended, as stated above, that if reg. 3(10)(a) is to be read as being of application

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to legal advisers - as it must, in my opinion, be read -

then it is ultra vires because it cannot reasonably be related to the purposes mentioned in sec. 3(1) (a)

of the Act. The right of free and unconditional access, it was argued, cannot reasonably impinge upon those purposes. It cannot in my opinion be

said that the regulation is not related to the purposes mentioned in the section, and I do not agree with

the submission. It was contended, next, that the State President failed properly to apply his mind to the matter and that he acted with gross unreasonableness.

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The affidavit made by the State President, counsel

submitted, shows that he did not apply his mind to the matter. In his affidavit the State President, after

stating that he had been advised that it was not necessary for him to mention "al die faktore ... wat ek

oorweeg het alvorens ek regulasies ingevolge artikel 3 van die Wet op Openbare Veiligheid No. 3 van 1953 met betrekking tot die tans bestaande noodtoestand

in sekere landdrost distrikte uitgevaardig het", went

on to say the following about the question of access

to legal advisers:

"13.

Ek is bewus daarvan dat die reg op toegang tot 'n regsadviseur 'n basiese reg is en dat die reg om mediese behandeling te ontvang

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wanneer nodig ook 'n basiese reg is.

14.

Die omstandighede wat dit noodsaaklik ge-maak het om 'n noodtoestand af te kondig bring egter na my mening mee dat dit nodig en raadsaam mag wees om onder gegewe omstandighede 'n spesifieke aangehoudene nie toe te laat om in aanraking te kom met persone buite die plek van aanhouding nie.

Daar is persone buite die plekke waar aan-gehouenes aangehou word, wat die openbare orde wil versteur, wat die veiligheid van die publiek bedreig en wat die omstandighede wat dit noodsaaklik gemaak het om 'n noodtoestand te verklaar wil laat voortduur en vererger en dus die beëindiging van 'n noodtoestand wil teenwerk.

Gevolglik mag dit die veiligheid van die publiek, die handhawing van die openbare orde en die beëindiging van die noodtoestand bevorder as 'n besondere aangehoudene onder gegewe omstandighede nie toegelaat word om kontak te hê met sodanige persone

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buite die gevangenis nie.

15.

Kontak tussen 'n aangehoudene en sodanige persone kan plaasvind deur bemiddeling van 'n regsadviseur of private mediese praktisyn.

16.

Die vraag of 'n spesifieke aangehoudene kontak met persone buite die plek van aan-houding geweier moet word aldan nie, kan slegs behoorlik beslis word met inagneming van inligting aangaande die aangehoudene se deelname en rol in die oproer en geweld wat gepleeg is of vermag kan word. Die KOMMISSARIS VAN POLISIE en MINISTER VAN WET EN ORDE het toegang tot die bronne waar-uit bepaal kan word of sodanige inligting bestaan aldan nie en gevolglik het ek in Regulasie 3(10) bepaal dat die aansoeke om toestemming tot toegang tot 'n aangehoudene oorweeg moet word deur die KOMMISSARIS VAN POLISIE of die MINISTER VAN WET EN ORDE en dat hulle sodanige voorwaardes mag oplê as wat hulle nodig ag. Ek herhaal dat ek so-

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danige Regulasie as nodig en raadsaam be-skou het om die oogmerk te bereik soos in artikel 3 van die Wet op Openbare Veilig-heid vermeld."

Counsel relied on the contents of paragraph 14 for his argument that the State President did not properly apply his mind to the question of access to legal advisers. I do not agree with the submission. The passage shows that the State President realised that it might not always, or in all cases, be necessary to exclude access, but this does not justify the charge that his decision to make access in every case dependent on permission being granted by the Minister or the Commissioner of Police is indicative of a failure

to apply his mind to the matter. The statements made

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by him in his affidavit show, in my view, that he gave

earnest consideration to the question of access to

detainees and to the manner in which it should be dealt

with. The same can be said, in my opinion, about what the Minister of Justice says in his affidavit regarding the

question of access in the case of legal advisers.

He states inter alia:

"15.

