C. of A. (CIV) No. 27 of 1988

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:

JOHNNY WA KA MASEKO — Appellant

and

ATTORNEY-GENERAL — 1st Respondent

COMMISSIONER OF POLICE — 2nd Respondent

Held at Maseru

Coram:

Schutz, P
Mahomed, J A
Ackermann, J A

J U D G M E N T

Ackermann, J A

This appeal is concerned, in the main, with the validity of appellant's arrest and detention, purportedly in terms of the provisions of s. 13(1) of the Internal Security (General) Act of 1984, which arrest and detention occured on or about the 14th November 1988.

On the 21st November 1988 the appellant caused an application to be launched as a matter of urgency against the two respondents in which an order was sought in the following terms:

"(a) Dispensing with the periods of notice required by the rules of court on the grounds of urgency of this matter;

(b) Directing Second Respondent and/or officers subordinate to him to produce the body of Applicant before this Honourable Court so that Applicant may be dealt with in accordance with law;

(c) Alternatively to (b), directing Second Respondent and/or officers subordinate to him to release Applicant forthwith;

(d) Alternatively to (b) and (c), directing Second Respondent and/or officers subordinate to him to formally charge Applicant and take him forthwith before a court of competent jurisdiction in order that Applicant may be dealt with in accordance with law;

(e) Alternatively to (b), (c) and (d), directing Second Respondent and/or officers subordinate to him to allow Applicant's attorney of record herein to take instructions from Applicant and settle Applicant's affidavit or any other court process in private;

(f) Alternatively to (b), (c), (d) and (e), directing Second Respondent to exercise his discretion forthwith, in view of the urgency of the matter, pursuant to regulation 2 of the Internal Security (General) Regulations 1985;

(g) Directing Respondents to pay the costs of this Application."

The application was opposed by both respondents.

On the 25th November 1988 the High Court granted an order in terms of prayer (a) and (b) of the Notice of Motion. On that day the matter was postponed to the 1st December 1988. Appellant's attorney experienced difficulties, however, in consulting privately with the appellant and on the 1st December 1988 a further order was made

> "granting applicant an opportunity to consult in privacy with his attorney in order to settle his replying affidavit."

and postponing the hearing of the matter to 6th December 1988. The matter was eventually argued on the 9th and 10th December 1988. On the lastmentioned date Lehohla, J. made a finding and granted an order, apparently intimating that reasons would be filed later. Such reasons were filed on the 13th June 1989. While the terms of the finding and order actually made on the 10th December 1988 do not appear from the record, they are presumably the same as those recorded in the reasons for judgment as follows:

> "The detention is held to be lawful. The interim court order authorising reasonable access to the applicant is confirmed with 5% costs. The rest of the costs are awarded to respondents."

The following facts were common cause or not in dispute:

At all material times appellant, though not a national of Lesotho, resided in Maseru and was the proprietor and publisher of "The Mirror", a newspaper circulating in the Kingdom of Lesotho. When the application was effectively dismissed on the 10th December 1988, appellant was deported from the Kingdom of Lesotho. On the 9th September 1988 appellant caused to be published in "The Mirror", a report in which allegations were made concerning the relationship between certain Chief Evaristus Sekhonyana, the then Minister of Finance, and a certain Italian company called "Benco". The report alleged, *inter alia* that Benco had swindled Lesotho out of millions of Maloti; that Chief Sekhonyana had a close relationship with BENCO; that on four occasions in the months of January and February 1981 he had helped Benco to transfer more than two million Maloti from the Company's account at Lesotho bank into an account in Switzerland and that a few days after these transfers, Benco's account dried up and that the company was subsequently liquidated. In consequence of this report appellant was charged with criminal defamation and released on bail. One of the conditions of bail was that appellant was not to comment in his newspaper on the criminal defamation charge. Subsequent to the appellant's release on bail a report appeared in appellant's newspaper stating the fact that appellant had been charged with criminal defamation. On or about the 14th November 1988 appellant was purportedly arrested by a member of the police force, and handed to Lieutenant Metsing at police headquarters. At appellant's request the police took him to his attorney's office. His attorney was not there and appellant left him a

note. Appellant was taken back to police headquarters where he remained until brought before court on 1st December 1988. He did not see his attorney before then. In order to give instructions to his attorney, on the basis whereof the founding affidavit dated the 21st November 1988 was drawn, appellant passed information to his attorney through friends and relatives who visited him in detention.

It is trite law that when the liberty of an individual has been restrained or limited and the person whose liberty has been so affected challenges the validity of such restraint or limitation, as the appellant in this case has challenged his arrest and detention by the police, the onus of establishing the lawfulness thereof is on the arrestor or the person who caused the arrest. (Minister of Law and Order and Another v. Parker 1989 (2) S.A. 633 (A) at 637 and the authorities there cited).

In the present case second respondent, who caused appellant to be arrested and detained seeks to justify appellant's detention by reliance upon the provisions of s. 13(1) of the Internal Security Act which provides that:

> "A member of the police force may arrest without warrant a person whom he reasonably suspects to be a person involved in subversive activity."

There is no affidavit or explanation from the member of the police force who physically arrested appellant.

