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E du P Case no. 165/87

IN THE SUPREME COURT OF SOUTH

(APPELLATE DIVISION)

In the matter between:

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

THE COMMISSIONER OF POLICE ..... Second Appellant

THE HEAD OF THE SECURITY POLICE,

EAST LONDON ..... Third Appellant

THE COMMISSIONER OF PRISONS ..... Fourth Appellant

and

THE BISHOP OF THE ROMAN CATHOLIC CHURCH OF THE

DIOCESE OF PORT ELIZABETH ..... Respondent

Coram: RABIE ACJ, JOUBERT, HEFER, VIVIER et STEYN JJA

Heard: Delivered:

29-09-1988

16 September 1988.

J U D G M E N T

RABIE ACJ:

The respondent in this appeal and Mrs Lizzie Leeuw, the wife of Reverend E. E. Leeuw, brought an application in the Eastern Cape Division in which they sought an order in the following terms against the present appellants:

> "2.1 Declaring that the detention of Father GRAHAM CORNELIUS and Reverend LEEUW at the instance of and under the direction of members of the South African Police Force within the town of East London is unlawful and of no force and effect;
>
> 2.2 Directing the Respondents forthwith to take all such steps as might be necessary to cause the release from detention of the said Father GRAHAM CORNELIUS and the Reverend LEEUW;
>
> 2.3 Granting the Applicants such further and/or alternative relief as this Honourable Court deems fit;
>
> 2.4 Directing the Respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved, in the event of this application being opposed."

The application was opposed by all four of the appellants. The Court (**Kroon J**) made the following order:

> "(1) The detention of Father Graham Cornelius purportedly effected in terms of the

provisions of regulation 3(1) of the regulations contained in Proclamation R 109 of 12 June 1986 is declared to be unlawful.

(2) The respondents are directed forthwith to take all such steps as may be necessary to cause the release from detention of the said Father Graham Cornelius.

(3) The application, insofar as it relates to the detention of Reverend Leeuw, is dismissed.

(4) The respondents are directed to pay 50% of the applicants' costs jointly and severally.

(5) The applicants are directed to pay 50% of the respondents' costs jointly and severally."

The appellants now appeal, with the leave of the Court a quo, against paragraphs 1, 2, 4 and 5 of this order.

Father Graham Cornelius (hereinafter referred to as "Father Cornelius"), a priest of the St Francis Xavier Roman Catholic church in Duncan Village, East London, was arrested and detained on the instructions of Captain C.E.J. van Wyk of the South African Police on 14 June 1986. Capt. Van Wyk states in an affidavit which he made on behalf of the first, second and third appellants, and to which fuller reference will be made below, that in causing Father Cornelius to be arrested and

detained, he acted in terms of regulation 3(1) of the regulations made by the State President in terms of section 3(1)(a) of the Public Safety Act, 1953 (Act 3 of 1953) and promulgated in Proclamation R 109 of 1986 on 12 June 1986. The said reg. 3(1) provides 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, or cause to be detained, any such person in custody in a prison."

The respondent made the following averments regarding Father Cornelius's work and character in his founding affidavit:

> "7.(a) Father GRAHAM CORNELIUS is an ordained priest who has been working in my diocese for several years. As Bishop of the Diocese, Father CORNELIUS has been working directly under me.
>
> .....
>
> 8. I am aware that Father CORNELIUS is engaged

in projects aimed at the upliftment of the poor, needy and oppressed. His involvement in community activities has always been to help people, particularly the underprivileged.

9. No report has ever been forwarded to me that Father CORNELIUS has ever been involved in any activities such as might even remotely promote violence. Nor have I ever heard or had any cause to believe that Father CORNELIUS has behaved in any way contrary to the teachings of the Church. On the contrary, his work has only been to promote the teachings of the church and to discourage violent activities."

