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THE MEDIA AND EMERGENCY REGULATIONS - A REVIEW OF THE PRESENT POSITION

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About the only government measures that have recently undergone substantial change and reform, have been the Emergency Regulations. Like nostalgia, they ain't what they used to be. The courts, particularly in Natal, have seen to that.

It is our view that it is now time to take stock of the net effect

of the emergency restrictions and the various Court judgments. The judgment in the SAAN / Argus case by the Natal Supreme Court is a bench-mark decision for the media, against which the applicability of any Regulations relating to the press must be read. On the eve of the Natal judgment, the Commissioner of Police issued Regulations, primarily dealing with the reporting of security action, unrest and gatherings. In the main, this notice is clear and unambiguous and capable of specific definition. The Commissioner is learning how to legislate. It would seem that a status quo has been established.

NEWS AND COMMENT IN GENERAL

Apart from news and comment on security force action, which we will deal with under a separate heading, the restrictions on news and comment in general are now to be found in the definition of subversive statement, read with Regulation 10. Under this Regulation, it is an offence, among others, to publish or disseminate a "subversive statement".

The definition of subversive statement, in the light of deletions by the Natal Supreme Court in the case of Metal and Allied Workers Union & Another v State President & Others, a full bench Natal decision ("the MAWU case"), now reads :-

"Subversive statement" means a statement which contains anything which is calculated to have the effect or is likely to have the effect -

- (a) ... (deleted - objects of unlawful organisations) ...
- (b) of inciting the public or any person or category of persons to -
 - (i) take part in any unlawful strike;
 - (ii) take part in or to support any boycott action;
 - (iii) take part in any unlawful demonstration, gathering or protest procession;
 - (iv) take part in any acts of civil disobedience; or
 - (v) discredit or undermine the system of compulsory military service;
- (c) of inciting the public or any section of the public or any person or category of persons to resist or oppose the Government or any Minister or official of the Republic or of any self-governing territory or any member of a Force, in connection with any measure adopted in terms of any of these Regulations or in connection with any other measure relating to the safety of the public or the maintenance of public order ...
(deleted)
- (d) ... (deleted - engendering hostility) ...
- (e) ... (deleted) ... of encouraging the public or any section of the public to commit any act or omission which endangers or may endanger the safety of the public, the public order or the termination of the state of emergency; or
- (f) of encouraging or promoting disinvestment or the application of sanctions ... (deleted) ... against the Republic;

and the expression "subversive nature" shall have a corresponding meaning;"

A few comments on this definition may be helpful.

The peg on which paragraphs (b) and (c) are hung, is the word "incite". Didcott J in the MAWU case had the following to say about the word "incite" in the context of clause (b) of the definition :-

"But all of these are governed by the word 'inciting'. True, what matters is not whether one intends to incite, but whether one does something which is likely to have the effect of inciting. When one considers some of the examples canvassed in argument, such as whether a pastor of Jehova's Witnesses could break the law as it stands under this Regulation by advising one of his flock that to undergo military service was contrary to his faith, I have no difficulty with the proposition that no court interpreting the Regulation properly would come to the conclusion that he was committing the offence of inciting the undermining of the system of compulsory military service." (our underlining)

And later, in the context of clause (c), the same Judge had this to say :-

"I think, when all is said and done, that this does not really mean that somebody who makes a speech, critical of the government and opposing its policies or measures, is inciting his listeners to oppose the government in an unlawful way. The proposition, while perhaps within the apparently literal sense of the Regulations, is not a very sensible interpretation. Once again the concept or notion of incitement is introduced. Then it is reasonably clear from the Afrikaans text that the mere expression of opinion, whether by speech or by writing, is not hit. In other words, opposition in the ordinary way of expressing opinions which are critical of the government, even strongly critical of the government, vehemently critical of the government if one likes, does not amount to resistance or opposition in this context." (our underlining)

The practical effect of these judicial pronouncements on subversive

statements has been to narrow down the meaning of such statements, so that each potentially subversive statement must now be looked at in context, and the editor or correspondent must decide whether that statement is likely to have the effect of inciting or encouraging the various acts and attitudes.