The reasons advanced by second respondent in his answering affidavit for causing appellant to be arrested must be

pieced together from various part of the affidavit which, in many respects, is obscure. In this affidavit second respondent details certain investigations which he conducted into appelant's activities during the latter half of 1988. He says he received credible information that appellant had been indulging in subversive activities as defined in the Internal Security Act, 1984. He became aware of reports published by appellant in "The Mirror" from the 9th September 1988 to the 13th September 1988 (only the report published on the 9th September 1988, to which reference has already been made was proved in the answering affidavits). Various allegations in the newspaper report of 9th September 1988 are based on copies of documents which were annexed to the papers. It is common cause that these documents had at some stage prior to 9th September 1988 come into appellant's possession and were subsequently handed by appellant to Major Petlane. They were six in number and featured as annexures to the affidavit of Captain Motaung. Two were copies of invoices on the letterheads of Benco and addressed to the Government of Lesotho and four were applications by authorised dealers to sell foreign currencies and addressed to the Lesotho Bank. Referring to these documents in his answering affidavit second respondent says the following:

> " I carefully studied the documents and I was startled to find that they referred to a highly secret Government Project which had a direct bearing on national security. There can be no doubt that the publication of that report was highly detrimental to national security and the Applicant's possession of a photo-copy of such a highly sensitive document which was in the custody of Central Bank of Lesotho made me very apprehensive"

I find this passage obscure and unsatisfactory. The reference merely to "that report" (which is obviously a reference to one of the two reports to which the deponent has previously referred) makes it impossible to determine whether he is referring to the report in "The Mirror" of the 9th September 1988 (which is before Court) or the other report which is not. The reference to "documents" which "referred to a highly secret Government Project" in the earlier part of the above passage becomes confusing when contrasted with the appellant's possession of "a highly sensitive document" in the latter part. Did all the documents refer to a highly secret government project or only one; and if only one, which one? Which one of the documents made second respondent apprehensive? Moreover the one "highly sensitive document" becomes "these documents" again in the next sentence of paragraph 12 which "must have been leaked to the Applicant by any employee of the Central Bank".

In paragraph 8 of his answering affidavit second respondent makes the bald statement that

> "Credible information continue to reach me and the Royal Lesotho Intelligence Service that the Applicant, in the latter half of the year 1988, had been indulging in subversive activities as defined in the Internal Security (General) Act 1984 (Act No. 24 of 1984)"

and in paragraph 12 there is an equally bald reference to

> "credible information that the Applicant was indulging in acts of espionage directed at the very country which had granted him sojourn".

This notwithstanding, the second respondent, in the last sentence of paragraph 12 justifies the arrest of appellant as follows:

> "The fact that the Applicant who claims to be a refugee, having in his possession highly sensitive documents belonging to the state, and his acts of publishing demonstrably false statements and accusations against members of the Government of Lesotho, coupled with credible information that the Applicant was indulging in acts of espionage directed at the very country which had granted him sojourn, made me to come to the conclusion that his subversive activities should be thoroughly investigated and that firm and deterrent action should be taken to protect and preserve national security. I accordingly ordered the arrest of the Applicant in terms of the powers vested in a member of the Police Force by s.13(1) of the Internal Security (General) Act of 1984."

In paragraph 16 the second respondent states that he "reasonably and honestly believed that he (i.e. the appellant) was a person involved in subversive activity" and in paragraph 7 that he was "in possession of a considerable body of objective facts on which I based on (sic) reasonable suspicion that the Applicant was involved in subversive activity. I am however unable to disclose them at this stage as they would be prejudicial to public interest and public safety."

Upon a synthesis and an analysis of all these averments it would seem that second respondent justifies the arrest of appellant in terms of s.13(1) of the Internal Security Act because of reasonable belief and suspicion that the appellant was involved in subversive activities because:

1. second respondent had credible information that the applicant was indulging in acts of espionage directed at the Kingdom of Lesotho;

2. second respondent had credible information that the appellant had been indulging in subversive activities as defined in the Internal Security Act;

3. appellant had published in "The Mirror" a report or reports which were highly detrimental to national security;

4. appellant had in his possession highly sensitive documents belonging to the state;

5. appellant had published in "The Mirror" demonstrably false statements and accusations against members of the Government of Lesotho.

On appeal the following contentions were advanced:

1. That second respondent had not in law discharged the onus of establishing the lawfulness of appellant's arrest and detention in terms of s.13(1) of the Act for the following reasons:

(a) There had not been a proper arrest of appellant because appellant had not, at any stage material to these proceedings, been informed by or on behalf of the person arresting him of the reasons for his arrest;

(b) in terms of s.13(1) of the Act is is the person who arrested appellant who had to entertain the reasonable suspicion that appellant was a person involved in subversive activity. On the facts neither police officer Lethunya, who arrested appellant, nor Lieutenant Metsing, who apparantly took appellant into detention at police headquarters had any such suspicion. There is no evidence that any other member of the police force who was physically involved in appellant's detention entertained such a suspicion. The only person who entertained a suspicion that appellant was involved in subversive activity was second respondent, the Commissioner of Police. He was not the person who arrested appellant, he merely caused his arrest, and therefore the section had not been complied with;

(c) alternatively, and if it is held that it was second respondent who in truth arrested the appellant, then such arrest was bad in law because, on a proper construction of Part III (ss. 13 to 24 of the Act), the second respondent, as Commissioner of Police, was not entitled to arrest appellant;

(d) on the facts second respondent did not discharge the onus of proving that this suspicion that appellant was a person involved in subversive activity was reasonable.

2. On the papers there was a material conflict of fact which could not be resolved without the hearing of oral evidence.

3. In the alternative to 1 and 2, and in the event of it being found that appellant's arrest and detention had correctly been found to be lawful by the Judge *a quo*, the Judge had misdirected himself in only awarding appellant 5% of his costs.

In order to deal with some of these issues it is necessary to construe certain provisions in the Internal Security Act against the general background of the scheme of the Act.

The long title of the Act is

> "To consolidate and amend the law relating to internal security in Lesotho".

While ss. 13 to 24 of the Act deal with the arrest without warrant of a person suspected of being involved in subversive activity, the interim custody and later detention of such a person and matters relating thereto, the other provisions of the Act are wide ranging and *inter alia* create a plethora of statutory crimes. Sections 4 and 5 enact a number of crimes relating to essential services. Apart from the definition of "essential service" in s.3(1) (a) to (f) the Minister may by notice in the Gazette declare other services to be essential services. Section 6 establishes the offence of sabotage and ss. 7, 8 and 9 respectively establish the offence of subversion and offences involving

contributions to subversive activities and failure to furnish information about subversive activities.

