IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

THE MINISTER OF LAW AND ORDER .....1st APPELLANT

THE COMMISSIONER OF POLICE .....2nd APPELLANT

and

ANGELA DEMPSEY .....RESPONDENT

CORAM:RABIE ACJ, JOUBERT, VILJOEN, HEFER et NESTADT,JJA.

HEARD : 23 NOVEMBER 1987.

DELIVERED : 11 MARCH 1988.

J U D G M E N T

HEFER JA :

This appeal is directed at an order made by MARAIS J in the court a quo for the release of Sister

Harkin.....2

Harkin, a member of the Dominican Order, from detention. The application for her release was brought against the appellants by the South African Regional Superior of the Order.

How the detention came about is described in the judgement of the court a quo, reported in 1986(4) S A 530 (C). At the relevant time a state of emergency had been declared and certain emergency regulations were in force throughout the country. (The regulations were made by the State President in terms of sec 3(1) of the Public Safety Act 3 of 1953, and published in proclamation R109 in Government Gazette No 10280.) Reg 3(1) reads as follows :

"A member of a Force may, without warrant

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> 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."

Sister Harkin was arrested on the instructions of Captain Oosthuizen of the South African police, a Force referred to in reg 3(1). On the day of the arrest she and a colleague, Sister Hardiman, attended a funeral in Guguletu. Captain Oosthuizen commanded a platoon of policemen who were patrolling the area at the time. He had past experience, so he says in his opposing affidavit, of violent and sometimes murderous rioting occurring

immediately....4

immediately after a funeral. On such occasions emotions were often fanned by dancing, the singing of songs and the shouting of slogans. That is why, upon being informed that a funeral was taking place, he proceeded with his platoon to the graveyard where he watched the proceedings from a distance. After the deceased had been buried all the cars left except one in which there were two nuns. (It later emerged that they were Sister Harkin and Sister Hardiman). Captain Oosthuizen says in his affidavit that a procession then formed which proceeded on foot from the graveyard, with the solitary car slowly driving along. The usual dancing and singing of "freedom songs", accompanied by the

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"black power" sign, began. (These are terms used by Captain Oosthuizen.) He permitted the procession to continue for a while and then, in order to prevent the situation from erupting into violence, ordered those who took part in it to disperse. Some of them obeyed and started to move away but were called and beckoned back by the nun in the passenger-seat of the car. Captain Ooshtuizen ordered his platoon to disperse the crowd with sjamboks and while this was going on, Sister Harkin actively interfered by grabbing the sjambok of one of the policemen and by assaulting him. Captain Oosthuizen ordered the policeman to arrest her. He did so, he says, because, in his opinion, her detention was

necessary....6

necessary for the maintenance of public order or the safety of the public or the termination of the state of emergency within the meaning of reg 3(1).

The court a quo found that Captain Oosthuizen had not properly applied his mind to the question of the necessity for the detention, since he never considered the possibility of arresting Sister Harkin under the ordinary laws of the land, nor the question whether she, "being at liberty after the day's events were over, posed any potential threat to the maintenance of public order or the safety of the public or the termination of the state of emergency". These omissions were regarded as so fundamental that they

vitiated.....7

vitiated Captain Oosthuizen's opinion that the detention was necessary for any of the stated purposes. The arrest and detention were accordingly declared invalid and the appellants were directed to release Sister Harkin.

In order to consider the correctness of the judgment, the proper approach to applications like the one filed in the present case must first be examined. I shall do so only in so far as it is necessary for the decision of the appeal.

Reg 3(1) has four essential elements. They

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are (1) that an opinion must be formed (2) by a member of a Force (3) that the detention of a particular person is necessary (4) for any of the purposes mentioned in the regulation. (Cf Kerchoff and Another v Minister of Law and Order and Others 1986(4) S A 1150 (A) at pp 1181 D-E and 1182 G-H.) It is obvious that no one may be arrested unless his detention is considered to be necessary for at least one of the stated purposes. It is equally obvious that the question of the necessity for detention has in terms of reg 3(1) been left for decision to members of the Forces and to no one else. This is plainly an instance where

> "... the statute itself has entrusted to

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> the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power."

