THE LAW

TREASON

The main charge is high treason. This is a common law crime with its origins in the perduellio of the Roman Law which in Roman-Dutch Law was known as "hoogverraad". Van der Linden: Institutes 2.4.2 defines it as a crime committed by those who with a hostile intent disturb, injure or endanger the independence or security of the state. Moorman: Misdaden 1.3.2 states that hoogverraad is something done or undertaken with a hostile intent to the injury of the state or the government of the country. These definitions were accepted by our Appellate Division in R v Erasmus 1923 AD 73 at 81 and 87. The learned chief justice referred also to Boehmer (Med. Const. Crim. Car. Art. 124.5) who

> "has some very practical remarks upon the point. Deeds, he thinks, speak for themselves, and it will not avail an accused person who has set on foot a movement which necessarily tends to the subversion of the state, to set up the defence that he did not contemplate its overthrow: such acts he says amount to perduellio because they are pregnant with danger and cannot be undertaken without the idea of imperilling the state, whatever intention the accused may profess."

Hostile intent includes the intent to coerce the government by force even though there is no direct proof of an aim to wholly subvert the government (p.82).

Damhouder (Prac. Crim. Cap. 62) gives as examples of treason inter alia the stirring up of sedition among the people and also the rendering of assistance to the enemy by acts, arms or counsel.

Matthaeus (De Crim 48.2.2) dealing with treason states that it makes no difference whether hostility against the state is stirred up from outside or from within.

According to Van Leeuwen (Cens. For. 5.2) treason can be committed in various ways - e.g. where one stirs up sedition or attempts to destroy the fatherland or collects the people against the state.

An historical overview of the crime treason can be found in S v M J Mayekiso & Others (case No 115/87 WLD 6/6/1988 unreported).

The essence of the crime of treason is the hostile intent. Except in cases where the crime consists of the omission to disclose information of treasonable activities, the hostile intent must, however, be evidenced by some act. The formation of a conspiracy may in itself be such act. R v Adams & Others 1959 1 SA 646 (Special Criminal Court) 666.

This act, evidencing hostile intent, need not be a violent act. One can commit high treason without committing violence. A classical case is that of spying for the enemy. The act can in normal circumstances in a different context be perfectly lawful and innocent yet given time, place and circumstances may lead to the conclusion that an ulterior and hostile intent exists. It need not in itself be an act which might endanger the state. R v Wenzel 1940 WLD 269 at 272-275. What can apparently be more lawful or innocent than the ringing of a church bell, yet when it is the signal to the commencement of a revolution it evidences the hostile intent of him who wittingly tolls it. Cf S v Mayekiso & Others, supra.

It must be emphasised, however, that the hostile intent must be proved beyond reasonable doubt.

Hostile intent may exist even if there is no feeling of enmity towards the state. R v Mardon 1947 2 SA 768 (Tvl. Special Criminal Court) 775.

For the purposes of the law of treason the government is wholly identified with the state. R v Leibbrandt & Others 1944 AD 253, 280 and 281. In the latter case the Appellate Division quoted with approval the words of SCHREINER, J in the court a quo, who inter alia remarked as follows:

"In peace time it may be difficult to ascertain whether any particular form of civil disturbance or anti-governmental activity evidences hostile intent, for there is no general enemy whose purpose it is to overthrow or subdue the Government and the requisite element of force must come from within. In war time the existence of such an enemy, who in the nature of things has this purpose, makes it easier in many cases to decide whether the hostile intent is present or not. There may still, of course, be cases of disturbance that have to be considered without regard to the fact that the country is at war, but many acts fall to be tested by reference to the intention with which they are done in relation to the country's war effort. The object of the enemy being to overthrow or subdue the government of the country, any act aimed at helping the enemy carries with it by necessary implication the intent to bring about the overthrow or subjugation of the government. In the same way any act designed to hinder the government in the waging of the war by necessary implication aims at its overthrow or subjugation by the enemy. The typical act of treason, historically, may be the adherence to or the furnishing of aid to a foreign foe, so that in war time it may be stated more directly that any act which is designed to assist the enemy either positively, by giving him help of any kind, or negatively, by obstructing or weakening the forces arrayed against him, is an act of high treason.

