
M E M O R A N D U M

TO :THE END CONSCRIPTION CAMPAIGN
FROM :CLIVE PLASKET
CHEADLE THOMPSON AND HAYSOM
DATE :31 AUGUST 1988
RE :RESTRICTION OF THE END CONSCRIPTION CAMPAIGN

INTRODUCTION

1. This memorandum will set out to explain, insofar as this is possible, the effect of Government Notice No. 1732 of 22 August 1988, which purports to restrict the ECC from 'carrying on or performing any activities or acts whatsoever'.
2. It must be stated at the outset that a major problem in dealing with the issue is the vagueness and breadth of the emergency regulations. This makes the giving of precise and confident advice impossible.

REGULATION 7

3. The ECC was purportedly restricted by the Minister of Law and Order acting in terms of powers vested in him by regulation 7 of the Security Emergency Regulations promulgated on 10 June 1988.

4. Regulations 7 states that the Minister may take action against an organisation if he forms an opinion that to do so is necessary 'for the safety of the public, the maintenance of public order or the termination of the state of emergency.' (Regulations 7(1)). The word 'opinion' has been held by the courts to vest a 'subjective' discretion and so the Minister's decision is very difficult to set aside in court.
5. The Minister has a choice regarding the type of action he may take. He may, if he deems it necessary for the purposes stated above, prohibit the organisation from carrying on or performing, 'any activities or acts whatsoever', a 'specified activity or act', or 'activities or acts of a nature, class or kind specified in the order' (Regulations 7(1)(a), (b) and (c)).
6. The right to a hearing prior to the making of the decision is expressly excluded. (Regulation 7(1)). It is likely that a court would take the view that a right to a hearing after the decision has been made is impliedly excluded. This was held to be the case in relation to the extension of detentions in terms of regulation 3(3) (Omar v Minister of Law and Order 1987 (3) SA 859 (A)).
7. The Minister purported to restrict the ECC from carrying on

or performing 'any activities or acts whatsoever'.
(Regulation 7(1)(a)).

8. A restriction may last for a specific period but if no period is specified it will last 'until the order is withdrawn' or 'until the declaration that a state of emergency exists in the Republic is withdrawn or expires, whichever occurs first' (Regulation 7(2)).
9. Note that a number of organisations were restricted in February 1988 in terms of the emergency regulations then in force. When that state of emergency lapsed and a new one was introduced, fresh orders were promulgated thus 'extending' the restrictions.
10. Apart from the general prohibition contained in regulation 7(1), regulation 7(3) specifically prohibits persons from two further forms of conduct. These are :
 - 10.1. the carrying on or performing of any activity or act which the organisation may not carry on or perform by a person acting 'on behalf or in the name, or in a capacity as office-bearer' of the organisation (Regulation 7(3)(a)) ; or
 - 10.2. the participation in an activity or act of the

organisation which is prohibited. (Regulation 7(3)(b)).

11. Regulation 7(4) qualifies the general terms of the prohibition to some extent. It provides that no matter how broad the prohibition, it shall not be construed as prohibiting the organisation from 'preserving its assets, keeping up to date its books and records and performing administrative functions in connection therewith, complying with an obligation imposed on it by or under any law or by a court of law, taking legal advice or judicial steps' or carrying on or performing an activity or act which the Minister consents to.
12. The Minister may only give consent if he is 'convinced' that the granting of such consent will not result in 'the safety of the public or the maintenance of public order being threatened or the termination of the state of emergency being delayed' (Regulation 7(5)(a)).

OFFENCES AND THE MEDIA EMERGENCY REGULATIONS

13. Regulation 12 creates the offences of contravening regulation 7(3) and 7(4)(e). It is therefore an offence, carrying a maximum sentence of ten years imprisonment, a R20 000,00 fine or both (Regulation 13) to :

- 13.1. 'perform an act or activity of a restricted organisation on its behalf, in its name, in the capacity of an office-bearer or to participate in a prohibited act or activity' (Regulation 7(3)) ;
- 13.2. 'to contravene the terms of a consent given by the Minister to the restricted organisation to carry on or perform a specified activity or act'. (Regulation 7(4)(e)).
14. The Media Emergency Regulations are designed to prevent the airing of views of restricted organisation through the media and are aimed more at the media than at the restricted organisation itself.
15. Regulation 3(1)(f) prohibits the publication of 'any news, comment or advertisement on or in connection with ...any speech, statement or remark... of a person intimating or of whom it is commonly known that he is an office-bearer or spokesman of a restricted organisation' in so far as 'any such speech, statement or remark has the effect or is calculated to have the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency'.
16. In addition regulation 3(2) prohibits the publication of

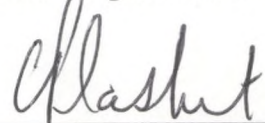
advertisements on or in connection with a restricted organisation 'defending, praising or endeavouring to justify such organisation or any of such organisations' campaigns, projects, programmes, actions or policies of violence or resistance against, or of subversion of, the authority of the State...'. .

17. These prohibitions are made subject to regulation 3(6) which allows coverage of matter disclosed or released by the government, debated in Parliament or the President's Council or adduced as evidence in a court, nor do they apply to a 'bona fide library' lending material to the public in the normal course of its activities'.
18. The real deterrent effect in relation to the above provisions lie in regulations 9(1) and 9(2) which allow for seizure of publications which publish subversive statements as defined.
19. It is also an offence to 'wilfully' contravene regulation 3(4) (ie. to 'broadcast any news, comment or advertisement' referred to in regulation 3(1)(f)) or to 'wilfully or negligently' contravene regulations 3(1) or 3(2) (ie. to otherwise publish or cause to be published such prohibited material) or regulation 3(3) (ie. to publish material banned by the Commissioner of Police).

CONCLUSIONS

20. The above is a description of the legal regime which applies to organisations restricted in terms of regulation 7. The restrictions appear to operate on two levels : on the one hand criminal offences are created and, on the other, wide executive powers are vested in functionaries ranging from the Minister of Law and Order to the rawest recruit in the security forces.
21. The offences are vague in their definition and may present considerable difficulties for the State in a prosecution. It is therefore more likely that members of a restricted organisation would be detained in terms of regulation 3 or restricted in terms of regulation 8 if they were seen to be engaging in acts or activities of the organisation.
22. Similarly, if a newspaper were to contravene one of the relevant media regulations, it is more likely that the Commissioner would order the seizure of the publication rather than institute a prosecution. The recent decision of WM Publications (Pty) Ltd v Commissioner of the S A Police WLD 16 August 1988 (case no. 14074/88) unreported, highlights the use of these powers. (It is also a case which has a bearing on the issue of conscription).

23. This memorandum will not seek to spell out what activities or acts the ECC may still carry on or perform as some of these have been dealt with in legal briefings. Suffice it to say that the activity or act, to fall within the prohibition must presumably bear some relationship to the purposes envisaged by the Public Safety Act and the emergency regulations.
24. It is realized that this hardly provides an adequate answer but such is the vagueness of the regulations. Some clarity may be provided by the court in the applications challenging regulation 7 brought by other restricted organisations.



CLIVE PLASKET

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