(Per CORBETT J (as he then was) in South African Defence and Aid Fund and Another v Minister of Justice 1967(1) S A 31 (C) at p 35 A-B.)

It is trite that it is not the function of the court in such a case to enquire into the correctness of the opinion. In Sachs v Minister of Justice 1934 A D 11 at p 36-37 STRATFORD ACJ said:

> "--------once we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a Court of law to curtail its scope in the least degree, indeed it would be quite

improper.....10

> improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will-----In this division, at all events, no decision affirms the right of a Court to interfere with the honest exercise of a duly conferred discretion."

The court was concerned in that case with a statute which authorized the Minister to prohibit a person from being in a specified area "whenever the Minister is satisfied" that the person concerned was promoting feelings of hostility between different sections of the inhabitants of the country. At p 37 of the report

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the learned judge proceeded to say:

> "Then it was said that the notice was invalid because the Minister's power is limited to such persons as are actively and publicly and directly promoting feelings of hostility. This argument entirely ignores the words "whenever the Minister is satisfied" which leaves the selection of the individual on whom he serves notice entirely to his discretion. If he is satisfied that such individual is promoting feelings of hostility he can validly serve the notice upon him whether in fact he is promoting hostility or not. The appellant's contention involves an enquiry on, and the determination of, a question of fact which would defeat the whole object of the section and render prompt action impossible. The only question of fact with which the Court is concerned is whether the Minister was satisfied." (My emphasis.)

In Winter and Others v Administrative-in-Executive Committee and Another 1973(1) S A 873 (A) the relevant

legislation...12

legislation authorized the Administrator of South-West Africa to direct the deportation of a person if he (the Administrator) was "satisfied" that the person concerned was, inter alia, dangerous to the peace, order or good government of the Territory. At pp 888 D-F and 889 F of the report OGILVIE THOMPSON CJ said :

> "--------in terms of sec 1(1)(a) of the Proclamation, it is the Administrator (i e the Administrator-in-Executive Committee) who has to be satisfied that the individual concerned is 'dangerous to the peace, order or good government of the Territory if he remained therein'. Provided that the Administrator-in-Executive Committee honestly directed their minds to that question ---- ----it is-----no part of the Court's function to determine whether a correct decision was reached------the correctness of their conclusion is irrelevant; the decision is

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by the Proclamation entrusted to that body alone."

The same reasoning applies to the exercise by a member of a Force of his power of arrest in terms of reg 3(1). Once he forms the opinion that the detention is necessary for any of the purposes mentioned in the regulation and an arrest is made, the correctness of his opinion cannot be questioned. The validity of the arrest may, however, be challenged on any of the well known grounds on which the performance of his functions by a statutory functionary endowed with discretionary powers, may be challenged. The grounds on which this may be done, are listed in cases such as Shidiack v Union Government (Minister of the Interior) 1912 A D 642 at p 651-652

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and Northwest Townships (Pty) Ltd v Administrator, Transvaal and Another 1975(4) S A 1 (T) at p 8.

There is one observation which I wish to make arising from the description of the grounds for review in the Northwest Township case. It relates to what COLMAN J referred to as "a failure to direct his thoughts to the relevant data", and is this: unless a functionary is enjoined by the relevant statute itself to take certain matters into account, or to exclude them from consideration, it is primarily his task to decide what is relevant and what is not, and, also, to determine the weight to be attached to each relevant factor.(Johannesburg City Council v The Administrator, Transvaal and Mayofis 1971(1)

S A 87 (A) at p 99A). In order not to substitute its own view for that of the functionary, a court is, accordingly, not entitled to interfere with the latter's decision merely because a factor which the court considers relevant was not taken into account, or because insufficient or undue weight was, according to the court's objective assessment, accorded to a relevant factor. A functionary's decision cannot be impeached on such a ground unless the court is satisfied, in all the circumstances of the case, that he did not properly apply his mind to the matter.