Met betrekking tot die reël wat bepaal dat niemand, gevolglik ook nie 'n regsverteenwoordiger of private mediese praktisyn, 'n aangehoudene mag besoek sonder die toe-stemming van die Minister van Wet en Orde of die Kommissaris van Polisie nie moet in gedagte gehou word dat 'n noodtoestand verklaar is na 'n toestand van onrus wat 'n geruime tyd in die betrokke distrikte bestaan het. Die onrus het gepaard gegaan met

geweld/ 41 geweld, moorde, brandstigting, sabotasie en ander vorms van geweld, op ongekende skaal, waardeur die veiligheid van die publiek en die handhawing van die openbare orde ernstig bedreig was en die veiligheid van die Staat in gevaar gestel kon word. Tydens so 'n noodtoestand mag omstandighede bestaan wat op 'n gegewe plek en onder gegewe omstandighede en plek dit noodsaaklik of raadsaam maak dat 'n spesifieke aangehoudene nie enige kontak hoegenaamd moet hê met persone buite die gevangenis nie. Die reëlings wat so 'n persoon se aanhouding reël, moet gevolglik bepalings bevat wat so 'n persoon se aanhouding reël op 'n wyse wat sy afsondering van die buitewêreld mee-bring. Ongelukkig is die situasie ernstig genoeg dat die reg om 'n regsverteenwoordiger te mag spreek beperk moet word en onder ge-gewe omstandighede, waar dit geregverdig is, vir 'n tydperk altans, geweier moet word. 'n Versoek om 'n private mediese praktisyn te mag spreek sal ingelyks oorweeg moet word in die lig van die tersaaklike feite en omstandighede.

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Ek is gevolglik adviseer, en ek was van oordeel, soos bedoel in artikel 3 van die Wet op Openbare Veiligheid No 3 van 1953, dat dit raadsaam sou wees, as gevolg van die bestaan van 'n noodtoestand, om die reg op toegang tot 'n regsverteenwoordiger, onder-hewig te maak aan toestemming. Dieselfde geld met betrekking tot 'n versoek om 'n private mediese praktisyn te mag spreek. Omdat die reg op toegang tot 'n regsverteenwoordiger 'n basiese reg is en omdat ek wil verseker dat sodanige toegang slegs beperk sou word as daar goeie rede daarvoor bestaan, het ek besluit dat aansoeke om 'n regsver-teenwoordiger te mag spreek, slegs op hoogste vlak besleg sou word naamlik deur die Minister van Wet en Orde of die Kommissaris van Polisie. Daardeur het ek verseker dat die mees verantwoordelike persone die aan-soeke sou oorweeg. Om so 'n aansoek be-hoorlik te kan oorweeg, moet inligting by die polisie bekom word aangaande die betrokke aangehoudene en sy omstandighede.

Dit/

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Dit was dus my oordeel dat die aansoeke deur die Minister van Wet en Orde of die Kommissaris van Polisie oorweeg moes word."

It is the appellants' contention that it is grossly unreasonable that detainees should be deprived of the fundamental right of access to their legal advisers and to be made to be dependent on "a discretionary licence", as their counsel put it, to gain such access. Detainees, counsel said, may urgently require access to their legal advisers for a variety of reasons unrelated to their detention or the emergency. This is, of course, possible, but it is, at the same time, not to be supposed that the Minister or the Commissioner of Police may, or will, refuse leave for the necessary access on just any ground whatsoever.

Rule/ 44 Rule 5(1) contemplates that leave may be asked to see one's legal adviser, and although the rule does not expressly state on what grounds leave may be granted or refused, it must, in my opinion, be taken to be implied that leave can be refused only on grounds which are related to the emergency. See Tsenoli's case, *supra*, where it was contended *inter alia* that reg. 3(3) was invalid because it purported to empower the Minister to order the further detention of a person arrested and detained under reg. 3(1) on what-

grounds ever grounds he deemed fit, including/quite unrelated

to the purposes mentioned in sec. 3(1)(a) of the Act

or in reg. 3(1). (See at 1183 A-B of the report of the

judgment). This Court rejected the argument and held

that/ 45 held that the Minister's power under reg. 3(3) must,

by necessary implication, be taken to be subject to

the limitation that he could order the further detention of a person already detained under reg. 3(1) only if he was of the opinion that it was necessary to do so for the purposes stated in reg. 3(1). (See at 1184 F of the report.) In the same way, in the present case, it is in my opinion not correct to suggest that access may be refused on a ground not related to the state of emergency. (This does not mean, of

course, that legal advisers need not comply with prison

regulations regarding access to persons held in a prison.)