CONSEQUENCES OF PUBLISHING A SUBVERSIVE STATEMENT

In the SAAN / Argus case, the court threw out the drastic seizure provisions in Regulations 11 and 12. These Regulations gave powers to the Minister of Law and Order, or a commissioned officer serving in the Forces, to seize any publication which contained even one subversive statement.

Aside from the extreme administrative sanctions of closing the publication down under the Internal Security Act or deporting foreign personnel, the publication of a subversive statement can now be visited only with a criminal sanction, after prosecution in the courts in the normal manner. Coupling this consideration with the narrower definition of subversive statement, it can be seen that the "legal space" within which to report upon protest activity in South Africa has increased significantly.

If a prosecution is successful however, the penalties could be severe. The maximum penalties are a fine not exceeding R20 000,00

or imprisonment for a period not exceeding ten years. But such penalties would only be imposed at a maximum level in the case of a blatant flouting of the restrictions.

REPORTING ACTIONS OF THE SECURITY FORCES

After two police orders prohibiting comment or news on the conduct of the Forces had fallen prey to the Supreme Court in Natal, the Commissioner promulgated an order in a Government Gazette on 3 September 1986. This order controls comment or news on "security action", as defined, and prohibits access by journalists, newsmen and cameramen to areas of "unrest". It does leave some scope for the inventive and careful journalist, because instead of a wide, all-embracing and vague decree, the Government notice has been far more carefully framed and includes tight definitions of "security action" and "unrest".

The key Order is No. 2 :-

"No person shall, except with the prior written consent of the Commissioner or of a member of a Force who serves as a commissioned officer in that Force, announce, disseminate, distribute, take or send any comment on or news in connection with any security action."

The key definition is that of "security action". It is defined as :-

- "(a) any of the following actions by a Force or a member of a Force, namely -
- (i) any action to terminate, or which contributes to the termination of, any unrest;
 - (ii) any action to protect life or property in consequence of any unrest;
 - (iii) any follow-up action after any unrest has been terminated or has ended, including any pursuit or tracking down of, or any other action taken against, a person who participated, or who is suspected of having participated, in that unrest;
 - (iv) any action involving the arrest of a person -
 - (aa) on a charge of having committed an offence under the Regulations or the Internal Security Act, 1982;
 - (bb) in connection with an offence committed during the course of any unrest or any incident arising therefrom or connected therewith; or
 - (cc) under a provision of the Regulations or of the Internal Security Act, 1982; or
 - (v) any action taken under regulation 2 of the Regulations.
- (b) any action by a Force or a member of a Force which on reasonable grounds appears to be action referred to in paragraph (a); or
- (c) any deployment of a Force, or of any vehicles, armaments, equipment or any accessories, for or in connection with any action referred to in paragraph (a) or which on reasonable grounds appears to be for or in connection with any such action;"

Significantly, what the definition does not seem to embrace, is ordinary preventive action taken by the Forces in times of peace. Rather, it is focused upon action taken by the Security Forces to

bring to an end unrest which has already flared up. One must of course exercise care. A police blockade of roads into Soweto could just as easily be action taken to terminate unrest, which is imminent, as ordinary preventative measures where no unrest has yet occurred. And in this regard clause (b) of the definition is important.

The definition of "security action" refers throughout to unrest.

What is unrest? It is defined as :-

- "(a) any unlawful gathering, concourse or procession of any number of persons;
- (b) any attack on a Force or on a member of a Force;
- (c) any conduct which constitutes a public disturbance or riot, public violence or a contravention of section 1(1)(a) of the Intimidation Act, 1982 (Act 72 of 1982);
or
- (d) any activity or conduct which on reasonable grounds appears to be an activity or conduct referred to in paragraph (a), (b) or (c)."

Thus, in order for this restriction to apply, the story must be one in which security forces are quelling one of the above specific categories of unrest.

The only words that require any comment are those contained in paragraph (a), namely "any unlawful gathering, concourse or procession of any number of persons". It is important to be clear on what is meant by a "unlawful gathering". Not only does it

affect news and comment on security action, but, as we will see below, newsmen are denied access to unlawful gatherings, for the purpose of reporting. What then is an unlawful gathering? Under the Internal Security Act, the Minister of Law and Order has the power, "if he deems it necessary or expedient in the interests of the security of the State or for the maintenance of the public peace or in order to prevent the causing, encouraging or fomenting of feelings of hostility between different population groups or parts of population groups of the Republic", to prohibit gatherings.

