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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

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

CAPTAIN VAN SCHALKWYK ..... 2nd Appellant

and

RASHIDA PARKER ..... Respondent

Coram: JOUBERT, HEFER, VIVIER, STEYN JJ.A. et

VILJOEN A.J.A.

Heard: 1 November 1988

Delivered: 24 February 1989

JUDGMENT

JOUBERT, JA :

/Allie Parker.....

Allie Parker in partnership with his wife, Rashida Parker, (the respondent) conducted a printing business under the style and name of Allies Printing Services at premises in Epping Avenue, Elsies River. Captain van Schalkwyk, the second appellant, to whom I shall refer as "Van Schalkwyk", was a police officer commanding the Riot Squad at Bellville. On 12 June 1987 without a warrant of arrest he purportedly arrested Allie Parker at the premises of the printing business "ingevolge Regulasie 3 van die Noodregulasies." By virtue of a written order made out in terms of Regulation 3(1) of the Emergency Regulations Van Schalkwyk purportedly authorised the detention of Allie Parker in Victor Verster Prison at Paarl where he was detained. At the relevant time a state of emergency had been declared and certain emergency regulations were in force throughout the Republic.

On 16 June 1987 the respondent applied as a matter of urgency to the Cape of Good Hope Provincial Division for a rule nisi calling upon the Minister of Law and Order, the Officer Commanding Victor Verster Prison and Van Schalkwyk as respondents to show cause why the arrest and detention of Allie Parker should not be declared unlawful (prayer 3.1) and why the immediate release of Allie Parker from detention in the Victor Verster Prison at Paarl should not be ordered (prayer 3.2) with costs. Certain other orders were also sought but since they were abandoned at the hearing before the Court a quo it is not necessary to refer to them. The application was opposed by the present appellants, i.e. the Minister of Law and Order and Van Schalkwyk, who relied on a lawful arrest and detention of Allie Parker in terms of Regulation 3(1) of the Emergency Regulations made by the State President under sec 3 (1)(a)

of the Public Safety Act, 3 of 1953, and published in Proclamation R 96 of 1987 on 11 June 1987. The Officer Commanding Victor Verster Prison did not oppose the application. Presumably he abided the decision of the Court a quo. On 3 July 1987 **ROSE-INNES** J upheld the application by granting final orders in terms of prayers 3.1 and 3.2 with costs of suit to be paid by the Minister of Law and Order. With leave of the Court a quo the appellants now appeal to this Court.

It is trite law that where an arrestee challenges the validity of his arrest and detention the onus of establishing the lawfulness thereof is on the arrestor or the person who caused the arrest to be made. (Minister of Law & Order and Others v Hurley & Another, 1986 (3) SA 568 (A) at p 589 D-E, Ngqumba en 'n Ander v Staatspresident en Andere, 1988 (4) SA 224 (A) at p 259 C).

In paragraph 6 of his opposing affidavit Van Schalkwyk stated the following regarding the arrest and detention of Allie Parker, viz. :

> "Ek het hom gevolglik ingevolge die bepalings van Regulasie 3(1) van voormelde Regulasies gearresteer en laat aanhou. Ek het 'n skriftelike bevel onderteken vir die aanhouding van Applikante se eggenoot wat as Aanhangsel "A" by die Beëdigde Verklaring van Johannes Petrus Mouton aangeheg is. Toe ek Applikante se eggenoot arresteer soos voormeld, het ek hom meegedeel dat ek ingevolge Regulasie 3 van die Noodregulasies handel." (My underlining).
>
> Regulation 3(1) reads as follows:
>
> "A member of a security 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 safety of the public or the maintenance of public order, or for the safety of that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a

> security force, detain or cause to be detained any such person in custody in a prison."

The main submission on behalf of the present respondent in the Court a quo was summarised as follows by **ROSE-INNES** J in his judgment:

> "The first and main submission for applicant is that at the time of Parker's arrest no facts or grounds or reasons for his apprehension were conveyed to him and at the most he was told that he was being arrested in terms of regulation 3.1. In other words, on this submission, he was not informed of the reasons for his arrest. The submission is that the failure to inform a person who is to be arrested of the cause or reasons for his arrest at the time of the arrest, and his consequent detention, is unlawful according to the well established principles of the common law which, it is submitted, are not excluded by regulation 3.1. If the person arrested is not apprised why he is being apprehended the arrest is irregular, invalid and ultra vires regulation 3.1 because regulation 3.1 does not contemplate an arrest in which the cause

of arrest is secretive."