"For the purposes of the law of treason the government is wholly identified with the state. ... Treason may be committed and the hostile intent be entertained with a view to achieving some further purpose. The ultimate goal may be the achievement of some social or economic advantage for a portion or even for the whole of the community.

It may be the advancement of some political or ideological theory, or it may be the fulfilment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the enquiry whether treason has been committed or not."

As regards the nature of acts from which an inference of hostile intent may be drawn the following remarks of the learned judge are apposite:

"One of the most powerful means of waging war to-day is propaganda designed to weaken the enemy's will to war by causing divisions of opinion and lack of confidence among the people in the government. By such means recruiting for the armed forces may be discouraged and the output of factories be reduced. Before the days of so-called total war subversive propaganda might have little effect unless conducted among

"the armed forces themselves, but to-day any attempt to interfere with the activities of the civilian population in aid of the war effort may have as dangerous consequences as attempts to undermine the loyalty of the troops themselves. Particularly dangerous is propaganda directed towards the weakening of the loyalty and sense of duty of the police forces of the country. To say that anti-war propaganda designed to weaken the war effort is treasonable does not mean that all expressions of anti-war opinion necessarily disclose hostile intent against the state. A person may believe that it is right or politic for his country to make peace and if he urges this course it will not necessarily be a proper inference that he is seeking to weaken his country's efforts against the enemy. While he urges the conclusion of peace he may consistently support the most effective prosecution of the war, while it lasts. Naturally such a person is in danger of finding his purposes misunderstood but logically the dual attitude is maintainable and is consistent with loyalty to the state."

Hostile intent is present where the wrongdoer intends to overthrow the state. But it also exists where he intends unlawfully to impair or endanger the independence or security of the state or to coerce the government to adopt or to refrain from adopting a certain line of action. This appears from the definitions of treason aforementioned.

What is omitted is the requirement that the accused should owe allegiance to the state. It was probably taken for granted as it is an essential element.

In passing it must be mentioned that the noblest desires will not negative hostile intent. A person who acts against the state in the belief that a new government or a different form of state will be in the interests of South Africa is not excused by his motives. R v Strauss 1948 1 SA 934 (A) 940.

As will be seen from the above, propaganda and protest action which has the object of coercing the government in a certain direction might in given circumstances amount to high treason. This fact makes this case unique and difficult.

A line has to be drawn where legitimate protest and criticism and lawful mass demonstrations against the government end and foul play begins. When the area of lawful protest action is demarcated the following principles are to be borne in mind:

> "Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously for they are part

And yet, no freedom can be absolute - also not the freedom of speech. The rights of others are involved, individual and communal, the neighbour and the state. One need but to refer to the constraints imposed by law on the freedom of expression in respect of matters such as blasphemy, obscenity, insulting words or behaviour, defamation, contempt of court and official secrets to realise that the state is also entitled to protection against the venomous tongue of the rabble rouser. The least that can be expected is that pamphletteer and demagogue act in good faith and that when they step into the public domain they take care not to knock down the pillars of government and public order by fanning flames of hatred against the state and inciting the populace to sedition.

We have stated that this court has to draw the line somewhere. This cannot be done by an advance blue print. Each speech and each document will have to be scrutinised in context individually and together with all other admissible material to determine whether there is evidence of a hostile intent against the state.

The defence relied heavily on S v Adams & Others (Special Criminal Court) in which case the African National Congress and others stood trial for their actions in the period 1952 to 1956. It is necessary to set out the particulars in this case in some detail.

"of the very foundations upon which Parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly."

S v Turrell & Others 1973 1 SA 248 (C) 256G.

To this should be added the following remarks by RUMPFF, JA in Publications Control Board v William Heinemann Ltd & Others 1965 4 SA 137 (A) 160E-G:

"The freedom of speech - which includes the freedom to print - is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as

"possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost. And in its approach to the law, including any statute by which the court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such extent as it in clear terms declares, and, if it gives a discretion to a court of law, only to such extent as is absolutely necessary."

When evaluating the speeches and documents upon which the case against the accused is based it is not our duty to judge their style, political philosophy, morals or good taste. Politics is no parlour game and truth is not always its bed-fellow. Real and imagined grievances are often stridently voiced and ad nauseam. The right of everyone to comment openly upon matters of public importance and to be heard by whoever wants to listen - the freedom of speech - should not be unduly curtailed by fear of prosecution for treason should the expressed views be repugnant to the ear of authority - even if such criticism does not attain the standards of good taste, fairness and accuracy which one would expect from a prudent author or public speaker. Freedom of speech is far too precious to allow it to be subdued by such spectre. It is robust criticism that lubricates the wheels of democracy and galvanises into action the sluggish machinery of government.