Section 10 provides for the declaration of certain organizations as unlawful and s.11 enacts various offences in relation to unlawful organizations.

Part IV (ss. 25 to 37) enacts a large number of offences including offences relating to going armed in public (s. 25); offensive conduct conducive to breach of the peace (s. 27); incitement to violence and disobedience (s. 28); intimidation or annoyance (s. 29); a variety of acts, 13 in all, detailed in s. 30 and somewhat euphemistically described in the rubric to the section as "Idle and disorderly persons" ranging from public indecency, soliciting for immoral purposes, betting, gaming, committing a nuisance in a public place, defacing buildings and walls, to suspicious activities at night, being in suspicious places, possessing suspicious objects, etc.; provoking breaches of the peace (s. 31); nuisance by drunken persons (s. 32); criminal trespass (s. 33); incitement to public violence (s. 34); consorting with a person carrying arms or explosives (s.35); impersonating a public officer (s.36); wearing certain uniforms (s. 37).

Part V (ss. 38-44) deals with various offences relating to protected places, vehicles and aircraft.

Part VI (ss. 45-52) embodies offences relating to dangerous weapons, military drilling, explosive, incendiary and corrosive devices and bombs.

Part IX (ss. 64-73) deals, *inter alia*, with offences relating to the disruption of lawful meetings and processions and to unlawful meetings and processions.

The scheme of part III of the Act (ss. 13-23) insofar as it might be relevant to the present appeal is as follows:

In terms of s. 13 a member of the police force may arrest without warrant a person whom he reasonably suspects to be a person involved in subversive activity but a person arrested under this section may not be detained for more than 14 days. In terms of ss. 14(1) the Commissioner may, in particular circumstances, make an "interim custody order" for the further temporary detention of that person for a period not exceeding 14 days. For the sake of clarity I would point out at this stage that, after specified procedures have been followed, the Minister may in terms of ss. 19 (1) make a "detention order".

Both ss.14(3) and ss. 19(2) provide in identical terms (with the exception of two words in the proviso to which I shall later allude) that:

> "If a person is detained under an interim custody order and a detention order is not made in respect of that person within 14 days following the date of the interim custody order, that interim custody order shall cease to have effect and the person detained shall be released ...."

It is not clear to me why this provision was duplicated in ss. 19(2).

Although the proviso to 14(3) is not germane to the present appeal I shall refer thereto because it contains an obvious typographical error, both in the ACt as published as supplement No.1 to Gazette No. 34 of 7th September 1984 and in the original Act lodged with the Ministry of Justice.

This proviso reads -

> "unless he is in custody under some other provision of this or any other law or is arrested under this Part or information, other than, or for reasons, other than, those stated under s. 17(1) in respect of the interim custody order." (My underlining).

It is patently obvious that the word "or" is a clerical error and should in fact read "on". This is confirmed by the proviso to ss. 19(2) where the proviso reads -

> "..... unless he is in custody under some other provision of this or any other law or is arrested under this Part on information other than that or for reasons other than those stated under s. 17(1) in respect of that interim custody order." (My underlining).

It is to be observed that the underlined word "that" does not appear in 5. 14(3) butits omission makes no difference to the sense of the proviso. There is ample authority for the view that in construing ss. 14(3) one may and indeed must read "on" for the word "or". (See Maxwell on Interpretation of Statutes, 11th ed. p 243).

Returning to the scheme of Part III it is therefore clear that unless the Minister makes a detention order "within 14 days following the date of the interim order" and subject to the proviso, then the person in custody must be released.

SS. 16(1) provides that -

> "The Minister may at any time before the expiration of the period of 14 days following the date of an interim custody order refer the case to an adviser as appointed in terms of s.15." (My underlining).

Section 18 provides for the manner in which the adviser must "independently and impartially" consider the detainee's case and report to the Minister. Section 17 provides that as soon as possible after a case has been referred to an adviser the person detained "shall be served with a statement in writing of the activities of which he is suspected" whereupon the detained person may, within seven days following the date on which he receives such statement, send to the Minister written representations concerning his case or a written request that he be seen personally by an adviser. A copy of these representations or request must be sent to the adviser and the adviser must, in terms of ss. 18(2), and before reporting to the Minister, have regard,

inter alia, to oral and written representations made by the person detained. After receiving the adviser's report the Minister must in terms of ss. 19(1) consider the case of the person to whom it relates and may make an order for the detention of that person "if the Minister is satisfied that he has been involved in subversive activities and that his detention is necessary for the investigation of those activities with a view to criminal proceedings before a Subordinate Court or the High Court." Such a detention order must, in terms of ss. 19(3), be signed by the Minister or such other person as the Minister may designate and the period of such detention order may not exceeding 14 days following the date of that detention.

The phrase "14 days following the date of" is used both in ss. 14(3) and 19(2) in relation to the interim custody order and in ss. 19(3) in relation to the detention order. In my view the meaning of this phrase in both contexts is quite clear. It describes a period of 14 days which commences on the date on which the order in question comes into operation.

The import of all these provisions is to the effect that unless a detention order is made within 28 days of the initial arrest of the person in question, such person must be released.

It will require very prompt action on behalf of the police authorities for a detention order to be duly made within these time limits, when all the procedures must be carried

out within the period of 14 days commencing with the interim custody order. It may be possible for the Minister to refer the case on the first day of the interim custody order to an adviser, and simultaneously to serve his written statement on the detainee. The detainee still has 7 days within which to send his written representations or requests to the Minister. Within the remaining 7 days the representations must be sent to the adviser, the adviser must consider the case, report to the Minister and the Minister must consider whether to issue a detention order and then issue it. Of course, on the assumption that there are circumstances under which detention without trial can be justified, then it is absolutely essential that the period of such detention be limited to the absolute minimum. The provisions I have referred to appear to be an attempt to do so.