In this Court Mr Gamble on behalf of the respondent developed his argument along the same lines.

What is our common law in this connection ? Unfortunately counsel could not assist this Court because they neglected to consult our common law authorities. The same holds for ROSE-INNES J. who confined his consultation of our common law on arrest to a passage in Van Zyl's Judicial Practice of South Africa, vol 1, 4th ed, p 207. The inadequacy of this passage appears abundantly from the decision of this Court in Ngqumba's case, supra, at p 263 H-264 I.

Let us consult our common law sources on the physical arrest (Beslag op yemands persoon / prise de corps) of persons. The Roman-Dutch writers distinguished between various types of arrest. They regard all arrests

as odious because they deprived an arrestee of his freedom of movement. See Pieter Vromans (+ 1690), Tractaat de foro competenti, lib 1 cap 1 nr 25. Unless an arrest was made in accordance with certain rules of law it was unlawful and could be resisted with impunity by an arrestee. (5 Holl Cons c 97 nr 2, Voet (1647-1713) 5.1.62). In footnote 1 to Van Zurck's Codex Batavus, s v Gevangenis, Apprehensie nr 2, Van der Schelling (1691-1751) rightly observed that among the most serious grievances which the Dutch bore against the notoriously repressive regime of the Duke of Alva, as regent of the Netherlands from 1567 to 1573, "is geweest het gevangen zetten zonder verhooren."

The main types of arrest were the following:

Civil Arrest:

The Dutch word for civil arrest was "arrest"

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which was derived via French from the medieval Latin word arrestum. See Gail (1526-1587), Tractatus de Arrestis, cap 1 nr 1 and Huber (1636-1694), Praelectiones ad D 2.4.1. A Creditor could secure the arrest of his debtor on two grounds, viz.

(a) in the case of a debtor suspectus de fuga, or

(b) to found the jurisdiction of the court (ad fundandam jurisdictionem).

The procedure he had to adopt was to petition the court for a mandament van arrest in order to secure the person of his debtor. In the petition he had to set out the particulars on which he based his claim and the reasons for requiring the arrest of his debtor. According to Voet 2.4.17 civil arrest is rigidissimus vero in jus vocandi modus. The grant of a mandament van arrest by a judge authorised and ordered the Deurwaarder or Bailjuw and his officials to arrest the

debtor and to bring him without delay before the court. On furnishing a cautio de judicio sisti and/or a cautio de judicatum solvendo the arrestee was released from detention and the civil proceedings continued. According to Van der Linden (1756-1835) 3.1.4.3 the practice in the south of Province of Holland was to serve on the debtor simultaneously with his arrest a civil summons of the creditor's claim against him. In the north of Province of Holland the arrest was made without serving a civil summons on the arrestee. The latter was, however, entitled to demand from the creditor reasons for his arrest. It should be noted that in a case of emergency where there was a grave danger of the imminent flight of the debtor the latter could be arrested without a mandament van arrest. An arrest would be made at the risk of the arrestor should it transpire that it was unlawful. See Huber H.R. 4.31.7; Voet

2.4.18; Kersteman (1728-1793) Hollandsch Rechtsgeleert Woordenboek, s v Arresten. According to Groenewegen (1613-1652) ad Cod 3.18 nr 4 the practice of arresting debtors was very common in the Netherlands. It is still part of our modern law.

The Dutch practice then as regards civil arrests was that the arrestee should be ~~appraised~~ apprised of the grounds or reasons for his arrest pursuant to a mandament van arrest. Moreover, if he timeously got wind of his creditor's application for a mandament van arrest he could oppose it and even appeal against its grant before his arrest. See Kersteman, loc.cit. The authorities do not discuss the question whether or not an arrestee had to be informed of the reasons for his arrest without a mandament van arrest. The creditor knew them and presumably he had to inform the arrestee why he was arresting him.