Counsel contended also, with regard to his

submission as to the unreasonableness of reg. 3(10)(a)

46 and rule 5(1), that the State President could have avoided security risks arising from contact between a detainee and his legal adviser by - I quote from counsel's written heads of argument - "a spectrum of conditions ranging from restrictions on physical contact, to some form of supervising consultations, and to the making of even more onerous stipulations in the case of particular individuals." This may, or may not have been, feasible. I do not know. It may even be that the State President and the Minister of Justice considered measures of the kind suggested but decided against them on the ground that they would be impracticable. As to the whole of

counsel's argument about unreasonableness it should be borne in mind/

47 mind, as I have said before, that the Act empowers the State President to make such regulations as appear to him to be necessary or expedient to combat the emergency situation, and that the Court cannot substitute its view of what measures would be necessary or expedient for that of the State President. As to the question of reasonableness, also, I find myself unable to accede to the argument that reg. 3(10)(a) and rule 5(1) are so unreasonable that they cannot be held to have been authorised by the Act. There is one further argument to which I must refer. It runs as follows. The Minister of Justice, it is said, is given the power by reg. 3(9)(a)

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to "regulate the detention of persons in terms of this regulation" (i.e. reg. 3), and it is no such regulation of the "detention of persons" to exclude the right of access to legal representatives, rather than to seek to regulate such access by virtue of practical considerations. I do not agree with the submission. The Minister of Justice has the power to regulate the detention of persons, and this includes, in my view, the power to regulate access to persons in detention.

It was not argued before us that rule 5(2), (3) and (7) should be held to be invalid even if it were/

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were found that rule 5(1) was not invalid. In view of all the foregoing I am of the opinion that the appeal against the judgment of Vivier J concerning the validity of reg. 3(10)(a) and rule 5(1) cannot succeed. It follows, too, that in my view the decision in *Metal and Allied Workers Union and Another v. State President of the Republic of South Africa* 1986(4) 358 (D&CLD), to which we were referred in argument, that reg. 3(10)(a) and rule 5(1) are ultra vires, is incorrect. (See at 373 C- 375 G of the report of the judgment.)

Fani's/...

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Fani's case. Fani's case was an application for the release from detention of six persons who had been arrested and detained in terms of reg. 3(1) of the aforesaid emergency regulations and who were thereafter further detained in terms of the provisions of reg. 3(3). Their further detention was ordered without their having been given an opportunity of making re-presentations to the Minister, and the issue which the Court was called upon to decide was whether reg. 3(3) was ultra vires on the ground that the State President did not have the power to make a regulation which deprived persons who had been arrested and detained

under/ 51 under reg. 3(1) of the right of being heard before their further arrest was ordered. The Court (per Zietsman J, with whom Cloete J P and Eksteen J agreed) held that reg. 3(3) was not invalid and dismissed the application with costs. The appeal is against this judgment. In arguing the appeal, counsel relied on the same arguments as those advanced by him in Omar's case. It follows from what I have said above regarding Omar's case that in my view the decision of the Court in Fani's case was correct and that the appeal against it can accordingly not succeed.

Bill's/.....