Acting under these powers, the Minister has, annually, issued countrywide bans on open air gatherings. The current notice is presently under attack before a full bench of the Eastern Cape Division of the Supreme Court, as being void for vagueness and unreasonableness. Until the Court gives a ruling, open air political gatherings for which no specific permission has been granted should be regarded as unlawful.

ACCESS BY JOURNALISTS TO UNREST

Order 3 of the orders of 3 September 1986 reads :-

- "3. (1) Subject to subclause (2), no journalist, news reporter, news commentator, news correspondent, newspaper or magazine photographer, operator of

any television or other camera or of any television, sound, film or other recording equipment, person carrying or assisting in the conveyance or operation of such camera or equipment, or other person covering events of the purposes of gathering news material for the dissemination, distribution or publication thereof in the Republic or elsewhere, shall, except with the prior consent of the Commissioner, or of any member of a Force who serves as a commissioned officer in that Force, be on the scene, or at a place within sight, of any unrest, restricted gathering or security action (according to paragraph (a) or (b) of the definition of "security action")

(2) The provisions of subclause (1) shall not -

(a) apply to any person mentioned therein who -

(i) at the commencement of any unrest, restricted gathering or security action happens to be on the scene, or at a place within sight, of that unrest, gathering or action; or

(ii) after the commencement of any unrest, restricted gathering or security action happens to arrive on the scene, or at a place within sight, of that unrest, gathering or action for a reason other than to cover that unrest, gathering or action for the gathering of news material,

provided that such person immediately leaves the scene of that unrest, gathering or action or removes himself to a place outside sight of that unrest, gathering or action within such time as is reasonably required under the circumstances for such purpose; or

(b) prevent a person mentioned therein from being in his residence or on his way to or from his residence."

The key definitions here are "unrest", "restricted gathering" and "security action".

We have already commented on "unrest", which, as stated above, includes an unlawful gathering.

However a new animal has crept into the order, namely a "restricted gathering". This is defined as "any gathering in respect of which a condition has been determined under Section 46(1)(ii) of the Internal Security, 1982 (Act 74 of 1982), or a restriction or condition has been imposed or determined under Regulation 7 of the Regulations". This definition therefore envisages two types of restricted gathering :-

1. A gathering in respect of which conditions have been imposed by a Magistrate under the Internal Security Act. These have been fairly common in the past, and require no further comment.
2. A gathering in respect of which the Commissioner, or a Divisional Commissioner, has imposed restrictions under Regulation 7 of the Regulations.

Acting under Regulation 7(1)(d), the Commissioner recently imposed restrictions on funerals in Soweto. But this Regulation has now been declared void by the Natal Supreme Court. Newsmen must therefore be vigilant in scrutinising any orders issued by the Commissioner or Divisional Commissioner which impose restrictions on gatherings, to determine under which Section of Regulation 7

these restrictions have been imposed. We say this, because, without Regulation 7(1)(d), the Commissioner does not seem to have the power to impose restrictions on gatherings, of the type recently imposed in Soweto.

THE VALIDITY OF THIS ORDER

The order denying access to unrest is stated to have been issued under the powers vested in the Commissioner by Regulation 7(1). As stated above, Regulation 7(1)(d) has been declared void by the Natal Supreme Court. Outside the provisions of this, now void, Regulation it is difficult to find the source of the Commissioner's power to impose restrictions on the presence of journalists at incidents of unrest and gatherings.

Accordingly, this order might very well be wholly or partially ultra vires. We must warn that editors, correspondents or journalists who wish to test this might be prosecuted. A decision to publish or disseminate will undoubtedly be based on editorial rather than strictly legal considerations, and will no doubt be influenced by the newsworthiness of the event. What we can advise is that a strong ultra vires defence will be available for those who are prosecuted.