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Criminal Arrest:

The Roman-Dutch jurists referred to criminal arrest as apprehensie or apprehensio. Although private prosecutions of crimes were not prohibited they were not resorted to in the Province of Holland where all criminal prosecutions were conducted by the State. (De Groot (1583-1645) 3.4.5, Van Leeuwen (1625-1682) R.H.R. 5.27.2, Groenewegen ad Cod 9.1. nrs 3 et 4, ad Cod 9.31.1, Van der Keessel (1738-1816), Jus Criminale, vol 2 p 577).

Mention should be made of two very important Placcaten or Statutes which were enacted by Phillip 11 for the Netherlands. The one is the Ordonnantie, Edict ende Gebodt op 't stuk vande Criminele Justitie inde Nederlanden of 5 July 1570 (2 Groot-Placaet Boeck 1007-1042) to which the Dutch writers referred under a somewhat misleading short title as Criminele Ordonnantie.

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I shall refer to it as the "Ordinance of 5 July 1570".

It regulated inter alia the functions of officials in the administration of criminal law as well as the maintenance and administration of prisons. Its provisions for the humane treatment of prisoners were certainly very enlightened and advanced for the 16th century. The other one is the Ordonnantie aengaende de stijl generael, die men voortaen sal onderhouden ende observeren inde Procedeeren vande Criminele saken ende materien inde Nederlanden of 9 July 1570 (2 Groot-Placaet Boeck 1045-1062). Dutch writers referred to it as Criminele Stijl or Ordonnantie op 't Stijl. I shall refer to it as the "Ordinance of 9 July 1570". It regulated the law of criminal procedure. Van der Linden 3.2.1.6 branded some of its provisions as "onbeschaefdheid van den tijd harer making".

The practice in the Province of Holland

was to try the more serious crimes for which capital or corporal punishment could be imposed according to the extraordinary or inquisitorial process. The main features of this type of criminal procedure are conveniently summarised by J M VAN BEMMELEN in his Strafvordering, Leerboek van het Nederlandsche Strafprocesrecht, tweede vermeerde druk, 1940, at p 35 as follows:

> "Hoofdbestanddeelen van dit proces waren: arrestatie en insluiting, het verhoor van den gevangene, confrontatie van dezen met de getuigen en het aanwenden van de pijnbank, een niet openbaar onderzoek, zonder verdediging, waarbij de gevangene voorwerp van onderzoek was en het onderzoek voornamelijk gericht was op het verkrijgen van een bekentenis. Deze sterke drang om den verdachte tot bekentenis te dwingen was vooral toe te schrijven aan twee rechtsregels:
> le dat de bekentenis noodig was voor het uitspreken van lijf- of

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doodstraf;

2e dat de bekennende verdachte niet kon appelleeren, confessus non appellat."

Consult on the extraordinary process: Van Leeuwen R.H.R. 5.27.11 sqq.; Voet 48.2.19; Pieter Bort, Tractaet Crimineel tit 5; Kersteman, op.cit., s v Apprehensie et Crimineele Zaken; Van der Keessel, op.cit., vol 2 p 579-583; Van der Linden 3.2.2.1-5.

The presence of a suspect or an accused at an extraordinary process was normally procured by means of criminal arrest (apprehensie). It was the duty of the public prosecutor to commence his investigations as soon as possible after he became aware of the perpetration of the serious crime. He would then place his praecedente informatien before a judge in order to obtain a mandament crimineel or mandament van apprehensie, authorising and

ordering the arrest of the suspect or accused. (Arts 30 et 50 of the Ordinance of 5 July 1570, Art 4 of the Ordinance of 9 July 1570, Pieter Bort, op.cit., nr 17, Van der Linden 3.2.1.8 et 9). Armed with the mandament van apprehensie the Deurwaarder or Bailjuw and his officials would make the arrest and bring the arrestee before a judge within 24 hours after his arrest, or at the latest within 3 days thereof. (Art 6 of the Ordinance of 9 July 1570, Van Zurck, op.cit. nr 4, Voet 48.2.20). The extraordinary process would then proceed until the verdict was given. See Van der Linden 3.2.2. The common law sources make no mention of a duty on the arrestor to inform the arrestee at the time of his arrest why the arrest was being made. It is most significant that in an example of a mandament crimineel issued by the Registrar of the Court of Holland at the Hague on 1 October 1653 to arrest a certain N no

mention was made of the crime with which he would be charged, as appears from Pieter Bort, op.cit., nr 19. This view is fortified by the lack of particulars regarding the nature of the crime in a criminal summons, as I shall point out presently.