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Bill's case

The state of emergency which was declared by the State President on 21 July 1985 (Proclamation R 120 of 1985) was lifted after some months and the regulations and rules which were in force at the time were repealed. On 12 June 1986 the State President, acting in terms of sec. 2(1) of the Act, by Proclamation R108 again declared the existence of a state of emergency, this time not within certain areas only, but within the whole of the Republic. On the same date, regulations made by the State President in terms of sec. 3(1)(a) of the Act were promulgated by Proclamation

R 109/

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R 109. On the same date, too, rules made by the Minister of Justice in terms of reg. 3(9)(a) of the new regulations were published in GN 1196. The regulations and rules which have a bearing on the present case are, save in a few immaterial respects, in the same terms, and also have the same numbers, as those which were in force during the earlier state of emergency. They need not be quoted again. The husband of the applicant (now the respondent) was arrested and detained in terms of reg. 3(1) on 20 June 1986. The Minister, acting in terms of reg. 3(3), thereafter ordered his detention to be

extended/

54 extended for as long as the emergency lasted. The detainee had not been given a hearing before the order was made. The respondent thereupon made an application to the Witwatersrand Local Division. The appellants filed no affidavits but were represented by counsel at the hearing. The main relief claimed by the respondent was, according to the notice of motion, an order directing the Minister of Law and Order to furnish her (or the detainee) "with the reasons for and the information upon which the order was issued" and "to allow the detainee's legal representatives to interview him with a view to making representations to the Minister of Law and Order for his release."

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In her affidavit supporting the notice of motion the respondent stated that if the Court held that she was not entitled to be furnished with the reasons for and the information upon which the Minister's order had been issued and that the detainee was not entitled to be interviewed by his legal representative with a view to making representations to the Minister, she would contend that the relevant regulations and rules were ultra vires the State President's powers under sec. 3 of the Act. If the detainee was not entitled to the relief claimed, she said, it would mean that he had been deprived of "his common law right to be heard" even after the order under reg. 3(3) had been made. Public safety and the maintenance of public order, she

added/

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added, could not conceivably be prejudiced by the exercise of such a right. The Court a quo (Leveson J) made the following order:

"1. That the Minister of Law and Order is

to furnish the detainee in writing with the grounds for his continued detention in terms of reg 3 of the emergency regulations.

2. That the detainee is entitled to consult his legal representatives (lawyers) who shall have access to him in terms of and in accordance with the Prisons Act and the regulations promulgated thereto, for the purpose of advising with regard to the representations which he has the right to make to the Minister of Law and Order.
3. The detainee is to be furnished with such writing materials as will enable him to make such representations.
4. The respondents are ordered to pay the costs of this application."

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As to this order, it may be said at once that paragraph 2 thereof was, in my opinion, wrongly made. It appears from the learned Judge's judgment (1987(1) SA 265 at 275 H-I) that he granted that part of the order because of his finding that reg. 3(10)(a) and rule 5(1) are ultra vires. In coming to that conclusion, he differed from the judgment of Vivier J in Omar's case on the question of the validity of reg. 3(10)(a) and rule 5(1), and agreed with that of Didcott J in Metal and Allied Workers Union and Another v. State President of the Republic of South Africa and Others, supra, at 373 C-375 G, on the same issue. As I stated above in my discussion of Omar's case, I am of the opinion that the judgment of Vivier J was correct

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and that of Didcott J incorrect. I consider, therefore, that Leveson J erred in holding that reg. 3(10) (a) and rule 5(1) are ultra vires and that the detainee's legal advisers are, for that reason, entitled only to have access to him, subject to the provisions of the Prisons Act and the regulations made thereunder.

As to paragraph 1 of the order, it orders the Minister to furnish the detainee in writing with the grounds on which he (the Minister) decided to order the further detention of the detainee in terms of reg. 3(3). In concluding that the Minister was obliged to furnish the detainee with the grounds for his order, the Court a quo reasoned as follows:

(a)/

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- (a) Reg. 3(3) deprives a detainee of the right of being heard before an order is made by the Minister, but does not exclude the right
 - being part of the right embodied in the audi alteram partem rule - of a detainee to make written representations to the Minister after the order has been made. (b) Counsel for the Minister conceded - rightly so, the learned Judge said - that a detainee is entitled to make written representations "to be released from further detention at some time after the further order pursuant to reg. 3(3) is made by the Minister". (See at 270 D of the report of the judgment.) (c) Because the detainee has the right to make written representations to the Minister, he also has the right to be furnished with writing materials which would