As to Father Cornelius's arrest and detention, the respondent said:

"10.(a) I was most surprised and perturbed to learn that Father CORNELIUS had been arrested and detained, as he has always been working for peace .....

(b) It is inconceivable to me that the arrest and detention of Father CORNELIUS could ever be deemed necessary for the maintenance of public order or the safety of the public, or the safety of Father CORNELIUS himself, or for the termination of the state of emergency. If any member of the Force formed the opinion that the detention of Father CORNELIUS was necessary, I am obliged to conclude that such opinion was formed hastily, without proper knowledge of the true

> factual situation or the man, and without the application of the necessary bona fides in making the decision. I believe it is likely to have been formed on the basis of prejudicial and inaccurate information given to him, and motivated by the confrontations which occurred in August, 1985 between Father CORNELIUS (and other persons, including Reverend LEEUW) and members of the South African Police. These events were the subject of an application brought to this Honourable Court by Father CORNELIUS as First Applicant in Case No. EL 481/1985. ....."

The respondent's aforesaid conclusion that the decision to arrest and detain Father Cornelius was not taken with the necessary bona fides, was repeated in paragraph 14 of the affidavit, in which he stated why, in his submission, the detention of Father Cornelius was unlawful. The paragraph reads as follows:

> "Accordingly, I submit that the detention of Father CORNELIUS is unlawful because the condition necessary to found a lawful detention in terms of Regulation 3(1) has not and cannot ever be satisfied, viz., that the member of the Force had the bona fide opinion at the time of the arrest that his detention was necessary for maintenance of public order or for any of the reasons set out in Regulation 3(1)".

In an affidavit made in support of that of the respondent, Father Thomas Fahy (hereinafter referred to as

"Father Fahy"), a Roman Catholic priest working in the diocese of Port Elizabeth, stated inter alia that Father Cornelius was not involved in any activities "which could be remotely aligned to causing violence, either in his private capacity or in his capacity as a Minister of the Church", but that, on the contrary, his "very presence" in the community acted as "a necessary moderating influence on what is an abnormal, violent and potentially revolutionary situation." As to the arrest and detention of Father Cornelius, he stated (in paragraph 8 of his affidavit) that it was incomprehensible how any member of a Force could have held the opinion that the detention of Father Cornelius was necessary for the maintenance of public order or the safety of the public or of Father Cornelius himself, or for the termination of the state of emergency, unless "(i) such opinion was motivated by malice; or (ii) such opinion was formed as part of a campaign to silence or victimize the Church and church ministers, for some unknown reason."

In a further supporting affidavit Reverend Paul Arthur

In a further supporting affidavit Reverend Paul Arthur Welsh (hereinafter referred to as "Reverend Welsh"), a Minister of the Trinity Methodist church in East London, stated inter alia that throughout his association with Father Cornelius, which began in 1985, the latter "never expressed any desire to disrupt public order or safety", and never condoned any "violent practices." "In fact", he said, "nothing could be further from his attitude and character", and he submitted that the detention of Father Cornelius, "if it was done purportedly to maintain public order or safety", could not have been ordered "in good faith in the circumstances."

I turn next to the affidavit deposed to by Capt. van Wyk. He was, at the relevant time, the head of a special police unit, known, he says, as "die onlusondersoekspan, wat betrokke is by die bekamping van onrus en met alle aangeleenthede wat verband hou met onrussituasies." In paragraph 10 of his affidavit he replied as follows to the averments contained in paragraphs 8 and 9 of the respondent's affidavit, which I quoted

above:

> "Ek is nie in staat om kommentaar te lewer op al die beweringe in hierdie paragraaf vervat nie. Ek voer egter met respek aan dat sekere van hierdie beweringe strydig is met die inligting wat tot my kennis gekom het, soos meer volledig hieronder na verwys, en vir soverre dit nodig mag wees ontken ek enige beweringe wat nie ooreenstem met wat in paragraaf 11 hieronder uiteengesit is nie."