Then there is the question of the onus of proof. The learned judge in the court a quo cited the decision in Minister of Law and Order and Others v Hurley and

Another.....16

another 1986(3) S A 568 (A) in which this court held that the onus to justify an arrest is on the person who made it or caused it to be made, but, nevertheless,ruled (at p 534B and G-I of the report) that the onus to prove mala fides on Captain Oosthuizen's part rested upon the present respondent. (Why the court referred specifically to mala fides will appear later.) In this court respondent's counsel adopted a different approach. He conceded the correctness of the court a quo's ruling but stated that it is not the respondent's case that Oosthuizen acted mala fide in ordering Sister Harkin's arrest; her case is, he said, that Oosthuizen failed to apply his mind properly to the question whether the arrest was necessary and, so

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he argued, the burden of proving that Oosthuizen exercised his mind properly rested upon the appellants and was not discharged. He relied for this submission on the judgment of TRENGOVE JA in Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa 1987(1) S A 695 (A).

In Katofa's case there was a difference of opinion between RABIE CJ (with whom JANSEN JA agreed) and TRENGOVE JA (with whom BOTHA JA agreed). The Chief Justice and TRENGOVE JA both proceeded from the premise that the party who seeks to justify an arrest bears the onus of doing so. This is in accordance with the decision in Hurley's case where (at p 589 D-E) it was

explained.....18

explained that

> "(an) arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law."

Sec 2 of the proclamation with which the court was concerned in *Katofa*, authorized the Administrator-general to order an arrest if he was satisfied, *inter alia*, that the person concerned had committed or had attempted to commit certain acts of violence or intimidation. The applicant's brother, Katofa, was detained (purportedly in terms of the relevant proclamation) and the application was for his release. The Administrator-general stated in his

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opposing affidavit that he had been satisfied at the time of ordering the detention, and was still satisfied at the time of making the affidavit, that Katofa was a person as described in the proclamation. He did not, however, furnish the reasons for his decision. His failure to do so led to the difference of opinion in this court which I mentioned. The Chief justice held the view (p 735E - 736A of the report) that, in the circumstances of the case, the Administrator-general's statement under oath that he was satisfied that Katofa was a person as described in the proclamation, was sufficient to discharge the onus to justify the detention. TRENGOVE JA (pp 741A-H, 743D-E and 744C-D) opined that it was not. The following are the key

passages.....20

passages in TRENGOVE JA's judgment:

> "Waar die bewyslas in die onderhawige geval op die Administrateur-generaal gerus het, moes hy, na my mening, in sy beëdigde verklaring prima facie bewys gelewer het dat hy met die uitreiking van die lasbrief, in elke opsig aan die voorskrifte van art 2 voldoen het, en stiptelik binne die bestek daarvan gehandel het. Dit blyk nie uit die Administrateur-generaal se beëdigde verklaring dat dit inderdaad gebeur het nie." (p 741A-B)

> "Waar dit egter gaan oor die interdictum de libero homine exhibendo, is dit duidelik dat die instansie wat verantwoordelik is vir die vryheidsberowing van die individu die bewyslas dra om die Hof te oortuig van die regmatigheid van die aanhouding. Daaruit moet dit volg dat hy ook die behoorlike uitoefening van die diskresie moet bewys, al is dit dan slegs met verwysing na die beperkte gronde waarop die uitoefening van sodanige diskresie aanvegbaar is," (My emphasis.) (p743D-E)

I am in respectful disagreement with this reasoning. The practical problems which may arise from casting the onus of proving the proper exercise of the discretion on the party bearing the onus of justifying the detention, are manifest. This is well illustrated by Katofa's case. The only material allegation in the applicant's founding affidavit was that his brother's detention was unlawful. No grounds were advanced for the assertion. In a supporting affidavit his attorney added that Katofa was being detained against his will without being charged with an offence. (Certain other allegations which he made were plainly irrelevant to the legality of the detention.) These then were the allegations which the Administrator-

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general had to meet. He did so by alleging in his opposing affidavit that he had ordered the arrest and detention in terms of sec 2 of the proclamation after satisfying himself that Katofa was a person as described therein. This allegation was not disputed in the replying affidavit.