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enable him to accomplish this objective. (d) Because he has the right to make representations to the Minister, the detainee must be put in possession of such information by the Minister as would make the right to make representations a real one. Without such information, the right will be an illusory one. With regard to what is said in (a) above, it is clear that reg. 3(3) does not say that a detainee is not entitled to make written representations to the Minister after an order for his further detention has been made. This does not, however, justify the conclusion that a detainee can, after such an order has been made, call upon the Minister to furnish him

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with the grounds on which the order was made. I do not wish to be understood as saying that a detainee may not, after his further detention has been ordered, make written representations to the Minister concerning such detention, for it seems to me that he would be entitled to do so. I do not, however, agree with the view that, because he may make such representations, the Minister is obliged to furnish him with the grounds on which his further detention was ordered. The regulation empowers the Minister to order the further detention of a person within 14 days after such person's arrest and detention in terms of reg. 3(1) without having to inform him of the grounds

on which he may

possibly/ 62 possibly be further detained, and without having to give him an opportunity of being heard as to why he should not be further detained. This being so, I find it difficult to accept that it was nevertheless the intention that the Minister would be obliged, after he has made an order, to inform the detainee of the grounds on which he made the order. The order which the Minister makes when he orders the further detention of a detainee is an order which becomes

effective immediately on being made, and which determines

the period of the further detention ordered. It

seems to me, therefore, that when the Minister makes

an order for a person's further detention in terms of

reg. 3(3), the order is a final one, and that there

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is thereafter no obligation on the Minister to inform the detainee of the grounds on which it was made and then, after considering such representations as the detainee may wish to make in regard to such grounds, to reconsider the order previously made by him. I appreciate that this view of the matter involves that reg. 3(3) does away completely with the *audi alteram partem* rule, and that this is not a view which one should lightly entertain. I think, however, that this is what reg. 3(3) entails. The question which then arises is whether a regulation which has this effect is *intra vires* the powers conferred on the State President by sec. 3(1)(a) of the Act. There

is/ 64 is no doubt that if this is the effect of reg. 3(3), as I consider it to be, it is a very harsh provision, but it nevertheless seems to me that, when regard is had to the extremely wide powers (discussed earlier in the judgment) which the Act confers on the State President to make such regulations as appear to him to be necessary or expedient for coping with the emergency situation, it cannot be said that the regulation in issue is *ultra vires*. The Court *a quo*, in holding that reg. 3(3) does not exclude the right of a detainee to make written representations to the Minister after the latter has ordered his further detention, and that a detainee is, for the purpose of making such representations, entitled

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to be furnished with the grounds on which the Minister's

order was made, adopted (at 269 G-H of the report of

the case) what is stated in the following passage in the judgment of

Goldstone J in the case of *Momoni v. Minister of*

Law and Order 1986(2) SA 264 (W) at 276 B-C:

"Public safety and the maintenance of public order could conceivably be prejudiced if the Minister is obliged in the case of every detention to allow a hearing prior to his making an order within a specified period after the initial arrest. That would depend inter alia, upon the period and number of detainees in question. However, after such order has been made I can conceive of no prejudice at all in the exercise of a right by such a detained person to make written representations to the Minister."

(The view that practical considerations may justify the

exclusion of the audi alteram partem rule when the

Minister/

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Minister has to make a decision as to a person's further detention within 14 days after such person's initial arrest and detention in terms of reg. 3(1), but that there could be no prejudice to the safety of the public or the maintenance of public order if a detainee were allowed to make written representations to the Minister thereafter (i.e. after he has been furnished with the grounds for the order made against him), is also expressed in the judgment of Coetzee J in Momoniat's case, supra, at 278 I- 279 A.)) In my view it cannot be accepted, as seems to have been done in Momoniat's case, that it was only because of practical considerations that the State President

decided/

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decided, when making reg. 3(3), that a detainee should not be entitled to be heard when the Minister considers whether he should make an order for the detainee's further detention. It is quite conceivable that it was thought that the audi alteram partem rule should be excluded in order to avoid the danger of sensitive information, or the sources of such information, being disclosed to detainees. (In fact, in Omar's case, as was indicated above, counsel for the appellants based part of his argument on a passage in the affidavit of the State President in which he says that he amended reg. 3(3), as originally worded, to its present form, which provides for the exclusion of the audi alteram

partem/

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partem rule, because of the danger of the disclosure of sources of information that ought not to be disclosed.) A consideration of this kind could be of application to the whole period of a detainee's detention.