Before dealing specifically with the issues which fall to be determined, reference must be made to the provisions of ss. 3(3) of the Act, because it was urged upon us that these provisions limit the manner in which the other provisions of the Act have to be construed. SS 3(3) provides that

> "No rule of law and no enactment other than this Act shall be construed as limiting or otherwise affecting the operation of any provision of this Act for the time being in force but, subject to the foregoing, any power conferred by this Act shall not derogate from His Majesty's prerogative".

It was contended that this meant *inter alia* that the Court ought not to interpret strictly those provisions of the Act which made inroads on the fundamental rights, nor in cases of ambiguity, adopt a construction in favour of the liberty

of the individual. In the very first place, however, the provisions of ss. 3(3) have themselves to be interpreted, and there is, in my view, no reason why they should not be contrued according to the normal rules of construction, including those referred to above. The provisions of ss. 3(3) are themselves ambiguous, particularly the phrases "no rule of law and no enactment other than this Act" and "limiting or otherwise affecting the operation of any provision of this Act", particularly when these phrases are related to one another. In my view it cannot mean that the Court is precluded from applying the ordinary rules of statutory constructing. If one were to exclude or limit the ordinary rules of construction the question immediately arises as to what legal rules must apply? The only answer to this question would be that there would be no legal rules that the Court could apply. In other words the Court would be enjoined to act arbitrarily. I cannot conceive that this could ever have been the intention of the legislature. As long as courts exist and function they must apply the law. To act arbitrarily is wholly at variance with the most fundamental duty of any court in any legal system with any pretention to calling itself civilized. If a court would attempt to do so, it would no longer be acting as a court. As long as courts exist, they must apply the law. The only way that the legislature can avoid this, is by abolishing courts altogether, or by entirely excluding the jurisdiction of the courts in relation to certain matters. Whatever the intention of the legislature might have been, it quite obviously did not do so in the present case. In my view, and at the very highest for the Crown, this ss. did no more

than enact that where there is a clear conflict between the provisions of this Act and any rule of the common law or statutory enactment, the provisions of this Act have to take precedence. The ss. does not apply in any way to the legal rules of statutory construction, whatever those rules may be.

I now proceed to deal specifically with the issues outlined earlier in this judgment.

1(a) Was appellant at any time material to his arrest, informed by or on behalf of the person arresting him of the reasons for his arrest and if not, did such failure render the arrest unlawful?

SS 13(1) of the Act in question does not provide how the arrest is to be carried out. Apparently the matter has not previously been considered by this Court or the High Court. Although the provisions of the Criminal Procedure and Evidence Act 1981 have, by virtue of the provisions of ss. 13(3) of the Internal Security Act, been excluded from applying to a person "detained by reason of an arrest under this section" it is clear that its provisions still apply to the arrest itself. SS 32(4) of the Criminal Procedure and Evidence Act 1981 provides that whenever a person effects an arrest without a warrant "he shall forthwith inform the arrested person of the cause of the arrest". SS 32(4) only applies, in my view, to the specific cases mentioned in sections 23 to 31 where persons are authorised to make an arrest without a warrant. An arrest in terms of ss. 13(1)

of the Act in question is not one of the types of arrest referred to therein (cf Ngqumba en 'n Ander v. Staatspresident en Andere 1988 (4) S.A. 224 (A) at 265 E-F.)

In Christie v. Leachinsky (1947) 1 All E.R. 567 (H.L.) the House of Lords held that at common law, when a policeman arrests without a warrant he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himelf or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized, but that when the circumstances under which he is arrested are such that he must know the general nature of the alleged offence for which he is detained, the person arresting him need not inform him thereof.

At p. 573 A Viscount Simon, with whose opinion the other Law Lords expressed agreement, pointed out that:

> "The requirement that he (the arrestee) should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed"

and at p. 573 C-E expressed himself in the following terms which are of particular relevance to the present case:

> "If a policeman who entertained a reasonable suspicion that X had committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of

> why he was doing this, the prima facie right of personal liberty would be gravely infringed. No one, I think, would approve a situation in which, when the person arrested asked for the reason, the policeman replied: "That has nothing to do with you. Come along with me." Such a situation may be tolerated under other systems of law, as, for instance, in the time of lettres de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an overriding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty. If I may introduce a reference to the well known book, Dalton's Country Justice that author, dealing with arrest and imprisonment, says: "The liberty of a man is a thing specially favoured by the common law". There are practical considerations, as well as theory, to support the view I take. If the charge on suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further enquires may save him from the consequences of false accusation."

In South Africa reg. 3(1) of the emergency regulations made by the State President in terms of s. 3 of the Public Safety Act 3 of 1953 provides *inter alia* that any member of the force may arrest a person without a warrant or cause him to be arrested without a warrant if he is of the opinion that such arrest is necessary for certain prescribed purposes. In Ngqumgas case, *supra* the question arose whether, for a valid arrest in terms of the regulation, it was necessary to inform the person of the cause or reason for his arrest. The Court found, per Rabie A C J, at 264I - 266N, that while the Roman Dutch common law did not require such notification where an arrest had taken place without a warrant, the present position was different. He further found (at 265 H) that in the case of an arrest in terms of