There was a very important exception to the rule which required an arrestor to have a mandament crimineel or mandament van apprehensie in order to arrest an arrestee. This exception was where the arrestee had been arrested in the act of committing the crime (in flagrante delicto / crimine, dat hy op 't bevonden is) or where the arrestee was a vagabond who might take to flight. See Art 50 of the Ordinance of 9 July 1570, arts 2 et 3 of the Ordinance of 5 July 1570, art 19 of the Instructie van den Hove van Hollandt, Zeeland ende Vriesland, 1531, Van Leeuwen R.H.R. 5.27.11, Voet 48.3.18, Kersteman,

op.cit., s v Apprehensie, Van der Keessel, op.cit. pp 579, 613, Van der Linden 3.2.1.7; Wassenaar (1589-1664), Practyk Judicieel, cap 27 nr 13. The arrestor could be an official or any private person. See the Italian jurist Farinacius (1554-1613), Praxis et theorica criminalis, tom 1 quaestio 21 nrs 138-140, 156. Such an arrest was made at the peril of the arrestor. It was therefore incumbent on him to produce the arrestee within 24 hours after his arrest before a judge to have the arrest confirmed and approved of as lawful. Compare Van der Linden 3.2.1.7.

For the sake of completeness I should mention the criminal summons (mandament van dagvaarding in persoon or citatie) which was usually used to procure the presence of an accused at a hearing on a charge of a lesser crime which did not involve capital or corporal punishment.

The hearing would be conducted according to the ordinary process like a civil trial. The criminal summons was issued by a judge and served on the accused by the Deurwaarder or Bailjuw and his officials. See Bort, op.cit., nr 48, Voet 48.3.20, Kersteman, op.cit., s v Mandamenten et Citatie, Van der Linden 3.2.1.10, 3.2.4. 1-3. The criminal summons merely informed the accused to appear in person on a fixed date "voor den Hove, ende aan te hooren alsulcken eysch en conclusie, als den Procureur Generaal tegen hem sal willen doen en nemen---" (Bort, op.cit., nr 48). It did not specify the nature of the crime with which he would be charged. Nor was he given a copy of the criminal summons. He was merely given a copy of a document that he had been summoned to appear in person in court on a fixed date. Van der Linden 3.2.10. The reason why he was kept in the dark of the nature of the

crime with which he would be charged is furnished by Bort, op.cit., nr 49 as follows: "-----redenen daer van zijnde, dat hy door 't Mandament niet en werde geinstrueert, van 't geene dan Procureur Generaal tot zyn laste is hebbende, ende sulckx buyten de waere gelegentheyt van de saecke artificielijck antwoorde op de Articulen, hem by den Procureur Generaal, alvooren eysch te doen, voor te houden -----" This explanation why the accused was not to be informed of the nature of the crime before the prosecutor put the charges to him sounds rather preposterous, but such was the Dutch practice at the time. Only after he had pleaded to the indictment could he request a copy thereof. It would seem to follow by the same parity of reasoning that an arrestee would not be given the reasons for his arrest before he appeared before a judge and heard the charges brought against him by the prosecutor.

Political Arrest:

Van der Linden 3.2.1.11 mentions arrest made during a state of emergency as follows:

> "Eindelijk heeft men zomwijlen ook wel eens gebruik zien maken van een middel, bekend onder den naam van Politique custodie of bewaaring - In geval van dringend nood, en tot bewaaring der openbare rust, kan de Lands- of Stads-Regeering zig zomtijds in de harde verpligting bevinden, om zig van deezen of geenen persoon of persoonen te verzekeren; maar het is altijd een gevaarlijk middel, waar van niet dan het spaarzaamst gebruik behoort gemaakt te worden."

These are then the various types of arrests according to Roman-Dutch law. It would appear that in the case of criminal arrest an arrestee was not informed of the reasons for his arrest on being arrested.

