A17.12

IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION) CASE NO. 1103/87

In the matter between: DATE DELIVERED:

JANET MARY CURRY Applicant

and

THE MINISTER OF LAW AND ORDER First Respondent

THE MINISTER OF JUSTICE Second Respondent

THE COMMISSIONER OF POLICE Third Respondent

THE OFFICER COMMANDING,
NORTH END PRISON Fourth Respondent

JUDGMENT

A13.2 BS.6
A17.12

KROON, J:

This is an application for the release of the applicant who was arrested in Cape Town on 22 August 1986 and who is at present being detained at the North End Prison, Port Elizabeth. An order is sought declaring her arrest and detention to be unlawful together with an order for her immediate release from custody. The applicant further prays for an order as to costs.

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The respondents cited are the Minister of Law and Order, the Minister of Justice, the Commissioner of Police and the Officer Commanding, North End Prison. The first three respondents oppose the application. The fourth respondent abides the decision of the Court.

It is common cause that the justification for the arrest and detention of the applicant is sought in the emergency regulations promulgated by the State President in terms of section 3 (1) (a) of the Public Safety Act, No. 3 of 1953 pursuant to the state of emergency declared by him on 12 June 1986. The papers disclose that the applicant was arrested and detained on the instructions of Major Roelofse of the Security Police, Port Elizabeth and that in issuing these instructions he invoked the powers vested in him by regulation 3 (1) and that the first respondent invoked the powers conferred on him by regulation 3(3) to extend the period of the detention of the applicant and it is in terms of such further order that the applicant is at present being held.

A number of similar applications have recently engaged the attention of various divisions of the Supreme Court and a number of legal principles have been laid down as being applicable to applications of this nature. In the circumstances it would be unneccessary to burden this judgment with a setting out of these legal principles; it would suffice to refer the readers of this judgment to the previous decisions which have been handed down in the various divisions including, inter alia the following:

STATE PRESIDENT AND OTHERS V TSENOLI 1986(4) S.A. 1150 (A.D); THE BISHOP OF THE ROMAN CATHOLIC CHURCH OF THE DIOCESE OF PORT ELIZABETH V THE MINISTER OF LAW AND ORDER AND OTHERS (E.C.D., 1 August 1986); VALE AND OTHERS V THE MINISTER OF LAW AND ORDER AND OTHERS (E.C.D., 5 September 1986) ORAM V THE MINISTER OF LAW AND ORDER AND OTHERS (E.C.D. 27 October 1986); NQUMBA AND OTHERS V THE STATE PRESIDENT AND OTHERS 1987(1)S.A. 456(E); RADEBE V ,MINISTER OF LAW AND ORDER AND ANOTHER (W.L.D.,7 July 1986); NKWINTI V COMMISSIONER OF POLICE AND OTHERS 1986(2) S.A. 421(E); SWART V MINISTER OF LAW AND OTHERS(C.P.D. 3 April 1987); KATOFA V CABINET FOR THE INTERIM GOVERNMENT OF SOUTH WEST AFRICA 1987 (1) S.A. 695 (A.D.) and the other cases cited in these decisions.

There are a number of disputes on various fundamental factual aspects between the applicant and the respondents. In these circumstances the correct approach is that set out in PLASCON -EVANS PAINTS V VAN RIEBEECK PAINTS (PTY) LTD 1984(3) S.A. 632 (A.D.) viz., that subject to the qualifications set out in this case, the matter must be dealt with on the basis of those facts set out in the applicant's papers which are either admitted or not denied by the respondents, together with the facts as stated by the respondents.

In his affidavit Roelofse states that he bona fide held the opinion that the detention of the applicant was necessary for the maintenance of public order, the safety of the public and the termination of the state of emergency. The grounds for such opinion are in the main based on information received by him from what he describes as "volwasse en uiters betroubare bronne"