In paragraph 11 of his affidavit, in which he replied to the allegations contained in paragraph 10 of the respondent's affidavit, quoted above, Capt. van Wyk said:

> "11. (a) Dit is korrek dat Vader CORNELIUS gearresteer is, aangehou is en tans steeds aangehou word ingevolge Regulasie 3 van die Noodregulasies afgekondig deur Proklamasie no. R 109, 1986. Ek het Vader CORNELIUS aanvanklik laat arresteer en aanhou. Hy is in my opdrag gearresteer deur Adjudant Offisier NAUDE op 14 Junie 1986 .....
>
> (b) Ek het Vader CORNELIUS op 14 Junie 1986 laat arresteer en aanhou omdat ek van oordeel was dat sy aanhouding nodig was vir die handhawing van die openbare orde en die veiligheid van die publiek. Ek het tot sodanige gevolgtrekking gekom op grond van wat hieronder uiteengesit word.
>
> (c) Vader CORNELIUS was tot en met sy arrestasie en aanhouding (en, sover ek weet, is tans nog) die beskermheer van 'n organisasie bekend

as die Duncan Village Residents Association. Hierdie organisasie of vereniging is na wat ek in die algemeen kan verwys as 'n 'alternatiewe struktuur'. Ek is daarvan bewus dat daar talle 'alternatiewe strukture' dwarsdeur die Republiek van Suid-Afrika gestig is om die plek in te neem van verbode organisasies soos veral die African National Congress. Op grond van my ondervinding en op grond van inligting wat tot my beskikking gekom het, glo ek dat die Duncan Village Residents Association 'n 'alternatiewe struktuur' van die African National Congress is. Die Duncan Village Residents Association het, soos ander 'alternatiewe strukture', ten doel die ondermyning van die Staatsgesag en die daarstelling van 'n ander vorm van regering. Die bedrywighede van die Duncan Village Residents Association is veral gemik op Duncan Village self. Reeds voor die afkondiging van die noodtoestand was die Duncan Village Residents Association daarvoor verantwoordelik en het dit daarin geslaag om al die bestaande gemeenskapsraadslede uit Duncan Village uit te dryf. Die bedrywighede van die lede van hierdie organisasie of vereniging was ook daarvoor verantwoordelik dat geen nooddienste voor die afkondiging van die noodtoestand in Duncan Village beskikbaar was nie.

(d) Die aktiwiteite van die lede van die Duncan Village Residents Association is van so 'n aard dat dit tot geweld, onrus, die versteuring van die openbare orde en die

skepping van gevaar vir lede van die publiek aanleiding gee. Hulle is verantwoordelik vir die afdwinging van byvoorbeeld verbruikersboikotte en wegbly-aksies. Laasgenoemde is optrede wat daarop gemik is om te verhoed dat swart werkers op sekere tye gaan werk. Beide die verbruikersboikotte en wegbly-aksies gaan met grootskaalse intimidasie gepaard. Dit word afgedwing deur die afbranding van huise, die toediening van lyfstraf, en die moord van persone deur die sogenaamde 'necklace' metode wat daaruit bestaan dat 'n persoon om die lewe gebring word deurdat 'n buiteband om sy nek geplaas word en aan die brand gesteek word. Ek was en is daarvan bewus dat die sogenaamde 'People's Courts' ook in Duncan Village funksioneer. Tydens 'sittings' van hierdie 'People's Courts' word persone 'gevonnis' tot lyfstraf of 'tereggestel' deur die toediening van 'n 'necklace' wanneer hulle 'n verbruikersboikot of 'n wegbly-aksie verontagsaam of probeer verontagsaam. Die Duncan Village Residents Association is so georganiseer dat die lede daarvan toesien dat enige persoon wat 'n verbruikersboikot of 'n wegbly-aksie verontagsaam, gerapporteer en voor die 'People's Courts' gebring word. Die afdwinging van verbruikersboikotte en wegblyaksies gaan ook met baie ander vorme van geweld gepaard.