With regard to counsel's concession in the Court a quo, as referred to in paragraph (b) above, concerning the right of a detainee to make written representations to the Minister concerning his further

detention, the position appears to be that counsel (Mr such Kruger) conceded that a detainee could make/representations, but that he did not concede that a detainee would, for the purpose of making such representations, be entitled to be informed of the grounds on which his/

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his further detention was ordered. I should add, also, that it was a matter of dispute between the parties in the Court a quo as to whether a person who had been further detained in terms of reg. 3(3) was entitled to be apprised of the grounds for the order, and, this being so, it is unlikely that counsel for the Minister would have made a concession which would have been in conflict with the case he was presenting to the Court. It may be said in this connection that counsel contended inter alia that reg. 3(10)(b) precludes a detainee from being informed of the reasons for his detention. (This argument, I may add, was also advanced in this Court. I do not propose to deal/

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deal with it, save to say that, on the wording of the regulation, the words "No person" cannot be read as including the detainee himself.) With regard to the question of making written representations to the Minister, it may be said at this point that it was not alleged by respondent that the detainee had been refused writing materials for the purpose of making such representations. (See paragraph

(c) above, and paragraph (3) of the Court a quo's order.)

Leveson J was of the opinion that the decisions of this Court in *Turner v. Jockey Club of South Africa* 1974(3) SA 633 and *Minister of Law and Order*

v. *Hurley and Another* 1986(3) SA 568 provide support for his view that in the present case the

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Minister is obliged to inform a detainee of the grounds on which he ordered his further detention. (See at 271-272 of the report of the judgment.)

Turner's case was the case of jockey (Turner) who was alleged to have bribed another jockey to induce to the latter deliberately to lose a race. Turner was charged with corrupt practice under the respondent club's rules, which were held by the Court to constitute the terms of a contract between jockeys and the respondent.

The Board of Inquiry which found Turner guilty was, under the respondent's rules, obliged to conduct an

investigation into the truth of the allegations made against him. The Board was in possession of certain

affidavits which contained allegations against Turner, but it showed/

72 showed these to him at such a late stage of the proceedings that he did not have time to read them or to prepare a defence to the allegations made against him. The Court held that Turner had not been given the fair and impartial hearing to which he was entitled under the respondent's rules (see 1974(3) SA at 653 G-H and 658 G-H), and that the finding made against him could, therefore, not stand. Turner's case provides no support for the learned judge's finding that in a case such as the one with which we are here concerned, a detainee is entitled to be informed of the grounds on which the Minister ordered his further detention. It was a case where allegations which affected the question of the

guilt/

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guilt of the person charged had, by reason of the terms of the contract which existed between him and the respondent, to be disclosed to him at the inquiry into the question of his guilt, and the Court's decision affords one no basis for saying that, in the present case, the Minister is obliged to inform the detainee of the grounds on which he (the Minister) ordered his further detention under reg. 3(3). With regard to the judgment of this Court in Hurley's case, supra, Leveson J relied on the following passage therein for his view that in the present case the Minister was obliged to inform the detainee of the grounds on which he made the order in terms of reg. 3(3):

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"I turn now to counsel's final argument in support of his contention that the Legislature did not, when using the words 'if he has reason to believe....' in s 29(1) of the Act, intend that the decision of the officer who arrested or caused the arrest of someone should be subject to objective inquiry

by the Court. Such an inquiry, counsel says, could result in the police being forced to disclose information which, if divulged, could endanger the security of the State, and the Legislature could not have intended such a result. It must be accepted that occasions may arise when the police will, for security reasons, not be able to disclose information available to them, and it must be acknowledged, in my view, that there is force in counsel's argument. At the same time it should not, I think, be assumed that occasions of the kind mentioned will frequently arise. It is, also, not to be assumed that the police will on such occasions necessarily have to disclose all the information of which they are possessed, or the sources of their information. Sec. 29(1) requires merely that it be shown that there were grounds

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on which the officer concerned could reasonably have held the belief that the person whom he arrested or caused to be arrested was a person as described in the subsection. I would sum up my view of counsel's argument by saying that, while it must be recognized that it has some force, it does not outweigh the consid-

rations, discussed above, which indicate, in my opinion, that the words 'if he has reason

to believe ' in s 29(1) should be construed

as constituting an objective criterion."