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He is, however, unable to disclose the identity of any of the persons who furnished him with the information in question as he fears for their safety and, secondly he considers that the security of the State would be prejudiced by such disclosure. His reasons for withholding the sources of his information cannot be criticised, nor did counsel seek to do so. The essence of the grounds relied upon by Roelofse may be summed up as follows: The applicant is a prominant radical political activist in the Port Elizabeth - Uitenhage area, i.e., a person who endeavours, by unlawful, violent and revolutionary methods, to overthrow the existing order in the Republic. She was prominent in the organisation and implementation of street and area committees which are structured in terms of the so-called M-plan (the Mandela plan which has the same objects as the African National Congress, a banned organisation which seeks to overthrow the present government of the Republic by means of violent and unlawful revolutionary methods) and which aim at organising the local black population, to politicise them and to mobilise them to overthrow the existing order with violence. The applicant used her connections with the East Cape Adult Learning Project (ECALP) and the Port Elizabeth Crisis in Education Committee to realise her aims. The street and area committees are responsible for the enforcement, by means of intimidation and violence, of consumer boycotts and worker stay aways. These committees are also responsible for the setting up and functioning of the so-called "people's courts" which "try" persons who infringe the boycotts and stay aways and suspected police informers and impose "sentences" varying from fines to the death sentence, the latter being carried out by way of the "necklace" method. The applicant was actively involved in such activities and ECALP was used by her as a front for the furtherance of these activities.

She further was responsible, together with the executive of the Port Elizabeth Youth Congress (PEYCO) for the organisation of the amabutho, i.e., youths who were responsible for the carrying out of the sentences imposed by the people's courts and the enforcement through intimidation and violence, of the boycotts and stay aways. She tutored others in Marxist doctrines, the revolutionary methods of the African National Congress (ANC) and revolutionary indoctrination. The instruction given by her incited others to go into the black residential areas and by means of indoctrination and revolutionary methods, endeavour to overthrow the existing order with violence.

The applicant later commenced giving instruction in regard to the area and street committees and how they should be implemented. The applicant had further been in direct contact with the ANC over an extended period and had kept it informed of the unrest situation in the Eastern Cape. Had the applicant not been detained in terms of the emergency regulations she would have continued with the activities set out above.

The order for the further detention of the applicant - which was determined to be for as long as the emergency regulations remained in force - was signed on 1 September 1986 by the then Minister of Law and Order, LOUIS LE GRANGE. In his affidavit the latter states that he was regularly kept advised and informed of all relevant information in regard to the unrest situation in the country. Prior to his decision to order the further detention of the applicant he received, inter alia, information regarding the applicant's involvement with ECALP and the Port Elizabeth Crisis in Education Committee and the circumstance that the applicant was involved in the activities which are referred to in the affidavit of Roelofse. After a thorough and anxious consideration of all the facts at his disposal he bona fide decided that it was necessary that the applicant be detained for as long as the emergency regulations remained in force in order to maintain public order, to ensure the safety of the public and for the termination of the state of emergency.

In his affidavit the first respondent, the present Minister of Law and Order, states that he, too, both in his former capacity as Deputy Minister of Law and Order and in his present capacity, was, and is continually being, kept informed of all relevant information concerning the unrest situation in the country. All the information which was available to his predecessor - adverted to above - was available to him when he considered representations for the release of the applicant. On a proper consideration of all the information at his disposal he bona fide concluded that the continued detention of the applicant was necessary for the maintenance of public order, for the safety of the public and for the determination of the state of emergency.

The applicant's reply to the factual allegations set out above is in essence as follows: A denial of any of the allegations of unlawful conduct on her part made by Roelofse. While admitting that she was a member of ECALP she avers that her activities as such member were confined to legitimate educational endeavours and she denies that she used ECALP as a front for revolutionary activities. She further admits that she is a politically active person, but avers that her political activities were confined to membership of legal organisations such as the End Conscription Campaign, and she points out that her involvement with these organisations is not relied upon by the respondents. She denies any association with the Port Elizabeth Crisis in Education Committee. In particular she denies any involvement with the organisation of the amabutho, the area or street committees, the implementation of the so-called M-Plan, the so-called "people's courts", the A.N.C. or any activities aimed at the overthrow of the existing order by revolutionary or violent means.

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In the result she denies that any person could have reasonably properly or honestly concluded that her detention was necessary for any of the purposes stated by the respondents. She further makes the point that the grounds set out in the affidavit of Roelofse are inconsistent with the reasons furnished by the former Minister of Law and Order for the further detention of the applicant which reasons were furnished in reply to a request by the applicant for the reasons for her further detention - about which more later.