(e) Ek is daarvan bewus, op grond van inligting wat ek ontvang het, dat Vader CORNELIUS gereeld sy kerkperseel beskikbaar gestel het

vir vergaderings van die Duncan Village Residents Association. By hierdie vergaderings, wat met sy toestemming en klaarblyklike goedkeuring gehou is, is, onder andere, verbruikersboikotte en wegbly-aksies beplan. Algemene bespreking in verband met die voortsetting van die aktiwiteite van die Duncan Village Residents Association het ook op sodanige vergaderings plaasgevind.

(f) Op 10 Junie 1986, na 'n verbod op alle vergaderings wat op 16 Junie 1986 gehou sou word om die 1976 geweld in Soweto te herdenk, het vader CORNELIUS 'n vergadering in Mdantsane bygewoon waar aanbevelings bespreek is om die verbod op vergaderings en herdenkingsdienste te omseil, deur sodanige dienste op Sondag 15 Junie 1986 te hou. As gevolg van Vader CORNELIUS se bywoning van hierdie vergadering en sy betrokkenheid by die Duncan Villiage Residents Association het ek geglo dat hy van voorneme was om so 'n diens te lewer op Sondag 15 Junie 1986.

(g) Op grond van al die voorafgaande het ek die mening gevorm en was ek van oordeel dat Vader CORNELIUS se aanhouding nodig was om die aktiwiteite van die Duncan Village Residents Association te beëindig en ook om te verhoed dat 'n herdenkingsdiens, soos hierbo na verwys, op 15 Junie 1986 gehou word. Ek kan net meld dat ek op grond van my jare-lange ondervinding in die polisie daarvan oortuig is dat die hou van sodanige diens aanleiding

sou gegee het tot geweld wat die openbare orde sou versteur en die veiligheid van die publiek in gevaar sou stel. Ek was van mening dat indien Vader CORNELIUS toegelaat sou word om 'n herdenkingsdiens op 15 Junie 1986 te hou die publieke veiligheid bedreig sou word. Ek was verder van mening dat die handhawing van die openbare orde en die veiligheid van die publiek ondermyn sou word deur die verdere beskikbaarstelling van persele vir vergaderings van die Duncan Village Residents Association in Vader CORNELIUS se kerk. Ek het gevolglik opdrag gegee vir Vader CORNELIUS se arrestasie en aanhouding ingevolge Regulasie 3 (1) van die Noodregulasies.

(h) Ek het hierbo verwys na die feit dat ek opgetree het op grond van sekere inligting wat ek ontvang het, afgesien van die feite wat binne my kennis was. Die inligting wat ek ontvang het was afkomstig van betroubare en geloofwaardige bronne en ek glo dat ek geregtig was om op hierdie inligting staat te maak. Ek kan nie die bronne van my inligting aan hierdie Agbare Hof openbaar nie omdat ek geen twyfel het nie dat indien ek die identiteit van enige van my informante of beriggewers sou openbaar sodanige persoon in lewensgevaar sou verkeer en heelwaarskynlik om die lewe gebring sou word.

(i) Ek ontken uitdruklik die beweringe in sub-paragraaf (b) van hierdie paragraaf en beweer eerbiediglik dat ek te goeie trou en na behoorlike oorweging van alle relevante gegewens die oordeel gevorm het dat Vader

> CORNELIUS se aanhouding nodig was vir die handhawing van die openbare orde en die veiligheid van die publiek. Ek is bewus van die feit dat Vader CORNELIUS gedurende 1985 betrokke was by die bring van 'n aansoek teen, onder andere, die Minister van Polisie. Ek is nie van voorneme om op die meriete van die aansoek enigsins kommentaar te lewer nie, maar ek ontken uitdruklik dat daardie aangeleentheid enigsins aanleiding gegee het tot my besluit om Vader CORNELIUS te laat arresteer en aanhou."