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A fortiori would this have been the case where he was arrested in flagrante delicto, since he was acquainted with the circumstances in which he was arrested. It was only when an accused heard the prosecutor putting the charges to him in court that he was informed of the reasons for his arrest.

It will be seen from the aforegoing that all arrests other than civil arrests and political arrests were directed at the prosecution of accused persons. So much then for arrests according to our common law.

In Ngqumba's case (supra, p 264 J-265 A) it was pointed out that pre-Union legislation did not require an arrestee upon being arrested without a warrant of arrest to be informed of the reasons for his arrest. It was, however, held that where an arrestee was arrested pursuant to Regulation 3(1) of the Emergency Regulations he

should be informed of the reasons for his arrest (p 265 H). It was furthermore held that no general principle could be laid down as to how fully an arrestee, arrested in terms of Regulation 3(1), should be informed of the reasons for his arrest since that would depend upon the facts of each case (p 266 B-C). At p 266 I the following dictum of OGILVIE THOMPSON JA in Brand v Minister of Justice and Another, 1959(4) SA 712 (AD) at p 718 C-D was quoted with approval: "What is required is that the arrested person should in substance be apprised of why his liberty is being restrained."

I now turn to consider the facts of the present appeal. Since there are disputes of fact relating to the relevant circumstances in connection with the arrest of Allie Parker the correct approach, where no evidence has been led, is to accept the version of the appellants, i.e.

the respondents in the Court a quo, together with the admitted facts in the affidavits of the respondent, i.e. the applicant in the Court a quo (Ngqumba's case, supra, p 259 C-I, 263 D). I draw attention to the fact that no supporting affidavit of Allie Parker was annexed to the founding affidavit of Rashida Parker. An affidavit of his was, however, annexed as Annexure RP 3 to her replying affidavit.

On Friday 12 June 1987 Van Schalkwyk accompanied by a few policemen visited the premises of Allies Printing Services. On his arrival he found that a certain Lieutenant Mostert was awaiting the instructions of his superior officer to attach 9 000 copies of a pamphlet, the "U D F News". Van Schalkwyk conducted a search of the premises where he found hot from the press a large number of pamphlets and negative printing plates for them. He

appended six copies of the pamphlets to his replying affidavit. Annexure "A" to his replying affidavit is a copy of the "U D F News". Some of the pamphlets commemorated Soweto Day on 16 June 1987. He found the contents of the pamphlets in general of an inflammatory nature inasmuch as they were provocative of public disorder and unrest by propagating acts of violence. They were in substance subversive documents intended to be disseminated by activists. Van Schalkwyk put the tenor of their contents to Allie Parker whose reaction was that he associated himself fully with their contents and supported the objectives set forth in the pamphlets. Van Schalkwyk then arrested Allie Parker in terms of Regulation 3 of the Emergency Regulations.

Mr Gamble submitted in this Court that Van Schalkwyk should have informed Allie Parker that the

pamphlets were subversive and that he could be arrested for printing them. In my judgment there is no substance in this submission in the light of the particlar circumstances of the case. It overlooks the fact that Allie Parker was caught red-handed (in flagrante delicto) in the very act of printing subversive pamphlets which constituted a security risk during the prevailing state of emergency. He was forthwith confronted with their subversive character by Van Schalkwyk. His arrest was made uno contextu with the confrontation, thereby furnishing the nexus between his act of printing the subversive pamphlets and his arrest. The particular circumstances made it accordingly clear that the reason for his arrest was the act of printing the subversive pamphlets. In the circumstances Allie Parker necessarily knew why he was arrested. Nowhere in his affidavit did he claim not to know why he was arrested. Compare

apprehensio in flagrante delicto (supra), Brand's case (supra) at p 718 A-B, Christie & Another v Leachinsky, 1947(1) A E R 567 (HL) at p 573 nr 3. It follows that the respondent was not entitled to the relief granted her by the Court a quo.

The result is that the appeal must succeed.

The following order is made:

(a) The appeal is allowed with costs which are to include the costs of one counsel only.

(b) The order of the Court a quo is set aside and the following order is substituted therefor:

'The application is dismissed with costs which are to include the costs of one counsel only.'

C. P. JOUBERT JA

HEFER JA)
VIVIER JA) Concur.
STEYN JA)
VILJOEN AJA)