(See 1986(3) SA at 583 D-H and 1987(1) SA at 272 B-D.) What is stated in this passage cannot, in my opinion, be regarded as authority for the view expressed by the learned Judge. In Hurley's case, which was concerned with the validity of an arrest made under sec. 29(1) of

the Internal Security Act, 1982, this Court held that

the Minister of Law and Order had to establish that the

police-officer who caused the arrest to be made had

reason/ 76 reason to believe that the person concerned was a person as described in sec. 29(1) of the said Act. Counsel for the Minister contended that the police-officer's decision to have the respondent in that case (Hurley) arrested was not objectively justiciable, and in the course of his argument he submitted that if the Court could objectively inquire into the question whether existed reasonable grounds/for the belief held by a police-

officer who caused an arrest to be made under sec. 29(1) of the said Act, the police might be forced to disclose the information on the strength of which the arrest was made. The disclosure of such information, counsel

submitted, could be harmful to the security of the

State/

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State, and the Court should therefore hold that action taken in reliance on the provisions of sec. 29(1) was not objectively justiciable. The Court, while of the view that the argument had some force, held that, since the Minister had to establish that the police-officer concerned had reason to believe that the person whom he caused to be arrested was a person as described in the section, and since the Court was entitled to inquire into that question, the test of reasonable belief being an objective one, the Minister was obliged - i.e. if he wished to discharge the said onus - to disclose information possessed by the police. As to the quantum of information to be disclosed, the Court said that the

disclosure/ 78 disclosure need go no further than to show that there were grounds on which the police-officer concerned could reasonably have held the belief that the person whom he caused to be arrested was a person as described in the section. Leveson J said (at 272 E-F of the re-port of the judgment): "In my opinion, in the same way as the officer concerned has to show grounds (but not the evidence) for his belief, so also must the Minister reveal the grounds (again, not the evidence) for the continued detention of the detainee." In Hurley's case the Minister was obliged to show grounds for the police-officer's belief, as required by sec. 29(1) of the Internal Security Act,

1982. That obligation,

which/

79which arose from the provisions of the said section, is not authority for the view that in the present case the Minister is obliged to reveal the grounds for his decision to order the further detention of the detainee. The question in the present case is whether the audi alteram partem rule obliges the Minister to inform a detainee of the grounds on which he ordered his further detention, or whether the rule is inapplicable because of the provisions of reg. 3(3)). In view of the foregoing I consider that the decision of the Court a quo was incorrect. It follows that in my opinion Kannemeyer J, too, erred when he held in *Nqumba and Others v. State President and Others* 1978(1) SA 456 (E) at 481, agreeing with

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the judgment of Leveson J, that the Minister is obliged to furnish the grounds for an order made by him under reg. 3(3) when requested to do so by the detainee. It is unnecessary to discuss Mr Kruger's argument that sec. 5B of the Act precludes a Court from considering the validity of reg. 3(3).

The following orders are made:

(1) In the case of *Omar and Others v. The Minister of Law and Order and Others*:

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

(2) In the case of Marjorie Fani and Others v. The Minister of Law and Order and Others:

The appeal is dismissed with costs, including

the/.

81 the costs of two counsel. (3) In the appeal of Bill v. State President

and Others:

- (a) The appeal is upheld with costs, including the costs of two counsel. (b) The order of the Court a quo is set aside, and the following order is substituted therefor: "The application is dismissed with costs, including the costs of two counsel."

P J RABIE

ACTING CHIEF JUSTICE JOUBERT JA

VILJOEN JA Concur. BOSHOFF AJA

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