The last two sentences of paragraph 11(i) contain Capt. van Wyk's reply to the respondent's statement (in paragraph 10(b) of his affidavit) that he believed it to be likely that the opinion that it was necessary to arrest and detain Father Cornelius had been "motivated by the confrontations which occurred in August 1985 between Father Cornelius (and other persons .....) and members of the South African Police", which events gave rise to an application to Court in which Father Cornelius was the first applicant. The said application is referred to in an affidavit by Mr Ian Sholto-Douglas, which was filed by the appellants. Mr Sholto-Douglas represented the

respondents in the application. He states in his affidavit that there was a conflict of fact which could not be resolved on the papers; that the matter was postponed for the hearing of oral evidence; that some time before the date appointed for the hearing of such evidence the attorney acting for Father Cornelius suggested to him (Mr Sholto-Douglas) that, because of the considerable costs involved, the matter should be settled on the basis that the application be withdrawn and that each party pay his own costs; and that the matter was so settled.

As to the affidavit of Father Fahy, Capt. van Wyk denied any suggestion therein contained that the detention of Father Cornelius was intended to serve any purpose other than those set out in reg. 3(1) of the aforesaid regulations. He specifically denied the submission contained in paragraph 8 of the respondent's affidavit, referred to above, that no member of a Force could have held the opinion that it was necessary to arrest and detain Father Cornelius unless such opinion "was motivated by malice" or "was formed as part of a campaign to

silence or victimize the Church and church ministers, for some unknown reason."

In his reply to the affidavit of Reverend Welsh, Capt. van Wyk denied the allegation that he had not acted in good faith in ordering the arrest and detention of Father Cornelius.

There was no reply to Capt. van Wyk's affidavit.

The Court a quo held, for reasons which are discussed below, that the grounds relied on by Capt. van Wyk when he formed his opinion that the detention of Father Cornelius was necessary,"were not such as to constitute an opinion as required by regulation 3(1)" and that the detention of Father Cornelius was, therefore, unlawful.

It is clear from the affidavits of the respondent, Father Fahy and Reverend Welsh that it was the respondent's case in the Court a quo that the person who formed the opinion that it was necessary to arrest and detain Father Cornelius had acted mala fide or that he had been actuated by an ulterior motive, and that the detention of Father Cornelius was, for that reason,

unlawful. In essence there is no difference between the concepts of mala fides and acting with an ulterior motive, and it can therefore be said, having regard to the facts of the present case, that the charge made against Capt. van Wyk was one of mala fides.

It appears to have been common cause between counsel in the Court a quo that the onus was on the present respondent to establish the charge of bad faith made against Capt. van Wyk, and it was so held by the learned Judge. This was a correct view of the law as to the onus of establishing a charge of mala fides: see Minister of Law and Order and Another v. Dempsey 1988(3) SA 19 (A) at 38F-39B.

The judgment of the Court a quo on the issue of the opinion formed by Capt. van Wyk begins with a discussion of the second of the grounds on which Capt. van Wyk states that he considered it to be necessary to detain Father Cornelius. The two grounds are mentioned in brief in the first sentence of paragraph 11(g) of Capt van Wyk's affidavit. The sentence reads

as follows (I have underlined the words relating to the second of the grounds):

> "Op grond van al die voorgaande het ek die mening gevorm en was ek van oordeel dat Vader CORNELIUS se aanhouding nodig was om die aktiwiteite van die Duncan Village Residents Association te beëindig en ook om te verhoed dat 'n herdenkingsdiens, soos hierbo na verwys, op 15 Junie 1986 gehou word."