From a practical point of view, however, those newsmen who do not

Publications Act, 1974 (Act 42 of 1974), or any photograph, drawing or other representation, or any sound recording, of -

- (i) any public disturbance, disorder, riot, public violence, strike or boycott, or any damaging of or damage to any property or any assault on or killing of a person, which occurs or has occurred or was caused in the course of any public disturbance, disorder, riot, public violence, strike or boycott; (the underlined words were added by way of a later amendment)
 - (ii) any person present at or involved in any public disturbance, disorder, riot, public violence, strike or boycott, or any damaging of any property, or any assault on or killing of any person; or
 - (iii) any conduct of a Force or any member of a Force with regard to the maintenance of the safety of the public or the public order or for the termination of the state of emergency, or cause it to be made, taken, recorded, manufactured, reproduced, published, broadcast or distributed, or to be taken or sent to any such place, or attempt to commit any such act.
- (2) Any person who contravenes a provision of subregulation (1) shall be guilty of an offence."

In the recent SAAN / Argus application in the Natal Supreme Court, there was some discussion about the effect of this clause. In commenting on the amendments (the underlined words in 9(1)(i)), the court said the following :-

"The amendment was plainly intended to limit the scope of that which it qualified and to place beyond the range of the prohibition the publication of photographs (we shall for convenience continue to refer to a "photograph" only) unrelated to any public disturbance, disorder (which in the context can only mean "public disorder") or public violence, which nonetheless depicts damaged property, loss of life or an assault: for instance, a fatal motor accident or so-called "over-robust play" at a rugby match.

For some reason paragraph (ii) was not amended at the same time in the same way. It is, however, in essence part or a continuation of paragraph (i), having as its object the inclusion of a person present at or involved in the occurrence at which the main prohibition in paragraph (i) is directed. It is thus reasonable to conclude, and Counsel for the Applicants did not argue to the contrary, that the qualification brought about by the amendment applies to paragraph (ii) as well ...

The prohibition does not refer to the publication of photographs of past public disturbance, etc. On the contrary, on an ordinary reading, and having regard to the mischief at which the Regulation is directed, it refers to a public disturbance, etc arising after the promulgation of the Regulation and conceivably to the publication of past disturbances, etc which have present relevance. Thus viewed, many of the illustrations given in the course of the Applicants' argument cannot be regarded as apposite. It is in our view far-fetched, and incorrect, to contend, for instance, that the publication of a photograph of a 1922 miners' strike or the storming of the Bastille would fall foul of paragraphs (i) or (ii)."

In commenting on the phrase "conduct of a Force", the court had the following to say :-

"The "conduct" of a Force or any member of a Force must relate to the maintenance of safety of the public or the public order or the termination of the State of Emergency. This qualification was overlooked in some of the illustrations given during argument of conduct which, it was contended, could not have been intended to fall within the prohibition: for instance, a policeman rendering assistance to the victim of a motor car accident."

According to the court, therefore, the key to the application of these provisions, is the word "public".

The court's discussion of past photographs (so-called file material), is also enlightening. The test to be adopted is whether

the file material could be said to have "present relevance". So for example, photographs of the 1976 Soweto Uprisings would, in our view, have present relevance, if published on June 16 in relation to contemporary commemoration plans.

IS THERE MORE SCOPE?

We believe there is.

- The definition of a subversive statement has been relaxed, and its interpretation narrowed.
- The seizure provisions have been jettisoned.
- The scope for reporting on the actions of the Forces has been widened as a result of the narrower definition of security action.
- The order denying access by journalists to unrest may be invalid.
- There is still scope for reporting on unrest not involving the Forces.

- The scope for the publication of pre-emergency photographs and file material has been widened.

- Photographers and cameramen should note that the regulations governing the taking of films are unchanged although the SAAN / Argus judgment has given some guidance in their interpretation, which effectively narrows their width.

As this opinion is in the nature of a broad outline of the current restrictions on the media under the emergency, it has not been possible to deal with the day to day problems which face the media in their attempt to cover the news. However, we hope that these guidelines will assist. It should be remembered that when a problem presents itself there is no substitute for a close reading of the Regulations and if, thereafter, there is still uncertainty, the seeking of legal advice.

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