Mindful of the limitations imposed upon him by the nature of the present proceedings in arguing which factual allegations should be accepted Counsel for the applicant did not seek to argue that on a mere weighing up of the respective allegations made by Roelofse and the applicant the averments of the latter should be accepted. In adopting that attitude counsel acted quite properly. Counsel did argue, however, that great weight should be attached to the reasons furnished to the applicant by the then Minister of Law and Order for the further detention of the applicant and he boldly submitted that a comparison of those reasons with the grounds now set out by Roelofse required the rejection of the validity of those grounds. The foundation of counsel's argument was an alleged inconsistency between the reasons and grounds which, so it was argued, demonstrated the unacceptability of the grounds. The corollary of this submission was the submisssion that where the first respondent avers that he relied on considerations not embraced in the reasons furnished to the applicant, his assertions are similarly to be rejected.

The papers disclose that on 24 September 1986 an attorney acting for the applicant addressed a letter to the then Minister of Law and Order seeking the reasons for the extended detention of the applicant. The reply thereto was in the following terms:

> "I am in receipt of your letter dated 24 September 1986 and wish to advise that the political unrest which prevails in the country, especially amongst the Black communities, manifests itself in various ways, inter alia in creation of unofficial educational structures intent on supplanting existing ones. These endeavours lead to the breakdown of law and order with concomitant eruption of violence, injury or death to innocent people, damage to private and public property.
>
> Your client was the director of the "East Cape Adult Learning Project". This progandaproject aims at teaching adult Blacks all aspects of Marxism and to equip them with the necessary knowledge to subsequently organise "Street Committees".
>
> Furthermore your client was also a member of the "Port Elizabeth Crisis in Education Committee". One of her tasks in this organisation was to draw up a syllabus for "People's Education" to replace the existing syllabus in government schools."

On an analysis of the contents of this reply I am of the view that it is not correct to say that the reasons set out therein are inconsistent with the grounds relied upon by the respondents in the present papers. At most it can be said that the reasons are not as full as the grounds relied upon in the papers. Account should also be had of the statement by Le Grange that in his reply to the applicant's request he merely set out the main reasons which had direct bearing on the unrest situation which then prevailed.

Certainly counsel has not persuaded me that on the strength of the contents of the first respondent's reply to the request filed by the applicant's attorney I should reject the statements under oath by Le Grange and Roelofse as to the considerations which led them to the conclusions reached by them as to the action to be taken against the applicant. I am further of the view insofar as it may be relevant, that the applicant was sufficiently appraised by the first respondent of the reasons for her further detention c.f. BILL V STATE PRESIDENT AND OTHERS 1987(1) S.A. 265 (WLD).

Counsel next pointed to the fact that it had been encumbent on the first respondent to apply his mind to the question of how long the further detention of the applicant was to endure and he submitted that the respondents had failed to show that the first respondent had so applied his mind. The affidavit of Le Grange states in terms, however as follows!

> "Na deeglike en ernstige oorweging van al die feite tot my beskikking het ek bona fide geoordeel dat dit noodsaaklik was dat Applikante aangehou word vir die tydperk soos deur my gelas in Aanhangsel "LLG 1" hiertoe. (my underlining)

The annexure referred to reflects an order that the applicant be detained for as long as the emergency regulations remain in force. Counsel argued that it was insufficient for the first respondent to set out his opinion by means of, as counsel put it, a cross-reference to another document. There is no substance in the submission. Le Grange has in terms stated that he considered that it was necessary that the applicant be detained for the period set out in the annexure and in my judgment that is an adequate statement that he applied his mind as he was required to do.

Counsel next submitted that both the initial arrest and detention at the instance of Roelofse and the subsequent extention of the detention by the first respondent were invalid because neither of those two officials considered the alternatives to detention under the emergency regulations. In her affidavit the applicant merely avers that the first respondent could not have formed the opinion that it is necessary to hold her in detention under the emergency regulations as opposed to releasing her with or without restrictions. In the course of setting out the reasons for the action taken by them against the applicant the respondents have denied this allegation by the applicant and it is implicit in their affidavit that the alternative suggested by the applicant was considered by them and opined not to be a feasible alternative course of action to be adopted. Counsel argued, however, that another alternative was prosecution under the ordinary law of the land. This contention was not raised by the applicant in her affidavit, but that notwithstanding - c.f. Oram 's case supra - consideration will be given thereto. It was counsel's submission that on Roelofse's allegations the applicant had committed acts of terrorism or even treason or furthering the aims of the A.N.C. and prosecution of those offences was a ready alternative to detention under the emergency regulations. In pressing this argument counsel relied on what I, following the approach in the Dempsey case (referred to in the Diocese case), said in the Diocese of Port Elizabeth case supra, viz:

> "In my view it cannot be said that an arrest and detention is necessary for the purposes set out in reg. 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.