In dealing with this issue, the learned Judge, adopting the approach followed by Marais J in Dempsey v. Minister of Law and Order and Others 1986(4) SA 530(C) at 541H-542H, held that Capt. van Wyk should have endeavoured to have the commemoration service prohibited in terms of sec. 46 of the Internal Security Act, 1982 (Act 74 of 1982). The prohibition of the church service in terms of sec. 46 of the said Act, the learned Judge said, would have been a much less drastic measure than the detention of Father Cornelius. The learned Judge pointed out that Capt. van Wyk made no mention of the said sec. 46 in his affidavit, and held that it was to be inferred from Capt. van Wyk's silence on the point that he "did not apply his mind to the question of

this alternative being adopted at all ....". It must accordingly be held, the learned Judge said, "on the basis of the principles discussed earlier in the judgment ..... that when he (i.e., Capt. van Wyk) formed the opinion he did he failed to properly apply his mind to the matter and his opinion was therefore not one as envisaged in regulation 3(1)". Earlier in his judgment the learned Judge had said, referring to the judgment of **Marais** J in Dempsey v. Minister of Law and Order and Others, supra, that in his view "it cannot be said that an arrest and detention is necessary for the purposes set out in regulation 3(1) unless there is no other viable alternative and accordingly there can be no opinion that such arrest is necessary unless alternatives to such action are considered and opined to be not feasible or practicable."

In my view the Court erred in its reasoning and in the conclusion to which it came. As I have pointed out, the case made in the affidavits of the respondent, Father Fahy and Reverend Welsh was that the detention of Father Cornelius was

unlawful because the person who decided that he was to be detained must have been mala fide or have been actuated by an ulterior motive, and that the charge which Capt van Wyk was called upon to meet was therefore essentially one of mala fides. He denied that he had acted mala fide, and he denied the suggestion of having been actuated by an improper motive, as set out in the affidavits of the respondent, Father Fahy and Reverend Welsh. He was not called upon to deal with the question whether he had considered the possibility of having the church service prohibited in terms of sec. 46 of the Internal Security Act, and his silence on the point cannot therefore justify the inference drawn by the Court - much less an inference of mala fides, which was the only charge that was made against Capt. Van Wyk. As to this, see the judgment of this Court in Minister of Law and Order and Another v. Dempsey, supra, at 41 E-H. The Court also erred in its view, stated earlier in its judgment, that "it cannot be said that an arrest and detention is necessary for the purposes

set out in regulation 3(1) unless there is no other viable alternative and accordingly there can be no opinion that such arrest and detention is necessary unless alternatives to such action are considered and opined to be not feasible or practicable." Reg. 3(1) empowers a member of a Force to arrest a person if the detention of such person is, "in the opinion of such member", necessary for the maintenance of public order or the safety of the public, etc. The relevant question is, therefore, not whether a detention "is", on an objective view of the matter, necessary to achieve the stated ends, but whether it is, in the opinion of the member of the Force concerned, necessary for the purpose. The test is a subjective one. It follows that it is incorrect to say that a detention is lawful only when there is "no viable alternative". See more fully as to this the judgment of this Court, delivered on 25 March 1988, in Phila Ngqumba and Another v. The State President and Three Others, at pages 36-38 of the typewritten copy of the judgment.

The Court a quo found further justification for its view that Capt. van Wyk failed to apply his mind to the matter when he formed the opinion that it was necessary to order the detention of Father Cornelius "om te verhoed dat 'n herdenkingsdiens .... op 15 Junie 1986 gehou word," in the fact that Capt. van Wyk did not explain why he thought it necessary that the detention of Father Cornelius should extend to a date beyond the day on which the church service was to be held. The Court found that Capt. van Wyk clearly did not consider this question, and, adopting an expression used by **Marais J** in Dempsey v. Minister of Law and Order and Others, supra, the Court concluded that "so fundamental an omission prevents his opinion from qualifying as the kind of opinion he was required to hold before he became entitled to exercise powers of arrest and detention in terms of regulation 3(1)".