What is immediately apparent, is that the Administrator-general's bona fides in exercising the discretion vested in him by sec 2 of the proclamation was not questioned in the applicant's papers. Nor was there the faintest suggestion that he had not properly exercised his mind. Yet, the following appears in TRENGOVE JA's judgment (at p 743E-I of the report) :

"Dit blyk nie uit die passasies (in the

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opposing affidavit) dat die Administrateur-generaal hoegenaamd bewus was van die strekking, en die kumulatiewe werking, van subparas (a) en (b) van art 2 van die proklamasie nie. Dit is immers 'n voorvereiste vir die behoorlike uitoefening van sy diskresie. Om te sê dat hy daarvan oortuig was, en nog is, dat die aangehoudene 'n persoon was soos bedoel in art 2 van die proklamasie is eintlik niksseggend tensy dit ook uit sy verklaring blyk dat hy presies geweet het wat die strekking van die twee subparagrawe is. Dit is verder 'n voorvereiste vir die uitoefening van sy diskresie, dat die Administrateur-generaal oortuig moet wees van die feitlike omstandighede wat in die subparagrawe uiteengesit word. Hy mag geen ander omstandighede of oorwegings in ag neem nie. Die Administrateur-generaal het ook nie in die betrokke passasies die redes vir sy oortuiging, of die gegewens waarop dit gegrond is,verstrek nie. Dit is dus nie moontlik om te sê of die Administrateur-generaal te goeder trou geglo het dat die gegewens waarop sy oortuiging

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gegrond is binne die bestek van subparas (a) en (b) van art 2 val nie en of daardie gegewens hoegenaamd vatbaar is vir die afleiding wat hy daarvan gemaak het nie."

If TRENGOVE JA's view of the onus is correct, there can be no doubt that these remarks were apposite, for, in that event, it would have been incumbent upon the Administrator-general to produce sufficient evidence to show that there was not a single ground upon which the exercise of his discretion could be assailed. But, therein lies the problem. In Jeewa v Dönges N.O. and Others 1950(3) S A 414 (A). at p 423D CENTLIVRES ACJ said that "(the) mere allegation that the Minister has acted mala fide or dishonestly is not sufficient to entitle the court to enquire into the reasons for the Minister's decision";

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and in Winter's case (supra at p 887G-H) OGILVIE THOMPSON CJ ruled that, there being nothing on the papers before the court to substantiate the appellant's averments that the respondent had acted arbitrarily or for an improper purpose, their "unsubstantiated allegations in that regard - albeit that appellants sought only interim relief and that respondents did not see fit to record on oath even a bare denial - do not warrant the Court in accepting, or acting upon, those allegations". These remarks were admittedly made in cases where there was no onus upon the respondent,but they were not made without purpose. It cannot be expected of a respondent to deal effectively in an opposing affidavit with unsub-

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stantiated averments of mala fides and the like without the specific facts on which they are based being stated. So much the more can it not be expected of a respondent to deal effectively with a founding affidavit in which no averment is made, save a general one that a detention is unlawful. And if TRENGOVE JA is correct, this is indeed what a respondent will be obliged to do. Unlike other statutory functionaries, he will in effect be obliged to disclose the reasons for his decision and be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the onus has not been discharged, may ensue. Such a state of affairs is quite untenable.