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An appeal in the Diocese case is presently pending, but at this stage I must proceed on the basis that the above passage is a correct reflection of the law. The case was quoted with approval by the full bench of this division in the NQUMBA case supra. In the DIOCESE case, however, I went on to say the following:

> "It may be that some limitation should be placed on what would properly constitute an alternative course to adopt and I wish to guard myself from stating that every alternative which counsel's ingenuity may, after the event, suggest was one which ought to have been considered before recourse was had to the powers conferred by reg. 3 (1). It is not necessary, however, that I venture any view as to what the nature of such limitation should be".

In a comment on this passage Kannemeyer,J., expressed himself thus in the Nqumba case at p.472 ;

> I would suggest that one possible limitation is this. The purpose of the Public Safety Act is to meet situations in which the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public or to maintain public order. If the situation with which the arresting member is faced is one which can properly be dealt with under the ordinary law of the land, then a recourse to detention will not be necessary. That was the situation in the Dempsey case and also in the Diocese of Port Elizabeth case in so far as one of the applicants was concerned. Also other alternatives must be viewed against the nature of the situation and the degree of urgency with which the arresting member has to act, bearing in mind the basic reason for the declaration of a state of emergency namely that the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public or to maintain public order.

> As the papers before us illustrate, much of the information leading to the detention of the various applicants is of a hearsay nature and its source cannot be disclosed for fear of reprisals. Under such circumstances, even where there is a possible alternative to detention under the ordinary law of the land it may be such an alternative as is more apparent than real as the alternative remedy cannot be relied on as its efficacy is dependent upon proof which cannot be put before a court. Thus while I am in respectful agreement with the decision of Marais J in the Dempsey case supra, it would appear that a situation such as that which he was dealing will not occur frequently, while the decision in the Bishop of the Roman Catholic Diocese of Port Elizabeth case would seem, on the facts, to be a borderline case in so far as Brother Cornelius was concerned. Again, if there is a degree of urgency present the arresting member cannot be expected to rely on an alternative remedy which depends upon the discretion and action of another. A magistrate asked to ban a meeting may not agree to do so; time may not permit of obtaining a Ministerial order; a prohibition under the regulations may be ignored by the person whose acts must necessarily be curtailed or controlled, he may be willing to face prosecution and the heavy penalties laid down by reg 14, in which case the alternative remedy, attractive in theory, would prove abortive in practice."

In the instant case it is clear from the affidavit of Roelofse that much, if not all, of the information leading to the detention of the applicant is of a hearsay nature and its source cannot be disclosed for fear of serious reprisals against such sources.

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In these circumstances I am of the view, on the reasoning set out in the Ngumba case, that the alternative suggested by counsel was not a feasible or practicable alternative.

A number of other submissions were mentioned by counsel during argument, but I do not think that I do counsel an injustice by saying that these submissions were not seriously pressed. They related in the main to an attack on the validity of the opinions held by Roelofse and on the principles set out in the cases mentioned earlier in this judgment it is clear that the submissions cannot justify an interference by this court with the action taken against the applicant.

As far as costs are concerned counsel for the applicant submitted that in the event of this court holding against the applicant on the grounds set out in the opposing affidavits, the applicant was nevertheless entitled to launch her application on the basis of the reasons furnished by the former Minister of Law and Order which, as set out earlier, it was alleged differed materially from the grounds set out in the opposing affidavits. I have already found that his submission is not valid and there is no other ground why costs should not follow the event. Counsel for the applicant did not oppose an order for costs in respect of two counsel.

In the result the order I make is as follows:
The application is dismissed with costs, such costs to include those attendant on the employment of two counsel.

F.KROON
JUDGE OF THE SUPREME COURT