I do not agree with the conclusion to which the Court came. Capt. van Wyk's affidavit should not, in my opinion, be read as saying that he regarded the need to prevent

Father Cornelius from conducting the church service as a separate, or independent, reason which, by itself, required his detention beyond the day on which the service was to be held. In my view there can be little doubt that it was Father Cornelius's involvement with the Duncan Village Residents Association which caused Capt. van Wyk to form the opinion that the detention of Father Cornelius should extend beyond the said date.

I turn now to the Court a quo's discussion of Capt. van Wyk's allegation that he was of the opinion that the detention of Father Cornelius was necessary "vir die handhawing van die openbare orde en die veiligheid van die publiek", and that he was of the opinion "dat Vader Cornelius se aanhouding nodig was om die aktiwiteite van die Duncan Village Residents Association te beëindig." The learned Judge's finding on the issue, as set out in the last paragraph of his judgment on the matter, reads as follows:

"In my judgment the grounds on which Capt. van Wyk

> formed the opinion that by reason of what Capt. van Wyk termed the involvement of Father Cornelius with the Duncan Village Residents Association, the detention of Father Cornelius was necessary for the maintenance of public order or the safety of the public are so flimsy that no reasonable man could have formed that opinion; the opinion is so unreasonable that it is explicable only on the basis that Capt. van Wyk acted mala fide or was actuated by an ulterior motive or that he failed to properly apply his mind to the matter."

The Court a quo held that "on the allegations made by Capt. van Wyk, the activities of the Duncan Village Residents Association were and would have been such that (he) could legitimately have formed the opinion that the arrest of any person active in such activities was necessary for the purposes referred to in reg. 3(1)." It found, however, that Capt. van Wyk's opinion that it was necessary to order the detention of Father Cornelius because of his involvement with the organisation was vitiated by mala fides, etc., as set out in the paragraph quoted immediately above. The Court's reasoning was as follows. On the papers, the Court said, the only

"involvement" of Father Cornelius with the Duncan Village Residents Association was that "he lent his name as patron" and that he allowed his church building to be used for meetings of the organisation at which, according to Capt. van Wyk, plans were made for the activities referred to by him. There is, the learned Judge said, no hint in the papers that Father Cornelius took any part in those activities, or even that he was aware of them. It is quite acceptable, the learned Judge continued, that a patron of an organisation may be quite unaware of any nefarious activities of that organisation, and that, in the light of the character references given to Father Cornelius in the affidavits filed by the respondent, that was "by no means improbable" in the case of Father Cornelius. Furthermore, the learned Judge said, he failed to understand "how it could be thought that the detention of Father Cornelius would put an end to the activities of the organisation". He added: "If all the members of the organisation had already been detained, such detention would

already have achieved that purpose. If not all the members had been detained, the detention of Father Cornelius, even if it did have the result of making his church unavailable for meetings of the organisation, which is debatable, would hardly have inhibited those members still at large from continuing with their activities." Having said this, the learned Judge proceeded to state his conclusion (quoted above) that the grounds on which Capt. Van Wyk formed his opinion that it was necessary to detain Father Cornelius were so flimsy as to justify the inference that he acted mala fide, etc.

In my opinion the Court erred. It is no doubt conceivable, as the learned Judge said, that the patron of an organisation may be ignorant of nefarious activities carried on by the organisation. (This presupposes, of course, that the organisation also carries on legitimate activities, of which one would expect the patron to be aware. As for the Duncan Village Residents Association, there is nothing on the papers which shows that it was engaged in any activities

other than those described by Capt. van Wyk.) The question in the present case is, however, whether it can justifiably be found that Capt. van Wyk was mala fide in believing that Father Cornelius's association with the Duncan Village Residents Association was not an innocent one. Capt. van Wyk stated in his affidavit that some of the allegations in the affidavits made by the respondent, Father Fahy and Reverend Welsh concerning Father Cornelius's character and activities did not accord with the information possessed by him,and that it was clear to him that the deponents did not have the same knowledge and information as he had. Information at his disposal showed, he said, that the Duncan Village Residents Association was an "alternatiewe struktuur" (alternative structure); that many such alternative structures had been establised throughout the country to take the place of prohibited organisations, especially the African National Congress; and that the Duncan Village Residents Organisation was an alternative structure of the African National Congress. The Duncan Village Residents