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There is, however, a more fundamental reason for holding that the onus of proving the proper exercise of the discretion is not on the party bearing the onus of justifying the arrest. I accept, of course, that the onus to justify an arrest is on the party who alleges that it was lawfully made and, since an arrest can only be justified on the basis of statutory authority, that the onus can only be discharged by showing that it was made within the ambit of the relevant statute. Any statutory function can, after all, only be validly performed within the limits prescribed by the statute itself, and, where a fact or a state of affairs is prescribed as a pre-condition to the performance of the function (a so-called

jurisdictional.....28

jurisdictional fact), that fact or state of affairs must obviously exist and be shown to have existed before it can be said that the function was validly performed. (Cf Roberts v Chairman, Local Road Transportation Board and Another 1980(2) S A 472 (C) at p 476H-477A; S v Ramgobin and Others 1985(3) S A 587 (N) at p 590I-591C.) But what has to be determined in every case is exactly what the jurisdictional fact is. In this regard the distinction drawn in the Defence and Aid case (supra) and recognised by this court in Lennon Ltd and Another v Hoechst Aktiengesellschaft 1981(1) S A 1066 (A) at p 1076 C-E is of decisive importance. I mentioned earlier that reg 3(1) is an instance where the repository of the power has

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himself been entrusted with the function of deciding whether the prerequisite fact or state of affairs exists. The result is, as indicated in the Defence and Aid case (at p 35 B-C), that

> "the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense, but whether, subjectively speaking, the repository of the power had decided that it did." (My emphasis.)

It is for this very reason that it was said in the Sachs case (supra) in the passage already quoted that "the only question of fact with which the Court is concerned is whether the Minister was satisfied". Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is

brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegation to prove it. There are in such a case two separate and distinct issues, each having its own onus (Pillay v Krishna and Another 1946 A D 946 at p 953). The first is whether the opinion was actually formed; the second, which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed, is whether it was properly formed. If eg in a case like the instant one the applicant were to admit that a member of a Force had formed the opinion that the detention of the person

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concerned was necessary for the maintenance of the public order, there can, in my view, be no doubt that the application will be dismissed unless evidence is produced which persuades the court on a preponderance of probabilities that the opinion was not properly formed.

To hold that the burden of proof on the second issue rests upon the party alleging that the opinion was not properly formed, will bring applications of the present kind in line with other applications for the review of the decisions of statutory functionaries on the grounds mentioned in the Shidiack case, except that the respondent will first have to prove that the required opinion was actually formed. It will also be in line with

decisions.....32

decisions such as Union Government (Minister of Railways) v Sykes 1913 A D 156 at p 169-170 and Johannesburg Municipality v African Realty Trust Ltd 1927 A D 163 at p 177 in terms of which the onus to prove a so-called neg - ligent performance of an act authorized by statute is cast upon the party alleging that it was "negligently" performed.

To conclude the discussion of the onus I wish to refer briefly to the decision in Radebe v Minister of Law and Order and Another 1987(1) S A 586 (W) where,in an application similar to the one brought in the present case, it was held that the onus to prove the unlawfulness of an arrest under reg 3(1) was on the applicant. GOLD-

STONE J relied for his ruling on reg 16(4) which, so the learned judge said(at p 591 D-H), "has the effect of transferring the onus of proof to the applicant". There is no need to quote reg 16(4). It seems to me to be linked to the indemnity against liability in reg 16(1) and to be applicable only in that context. However, I do not express any definite opinion in this regard. But, since reg 16(4) cannot have the effect of casting the onus to prove "the unlawfulness of the detention" on an applicant, as the learned judge said, and can at best only have a bearing on the question of bona fides and not on other possible grounds on which the lawfulness of a detention may be challenged, it does not assist in the enquiry

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in the present appeal.

In the present case, therefore, the onus to prove that Captain Oosthuizen had formed the required opinion, was on the appellants. Respondent's counsel conceded that this onus was discharged and what remains, is to determine whether the onus to prove that the opinion was improperly formed, was discharged by the respondent.