reg. 3(1) of the Emergency Regulations it was necessary to inform the person arrested of the reason for his arrest. He motivated this conclusion on two grounds, (p. 265 I-J). Firstly because, both in civil and criminal proceedings, it is a requirement that the reason be furnished and that the State President in promulgating the regulation must be presumed to have known this fact when promulgating the regulation. Secondly because, as Rabie C.J. put it at p. 265 I-J, it was inconceivable that the intention could have been to provide for the arrest of a person, and so deprive him of his freedom, without informing him of the reason for his arrest. It seems to me that all the reasoning which underlies the necessity, both in English and South African Law, for informing a person of the reason for his arrest even in the absence of statutory requirements to such effect, are equally applicable in the present case. It was argued, however, that this was not necessarily the case with regard to ss. 13(1) of the Lesotho Internal Security Act. It was submitted that the obligation on the Minister to furnish the detainee with a statement in writing of the activities of which he is suspected (ss. 17(1)) within 14 days, at the longest, after his initial arrest, countered the idea that it was essential to give such reasons at the time of arrest. I am unable to agree with the submission. There is in principle no difference between a detention of one day, or one week or one month. In all these cases a person is being deprived of his liberty, one of the most basic of his fundamental rights. The observations of Viscount Simon in the passages cited above are of equal application to the briefest of detentions. I therefore

conclude that for an arrest made in terms of ss. 13(1) of the Act to be valid, the person arrested must be informed of the reasons for his arrest.

Once it is accepted that such reasons have to be furnished to the person arrested, then it is irrelevant, for purposes of determining how fully the arrestee must be informed, whether the arrest is with or without a warrant. In my view the rules which have evolved for determining how fully the reasons have to be explained in the case of an arrest with a warrant are equally applicable to the case of an arrest in terms of ss. 13(10) (cf. *Ngqumba's* case, *supra*, at 266 B - 267 B where reference is made to Brand v. Minister of Justice and Another 1959 (4) S.A. 712 (A)). Where a thief or housebreaker is caught red-handed there is obviously no need to tell him that he is being arrested for theft or housebreaking, this fact is most clearly and unambiguously implicit in the physical component of arrest. Apart from such exceptional cases, however, the arrested person must be informed of the reason for his arrest. In Brand v. Minister of Justice and Another 1959 (4) S.A. 712 (A) at 718 B-C, Ogilvie Thompson, J.A. in a portion of his judgment in which he twice referred with approval to Christie and Another v. Leachinsky, *supra*, observed that s.26 of Act 56 of 1955

> "manifestly does not require the arrested person to be informed of the *ipsissima verba* of the charge which is later to be preferred against him. What is required is that the arrested person should in substance be apprised of why his liberty is being restrained." (My underlining).

In Ngqumba's case, *supra*, at 266 G - I Rabie, A C J referred with obivous approval to the observations of Ogilvie Thompson, J.A. in Brand's case without expressing any disapproval of the principles enunciated in Christie v. Leachinsky. It is against this background that the remarks of Rabie, A C J in Ngqumba's case at 266 B, (to the effect that in regard to the question of how fully a person arrested in terms of reg. 3(1) must be informed of the reason for his arrest it was from the nature of things impossible to give one generally applicable answer but that the question had to be answered in the light of the facts of each case) must be seen. I do not disagree with this view, but what must obviously be done in the light of the facts of each case is to determine whether the information given to the person arrested was sufficient to apprise him "in substance" as to why his liberty is being restrained. The views of Viscount Simon that I have quoted above also assist in principle, in determining the exent of the information necessary in order to apprise the arrested person in substance of the reason for his arrest. One of the reasons why the charge, on suspicion of which a person is arrested, must be made known to such person is in order to give him the opportunity, in the words of Viscount Simon at 573

> "of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further enquires may save him from the consequences of false accusation."

A further reason is given by Lord Diplock in Walker v. Lovell (1975) 3 all ER 107 (HC) at 115:

> "Nevertheless, the arrest imposes a restraint on his liberty. He is entitled to resist the arrest if it is unlawfull; but he commits a serious offence in resisting it if it is lawful. That is why at common law a citizen on being arrested is as a general rule entitled to be told the reason for his arrest by the person who arrests him".

I turn to the facts of the present case. This is clearly not a situation where the circumstances under which the appellant was arrested impliedly proclaimed the reason for the arrest. Accordingly appellant had to be informed of the reason "in substance." I have detailed the wide range of offences which are enacted in the Internal Security Act. It would have been insufficient merely to have told appellant that he was being arrested in terms of the Act, or on account of the Act, because he could not from such information have determined whether, *inter alia*, he was being arrested in terms of s. 13(1) on a charge of sabotage, or because he was a member of an unlawful organization, or of unlawfully possessing a dangerous weapon, or for public indecency, or for a breach of the peace, or for intimidation or annoyance. The mere information that he was being arrested in terms of s. 13(1) would have served none of the purposes referred to above. In fact the position is not far removed from that of a policeman who, in a country where the

criminal law is codified, arrests a person and only tells such a person that he is being arrested for breaching the criminal code.

It would not even have been sufficient, in my view, to have told appellant that he was being arrested because of a suspicion that he was reasonably suspected of being involved in subversive activity. "Subversive" as it is used in s. 13(1) is not given a restricted meaning in the Act because in defining "subversive" in ss. 3(1) the legislature has expressly stated that its ordinary meaning is not limited. In its ordinary meaning "subversive" is a word of the widest import. According to the Shorter Oxford Dictionary "subvert" can mean to "overthrow ... upset .... overturn .... undermine" or "bring about the overthrow or ruin of a people or country" while "subversive" means "Having a tendency to subvert or overthrow; tending to subversion". The word "tendency" vastly extends the ambit of the concept The problem is not helped by the other definitions of "subversive" in ss. 3(1) which are as follows:

> "(a) supporting, propagating or advocating any act or thing prejudicial to public order, the security of Lesotho or the administration of justice;
>
> (b) inciting to violence or other disorder or crime, or counselling defiance or disobedience to the law or lawful authority;

(c) being involved personally or by directing, organising or training another person or other persons, in the commission, attempted commission, preparation or instigation of any act involving the use of violence for the purpose of putting the public or any section of the public in fear;

(d) intended or calculated to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Lesotho or the administration of justice, or who incite, intend to incite or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to the law or lawful authority;

(e) connection, association, or affiliation with, or support for, an unlawful organisation;

(f) intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers in the execution of his or their duties;

(g) intended or calculated to seduce a public officer from his allegiance or duty."