Association, he said, "het, soos ander 'alternatiewe strukture', ten doel die ondermyning van die Staatsgesag en die daarstelling van 'n ander vorm van regering." There was, as I have said, no reply to Capt. van Wyk's affidavit. In the circumstances one must accept that Capt. van Wyk believed that the Duncan Village Residents Association was an organisation of the kind mentioned by him. All this being so, and having regard to the fact that this organisation operated in the same area (viz. Duncan Village) in which Father Cornelius served as a priest, I find myself quite unable to hold that Capt. van Wyk's belief that Father Cornelius's association with the Duncan Village Residents Association was not an innocent one was so unreasonable as to justify the inference that he was mala fide, or, as the learned Judge also said, that he was actuated by an ulterior motive or that he failed properly to apply his mind to the matter. On the contrary, I would find it difficult to hold that his belief was at all unreasonable.

The learned Judge, as stated above, found it

incomprehensible that Capt. van Wyk could have thought that the detention of Father Cornelius "would put an end to the activities" of the Duncan Village Residents Association, and said that such detention would hardly have inhibited members of the organisation who had not already been detained from continuing with their activities. I do not think that Capt. van Wyk's statement should be read as meaning that he thought that Father Cornelius's detention "would put an end to the activities of the organisation", i.e., that it would in fact put an end to its activities, but rather that he thought that Father Cornelius's detention was necessary if one intended to achieve such a result. Capt. van Wyk did not say that he believed that the detention of Father Cornelius would put an end to the activities of the organisation. If he had intended to say that, he would, I think, have said that he believed that "die aanhouding van Vader Cornelius die aktiwiteite van die organisasie sou beëindig", and not, as he did say, that he thought that the detention was necessary "om die

aktiwiteite van die Duncan Village Residents Association te beëindig." In any event, it seems to me that even if one were to read Capt. van Wyk's statement as meaning that he thought that the detention of Father Cornelius would put an end to the activities of the organisation, it would not justify the inference of mala fides etc. drawn by the Court a quo.

In view of all the aforegoing I consider that the Court a quo erred in holding that Capt. van Wyk's opinion that it was necessary to detain Father Cornelius was not an opinion as required by reg. 3(1) of the aforesaid regulations.

It remains to deal with the order that should be made regarding the costs of the application in the Court a quo. Mrs Leeuw's application was dismissed by the Court a quo, and in my view the application of the present respondent should also have been dismissed. One cannot, however, now make an order which would give the appellants all their costs in the Court a quo. Mrs Leeuw is not a party to the appeal

and one cannot, therefore, make an order which would impose on her a heavier burden than was done by the Court a quo. Counsel who appeared before us were agreed that, if the appeal succeeded, paragraphs (4) and (5) of the order made by the Court a quo (quoted above) should be replaced by orders in the terms set out in paragraphs (3) and (4) of the order of this Court, as set out below.

It is ordered as follows:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) Paragraphs (1) and (2) of the order of the Court a quo are set aside and the following paragraph is substituted therefor:

> "The application relating to the detention of Father Graham Cornelius is dismissed."

(3) Paragraph (4) of the order of the Court a quo is set aside and the following paragraph is substituted therefor:

"The respondents are directed to pay 50% of the second applicant's costs jointly and severally."

(4) Paragraph 5 of the order of the Court a quo is set aside and the following paragraph is substituted therefor:

"The first applicant is directed to pay the respondents' costs, with second applicant being jointly and severally liable with the first applicant for 50% of such costs."

P J RABIE

ACTING CHIEF JUSTICE.

JOUBERT JA

HEFER JA Concur.

VIVIER JA

STEYN JA