Captain Oosthuizen's version of the events which led to Sister Harkin's arrest differs in very material respects from that put forward by the respondent's witnesses. At the hearing of the application in the court a quo respondent's counsel elected not to lead oral evidence or to cross-examine any of the appellants' witnesses,

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but to argue the matter on Captain Oosthuizen's version of the facts. On that basis the case was eventually decided. As mentioned earlier, the learned judge found that Captain Oosthuizen had not properly applied his mind to the question of the necessity of Sister Harkin's detention. His reasoning appears from the following passage in the judgment (at p 541H-542H of the report) :

> "I return to Captain Oosthuizen's explanation of his decision to arrest and detain Sister Harkin. It is plain that his opinion stated in reg 3(1) was based solely and exclusively upon her conduct that day. As he saw it, she had been guilty of unlawful conduct of the kind described by him and had interfered with police action and with the restoration and maintenance of public order. I interpolate here that it follows that she had thus rendered herself liable to arrest in terms of the ordinary law

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of the land and Captain Oosthuizen must be taken to have been aware of that. His affidavit is silent on what seems to me to be a crucial factor in the circumstances of this particular case, namely why a conventional arrest and prosecution in accordance with the ordinary law of the land would not have served to put an end to any threat to public order which she may have then represented. I can only conclude that he failed to consider it. If he had considered it and concluded that it would not have sufficed, I would have expected him to say so and to explain why it would not have sufficed. Before he could conscientiously conclude that her arrest and detention in terms of the emergency regulations was necessary, I think that it is manifest that he would have to consider this obvious alternative. Certainly resort to that alternative would have put an end to any further participation by her in that day's events just as effectively as an arrest under the emergency regulations would have done. As for the future, there is no suggestion in

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Captain Oosthuizen's affidavit that he even applied his mind to that question. When I asked Mr Viljoen whether, on Captain Oosthuizen's version, he had done so, he initially answered that he had not. Upon realising the implications of this answer which was admittedly given without time for reflection, Mr Viljoen qualified it by submitting that it would have been mendacious for Captain Oosthuizen to claim that he had pertinently weighed up what her conduct in the future was likely to be, but that it was inherent in his decision to arrest and detain her in terms of reg 3(1) that some consideration must have been given to her possible or likely future conduct. Captain Oosthuizen has taken pains to lay his reasoning before the Court and he certainly does not claim to have applied his mind to that question. In the circumstances, I am satisfeid that he did not. Regulation 3(1) obliged him to opine whether her arrest and detention under the emergency regulations was necessary for the purposes therein set out. In forming such an opinion he was required to take account of relevant factors known to him and to weigh, not only

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> whether the arrest was called for, but also whether the ensuing detention under the emergency regulations was called for. That necessarily entailed considering whether or not Sister Harkin, being at liberty after the day's events were over, posed any potential threat to the maintenance of public order or the safety of the public or the termination of the state of emergency. That he failed to consider. So fundamental an omission, in my view, prevents his opinion from qualifying as the kind of opinion which he was required to hold before he became entitled to exercise powers of arrest and detention in terms of reg 3(1). His exercise of the power was therefore unlawful and it falls to be set aside."

Although I have certain reservations on which I need not elaborate in view of the conclusion at which I have arrived, I am prepared to accept for present purposes that, had Captain Oosthuizen not considered the two matters referred to by the learned judge, a finding that he did not

properly exercise his mind would be justified. But what has to be determined first is whether the finding that he did not consider them is correct. And it is at this level, in my view, that the court's reasoning fails.

As will be seen from the passage just quoted, the sole reason for the Court's finding was that Captain Oosthuizen did not explicitly state in his affidavit that he had considered the matters in question. This serves to emphasize what I said earlier in connection with the burden of proof and the necessity of heeding the *dicta* in *Jeewa's* case and *Winter's* case quoted above. Unless

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a respondent who is alleged to have exercised his discretion improperly knows in what respect or in what manner he is alleged to have done so, he cannot deal effectively with the complaint in his opposing affidavit. A mere allegation eg that he failed to apply his mind properly to the matter is of no assistance to him; there is always the risk that, in attempting to meet such an allegation, he may omit to deal with something which it may later be argued he should have dealt with. An adverse inference should, therefore, not lightly be drawn from a deponent's silence in an opposing affidavit on points not specifically raised in the applicant's founding affidavit and the affidavits filed in support thereof.