They cover a wide field. The person must know the reason for his arrest and in order to know this he must know in substance the particular acts he is suspected of committing or conspiring to commit. This was clearly not done in the present case. Appellant's assertion that the policeman who arrested him informed him that he was being arrested for breach of his bail conditions went unchallenged. In fact Lieut. Metsing, who received appellant from police officer Lethunya who had arrested him, says that Lethunya did not know why appellant had been arrested. There is no evidence from the respondent that any policeman ever informed appellant of the reason for his arrest prior to the filing of second respondent's answering affidavit. Much play was made of the letter dated 15 November 1988 which appellant's attorney, Mr Pheko wrote to the second respondent. In it Mr Pheko states that

> "it has now come to our notice that client has been detained per your instructions under the Internal Security (General) Act 1984."

There is no indication from whom the information emanated, least of all that it had emanated from the police. At this stage Mr Pheko had not yet been able to speak to his client. It is also clear that he had not been appointed by appellant as an agent to receive communication from the police in order to perfect the appellant's arrest. This all leads me

to conclude that appellant was unlawfully arrested and detained.

On this ground alone the appeal must succeed. This renders it strictly unnecessary to consider the other issues. Nevertheless I think it advisable to deal with some of them.

1(b) Must the arresting policeman be the member of the police force to have the reasonable suspicion required by ss. 13(1) or would it be sufficient if second respondent entertained it?

From the plain wording of s. 13(1) it is the person or persons who actually carry out the arrest who must entertain the suspicion. It was argued however that police officer Lethunya, who arrested the appellant was the agent or instrument of the second respondent. This submission is in my view unsound. When Lethunya purported to arrest appellant he was acting neither as an agent, servant or instrument of second respondent. He arrested appellant because he had the statutory power to do so in terms of ss. 13(1) and if he wished to exercise his power to do so he had to satisfy himself that he was entitled to do so. It is true that a Minister of Police may be held liable in delict for the unlawful arrest of a person who is arrested by a member of the police force without a warrant under circumstances where the arresting policeman is in terms of the statute not compelled to arrest, but has a discretion to do so. This was crisply decided in Minister of Police en 'n Ander v. Gamble en 'n Ander, 1979 (4) S.A. 759 (A) at 765 G

- 768 E. The reason is not because the arresting policeman is the instrument, agent or servant of the Minister. It is because the policeman is a servant of the State of Crown, as the case may be. (See Mhlongo & Another N.O. v. Minister of Police 1978 (2) S.A> 551 (A) at 566 G - 567 B). I am strongly inclined to the view that their can be no question of agency in the present case whereby the arrest of the appellant can be regarded as a "representative arrest" made by the subordinate police officers on behalf of the second respondent so as to make the arrest, in fact, the second respondent's arrest. Nevertheless, because it is not strictly necessary to decide this point and because we have not had the benefit of full argument on it (the Court having raised the issue) I consider it advisable not to express a final view on the matter at this stage, but rather leave it open.

1(c) In view of the approach adopted above I also consider it unnecessary to Pursue contention 1(c) as formulated earlier in this judgment.

1(d) Did second respondent, on the facts, discharge the onus of proving that his suspicion that appellant was a person involved in subversive activity, was reasonable.

Although, having found that the arrest was clearly unlawful for other reasons, it is also not strictly necessary to decide this issue, I nevertheless consider it advisable to do so.

It was common cause that in the present case the jurisdictional facts justifying arrest in terms of ss 13(1) were not dependent on a subjective state of mind of the arresting member of the force, but on an objective criterion, depending on proof by the second respondent that he as a matter of fact entertained the requisite suspicion and that such belief was reasonable in all the circumstances. In other words, the existence of the "reasonable suspicion" is objectively justiciable. (See Minister of Law and Order v. Hurley and Another 1986(3) 568(A) at 577 I - 583 H and in particular at 583 G-H).

The Court in the present case can and must therefore decide whether the suspicion was entertained and whether it was reasonable.

As to what constitutes suspicion, the following remarks of Lord Devlin in Shaban Bin Hussein and others Chong Fook Cam and Another (1969) 3 All E.R. 1626 are instructive. At p.1628 his Lordship said:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end ..... Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof".

Lord Devlin continued at p. 1631 by quoting with approval the following remarks of Scott, L.J., in Dunbell v. Roberts, [1944] 1 All E.R. 326 at 329:

> "That requirement (i.e. that the constable must, before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt) is very limited. The police are not called

> on before acting to have anything like a *prima facie* case for conviction".

Reference may also be made to the observations by Wentzel J.A. in this Court in Solicitor General v. Simon Frank Mapetla (unreported C. of A. (Civ) No. 17 of 1984) at p. 2:

> "A suspicion is of course not to be equated with *prima facie* proof; but the suspicion must be reasonable, that is to say it must be such that a reasonable man in possession of the facts would agree that there was reasonable ground to suspect that the person involved was concerned in subversive activity ..... It is this requirement of reasonableness which is the safeguard given against capricious arrest".

I have already alluded to the unsatisfactory aspects of first respondent's affidavit in respect of his reasonable suspicion, and in particular the bald statements that appellant "had been indulging in subversive activities as defined in the internal Security (General) Act" and "was indulging in acts of espionage". It is insufficient merely to state a conclusion without supplying some information on which such conclusion or suspicion is based. In the first place an evidential onus is discharged by proof of facts, not by statements of conclusions. Secondly, by not proving facts in support of the conclusion the Court is precluded from assessing the reasonableness of the conclusion or suspicion and accordingly precluded from finding that the onus has been discharged. All that has been adduced in support of the above last-cited conclusions is the assertion that the conclusion is based on credible information and objective facts. Once again this is little more than the bald assertion of a conclusion which it is impossible for the Court to evaluate. It is no answer to say, as second

respondent does, that he is unable to disclose the information or facts as they would be prejudicial to public interest and public safety. This merely precludes discharge of the onus. It is not expected of a litigant in these circumstances to disclose witness statements or the identity of witnesses or reveal in any detail security arrangements or the precise acts which the prisoner is suspected of performing. But there is a vast middle ground between revealing all and revealing nothing. Second respondent has not discharged the onus of proving the reasonableness of any suspicion in regard to these matters.