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It is said in the present respondent's founding affidavit that -

> "I respectfully submit that the police in arresting and detaining Sister Harkin acted mala fide and from improper and ulterior motives. I submit that no member of the police formed an opinion that the arrest and detention of the said Harkin was necessary for any of the purposes referred to in section 3(1) of the Emergency Regulations."

It emerges from the affidavit that the respondent was not present at the arrest and that she relies for these submissions on the evidence of three witnesses to whose affidavits the court is referred. One of these, Girlie Joja, after describing how the arrest came about, says (again by way of submission) that Sister Harkin was detained, not because any police official had formed an

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opinion as envisaged in reg 3(1), but because she had witnessed an assault committed by a policeman on a member of the funeral procession. In precisely the same words as those used by another witness, Sister Hardiman, she says that Sister Harkin did or said nothing "which would lead any reasonable person, properly and honestly applying his mind to all the relevant facts and without misdirecting himself to form an opinion that the arrest and detention of the said sister was necessary for any of the purposes set out in section 3(1)". Sister Hardiman adds:

> "In the light of the above, I respectfully submit that if any police official arrested and detained Sister Harkin for anything she did or said during the aforementioned period when she was in my presence and/or sight, then such

police.....43

police official acted mala fide and from improper and ulterior motives in so arresting and detaining her and that in the circumstances such arrest and detention is unlawful."

Captain Oosthuizen's affidavit was obviously prepared on the basis that what the applicant alleged was (1) that no opinion as envisaged by reg 3(1) had been formed and (2) that Sister Harkin had been arrested mala fide and for an ulterior or improper motive. This appears, inter alia, from the statement in his affidavit that Sister Harkin's detention was, in his bona fide opinion, necessary for the maintenance of public order or the safety of the public or the termination of the state of emergency within the meaning of reg 3(1), and from his denial that he acted mala fide or for an ulterior motive. He describes

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the events on the day of the arrest and the part which Sister Harkin played therein, obviously in order to substantiate his denial by showing that the facts relied upon by the respondent are not correct. In my opinion Captain Oosthuizen's view of the charges made against him was correct. He was accordingly not called upon to deal with the questions on which the court found his affidavit to be lacking. This being so, there is no justification for an inference that he did not consider a conventional arrest, nor whether Sister Harkin posed a potential future threat, merely because he does not say in his affidavit that he did so. The judgment can, accordingly, not be supported on this basis, nor on any other basis

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that I am able to conceive of. As mentioned earlier, respondent's counsel in this court disavowed any intention of relying on mala fides on Captain Oosthuizen's part and rested his argument on the latter's failure to consider the two matters referred to. But Oosthuizen's failure to do so has not been proved on the papers, and the opportunity which was available to the respondent to prove it was lost when her counsel elected in the court a quo not to cross-examine Captain Oosthuizen or to lead oral evidence.

In this court respondent's counsel, relying on TRENGOVE JA's judgment in the Katofa case (supra), sought to justify the court a quo's conclusion by

submitting that the onus was upon the appellant to show that Captain Oosthuizen considered all relevant factors - including the two factors mentioned by the learned judge - and that he acted "exactly and punctiliously within the four corners of reg 3(1)". (I quote from counsel's written heads of argument.) In dealing with Katofa's case I indicated why I do not agree with this contention, and I reject it.

I conclude, therefore, that the court a quo erred in declaring the arrest and detention invalid and in ordering Sister Harkin's release.

The appeal is upheld with costs including the costs of two counsel. The order of the court a quo is

set.....47

set aside. Substituted for it is an order that the application is dismissed with costs.

J J F HEFER JA.

RABIE ACJ)
JOUBERT JA) CONCUR.
VILJOEN JA)