The only matters which remain to be considered relate to the publication of a report or reports in the "The Mirror" and the possession of certain documents. I have already alluded to the fact that only the report of the 9th September 1988 was placed before Court. As far as the assertions concerning the publication of reports are concerned I have already said it is impossible to determine whether second respondent is alleging that both reports were alleged to be "highly detrimental" to national security or only one. In either event it is impossible for the Court to evaluate this assertion. If he is alleging that two were detrimental then, without seeing both, it is not possible to evaluate their joint impact. Conversely, if one cannot evaluate one, one cannot be sure that only one report would have led first respondent to the same conclusion. If it is equally possible that he may only be referring to only one report, and in my view it is equally likely, then in view of the onus which second respondent bears one must decide the issue

on that assumption. If that is the case, then it is not possible to determine in which publication it appeared. It cannot be accepted, on a balance of probability, that the report is the one, before Court. In that event one only has second respondent's say-so that the report might have had this important consequence. In any event I am unable to see how the report of the 9th September could be highly detrimental to National security. The main thrust of the report concerns Benco's defrauding of Lesotho and coupled with this the averments, mainly by way of innuendo, that finance Minister Sekhonyana had an improperly close relationship with Benco by means wherof he enriched himself and was further guilty of a serious dereliction of duty in helping Benco to transfer more than two million Maloti into a Swiss banking account and also abused his position in order to get favourable foreign exchange treatment. The article was clearly an attack on the probity and integrity of a Minister of State. I fail wholly to see why attempting to expose corrupt acts of a Minister of State is detrimental to National security unless sufficient material is placed before the Court to establish that second respondent had reasonable grounds for suspecting that the allegations made were deliberately or recklessly false. All second respondent does in this regard is to make the completely bald statement regarding appellant's "acts of publishing demonstrably false statements and accusations against members of the Government of Lesotho". The reference here is to "members" of the Government, whereas the report of the 9th September refers only to one member. The only person who attempts to furnish grounds for the averment that

appellant's report is incorrect was Mr Leuta the Exchange Control Officer in the Central Bank of Lesotho since January 1981. He avers that the report of 9th September is incorrect, or false or misleading in four respects.

1. The suggestion that the Minister of Finance instructed the Lesotho Bank to transfer funds to a Swiss Bank is incorrect because "there was no need for the Minister of Finance to instruct any bank to effect payment in foreign currency for a purely governmental transaction". As a matter of logic this statement is a *non sequitur*. The fact that there was no need for the instruction, because the bank could have done it *meru motu*, does not mean, as a matter of logic, that no instruction was given. If in fact the bank was empowered *mero motu*, to effect payment in foreign currency for a purely governmental, transaction then a further sting is added to appellants accusation. The innuendo would then be that the bank was reluctant to effect the payment and the Minister improperly used his influence to persuade the bank to do so. Mr. Leuta has not sought to counter this innuendo by asserting that it is factually untrue, but has attempted to do so by way of an argument which is fallacious. If appellant's accusation is true (and no whisp of evidence or explanation has been proferred to show that it is not) then the report, far from threatening state security, was a matter of public duty.

2. The second reason advanced by Mr. Leuta for stating that appellant's allegation regarding the transfer of funds to a Swiss bank account is false is that the report contained an innuendo (according to him) that the account was a secret account thereas Annexures A and B, which were in appellant's possession, indicate the contrary. Presumably Mr. Leuta is referring to the fact that these annexures, which are both copies of Benco invoices, embody a request for a remission of moneys to "Swiss Bank Corporation Account No. Q5/716211". This reason is simply factually wrong and indicates that Mr. Leuta misread the newspaper report. In the fourth column on the first page of the report (Annexure I) the number of the account is in fact stated.

3. Thirdly Mr. Leuta states in paragraph 8 of his affidavit that the allegation in the report that during January and February 1981 "more than two million Maloti" were transfered into the Swiss account is, even according to the documents which were in the possession of the applicant "a gross distortion of the truth". This assertion is also based on faulty logic. Mr. Leuta states categorically that Benco only submitted three invoices in support of their application for transfer of funds to Switzerland. Mr. Leuta says that he "can state as a fact that there is not any other invoice in this behalf". These three invoices total M1,238,589.75 which is the exact amount on Annexure "C", an application by an authorized dealer on a

printed document for a transfer of this sum. The identity and domicile of the recipient is given as "Bencofin AC Schaan, Vaduz - Switzerland". Therefore, says Mr. Leuta, there could not have been a transfer of more than this sum on Benco's behalf. What Mr. Leuta is apparently saying is that no transfer of money out of Lesotho can, or ought to take place, without the necessary supporting invoices. This is of course only true if no irregularity is committed. What Mr. Leuta has, somewhat surprisingly, overlooked are the existence and implications of Annexure "D" to the answering affidavit. Annexure "D" is also on the face of it, an application by an authorised dealer on a printed document for a transfer of funds. The transfer is in respect of an amount of M1, 238,000, whereas the sum reflected on Annexure "C" is for M1, 238,589-75. There are other differences between these two documents. Annexure "C" bears the manuscript note "L245" next to the printed words "Registrar of Financial Institutions Reply", whereas Annexure "D" bears the note "L244". Moreover, the "Beneficiary and Domicile" column in Annexure "C" is completed to read "Bencofin AC Schaan, Vaduz - Switzerland". Whereas the same column in Annexure "D" is completed to read "Lesotho Bank Account - Switzerland" while admitting that Annexure "D" is also an application on behalf of Benco by an authorized dealer, Mr. Leuta offers no explanation or justification for it. The documents before Court therefore indicate, prima facie, that during February 1981 application was made on behalf of

Benco to transfer a total sum of M2,476,589-75 to a Swiss bank account. Mr. Leuta leaves entirely unexplained the application embodied in Annexure "D" to transfer the sum of M1,238,000. Appellant said this sum was also transferred. Mr. Leuta does not deny that the money referred to in Annexure "D" was transferred. Moreover he said, quite categorically, that there are only three invoices to support the transfer of money in terms of Annexure "C". On the papers as they stand, Appellant's assertion that a total of more than M2,000,000 was transferred is not effectively challenged or contradicted. Moreover, there is apparently no justification or explanation for its transfer. Under these circumstances Mr. Leutas bold allegation of "a gross distortion of the truth" simply collapses.

4. Lastly Mr. Leuta argues that it is grossly misleading for appellant to suggest that an amount of more than M14,000 which was granted to the Minister concerned was in excess of what the Foreign Exchange Control Regulations allowed and that this privilege was seemingly extended to him in his capacity as Minister of Finance.

Mr. Leuta explains that while an authorized dealer, such as a commercial bank, could not exceed the limit of M10,000 in respect of a travel allowance, the Central Bank could in fact grant permission for a larger amount. I do not think Mr. Leuta meets the point The amount of R14,000 is in axcess of what, in the normal run of things, is granted by a

commercial bank to a traveller. Mr. Leuta's explanation for approving a larger amount is contradicted by the documentation.

Leuta said that the more than M14,000 was a travel allowance needed by the Minister because he was travelling to a number of European countries on government business. The only document before Court on which the Minister applies for more than M14,000 is Annexure "F", which is an application in the name of the Minister personally not in respect of a travel allowance but for M27,000 "to purchase some equipment from Belgium". On this issue nothing which Mr. Leuta has advanced is in any way indicative of the fact that what appellant had suggested was in any way misleading. Mr. Leuta has therefore not shown, in any of the respects suggested by him, that appellant's report was incorrect or misleading. In the result the second respondent has not, in any way, shown that appellant published false statements or accusations concerning any member of the Government of Lesotho.

The only remaining ground on which second respondent sought to justify a reasonable belief and suspicion that the appellant was involved in subversive activities was the fact that appellant was in possession of highly sensitive documents belonging to the state. This assertion by second respondent is not further elaborated in his papers. He does say however that the Central bank had not been broken into and that the inference was justified that the documents in appellant's possession had been leaked to appellant by an employee of the Central Bank. There is nothing to suggest

that even if an employee of the Central Bank had done so that this had been instigated by the appellant or that second respondent believed this. Such a suspicion would have been unreasonalbe inasmuch as it is a notorious fact of life that documents of a confidential nature are often anonmously delivered to newspaper reporters and editors. While it would no doubt be correct to refer to these documents as confidential it does not therefore follow that they are highly sensitive, in the sense that their disclosure would be harmful to state interest. Respondent does not say why appellant's mere possession of these documents led him to believe or suspect that appellant was involved in subversive activities. Quite obviously his possession of the documents is related to the report published in "The Mirror" which was aimed at linking Chief Sekhonyana with the Benco scandal. In the absence of any other explanation by second respondent his belief or suspicion could not be related to any other activities by the appellant. The *bona fide* attempt by a newspaper editor to disclose, through the publication of his newspaper, the existance of corruption or irregularity in public administration and the fact that a Minister of State is involved in or connected with such corruption or irregularity cannot possibly in my view, coustitute a subversive activity in terms of the Act, if the editor *bona fide* and reasonably believes in the truth of this assertion. It is not necessary for purposes of this case to decide whether such belief needs to be reasonable as well as *bona fide* but I shall assume, without deciding, that both an honest as well as a reasonable belief are necessary. It is

also unnecessary to decide whether the mere publication of such information, even where the publisher does not entertain a *bona fide* belief in its truth, would without more constitute subversion. For purposes of this judgment it is sufficient to decide that there can be no question of subversive activity if the editor both *bona fide* and reasonably believes in the truth of what he is publishing.

Without therefore showing that he had reasonalbe grounds for suspecting that appellant did not *bona fide* and reasonably believe in the truth of what he was publishing, second respondent could not reasonably have suspected the appellant of being involved in subversive activities merely because he was in possession of the documents referred to. For the reasons already stated the second respondant has not in any way established on these paper that he had any reasonable grounds for suspecting that appellant did not have such a *bona fide* and reasonable belief.

In the result the second respondant has failed to establish any of the grounds advanced by him for reasonably suspecting that the appellant was involved in subversive activities. For this reason as well, therefore, the second respondent has failed to prove that appellant's arrest or detention was lawful.

In this application the appellant was accordingly entitled to an order releasing him forthwith from detention. As indicted earlier in this judgment the appellant was deported from the Kingdom of Lesotho on the 10th December 1988. This

of course does not disentitle him from an order on his application including the appropriate order as to costs.

The appeal of the appellant accordingly succeeds with costs. The orders of the court a quo made on the 6th December 1988 and the 13rd June 1989 are set aside and the following order substituted:

1. The applicant is to be released forthwith from custody and detention.

2. The interim court order authorising reasonable access to the applicant is confirmed.

3. Respondents are ordered to pay the costs of the application.

Signed: .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

I agree

Signed: .....
W.P. SCHUTZ
PRESIDENT

I agree

Signed: ..for... I. Mahomed.....
I. MAHOMED
JUDGE OF APPEAL

Delivered at MASERU this ..24... day of ..January.. 1990.