The case for the prosecution was not that the accused came together and entered into a treasonable agreement. Its case was that a number of organisations in South Africa (including the ANC) had a policy to overthrow the state by violence, that these organisations co-operated with each other to achieve their common object and that for that object an alliance was established, called in that case the Congress Alliance, in which the ANC was the senior and dominant partner.

The accused were said to have conspired because they took an active and leading part in the activities of the organisations of which they were members, with full knowledge of and support for the aforesaid policy.

In order to prove the existence of the treasonable conspiracy the prosecution had to prove the violent policy of the Congress Alliance as well as the adherence of each accused thereto.

After the evidence had been concluded the case for the prosecution against the ANC was that it intended to organise the masses against the state and that through a process of

campaigns, stay at homes and strikes it would make its demands as set out in the Freedom Charter; that if those demands were not acceded to and if the circumstances were favourable in the sense that the masses were sufficiently politically conscientized it would organise a nation-wide strike which would be the final clash between the people and the state; that the ANC expected violence from the state to suppress the attack against it and that the ANC intended at that stage actively to retaliate. The defence in that case submitted that the case thus described was a case of contingent retaliation and was not the case set out in the indictment.

The court found proved that the ANC and the other organisations worked together to replace the existing form of state with a radically and fundamentally different form of state, based on the Freedom Charter, and that such a state advocated by the Transvaal Executive of the ANC was a dictatorship of the proletariat and accordingly a communist state known in Marxism-Leninism as a peoples' democracy. The court found however that the prosecution failed to prove that the accused had personal knowledge of the communist doctrine of violent revolution or that they propagated this doctrine as such. It further found that the ANC's official programme of action which set out the

means to be adopted to achieve the new state, provided inter alia for the use of boycott, strike, civil disobedience, non-co-operation and a national one day work stoppage. Some of these methods were illegal. The success of these methods depended on the non-European masses presenting an organised and united front to coerce the government or the electorate through mass action.

A Defiance Campaign was launched in 1952 against so-called "unjust laws". In 1954/1955 the Western Areas Campaign was directed against the removal of inhabitants from Sophiatown to Meadowlands. It was claimed to have led to the declaration of the state of emergency for a period of three weeks. An Anti-Pass Campaign, a Campaign against the Bantu Education Act and a Campaign for the Congress of the People were embarked upon. Despite all this activity no violence ensued. It was never the case for the prosecution that it did. In fact the prosecution did not even submit that the ANC had intended that violence be committed within the indictment period. Its case was that only eventually it wanted a clash and violence.

The prosecution attempted to prove by reference to innumerable documents and speeches that the Congress Alliance had a policy of violence. The prosecution had an insuperable difficulty. The leaders of the organisation openly proclaimed its policy to be non-violent and exhorted members to observe it.

Its National Conference endorsed this policy by way of ~~formal~~ of formal resolution. Internal documents urged that the policy was one of non-violence and had to be observed and at meetings the theme of non-violence was often preached.

Some leaders of the ANC did hold sporadic speeches which amounted to incitement to violence but these were insignificant in number having regard to the total number of speeches made.

The court could therefore not conclude that the ANC had acquired or adopted a policy to overthrow the state by violence in the sense that the masses had to be prepared or conditioned to commit direct acts of violence against the state.

A submission by the prosecution that the conspirators planned to provoke the state to resort to the use of force which would bring about retaliation by the masses leading to violent overthrow of the state, was rejected by the court as it was not covered by the indictment and not proved in evidence.

It is an important judgment and it was to be expected that the defence would rely heavily on it in the instant case.

The following factors are relevant when it is attempted to extract principles from that case and apply them in the instant one:

The keystone of the case for the prosecution was the policy of direct violence alleged in the indictment. That failed.

The case was heard against the backdrop of a tranquil non-violent situation in our country in the period 1952 to 1956.

In both these respects the instant case differs from Adams' case. It is common cause that at all times relevant to our indictment the African National Congress was a revolutionary organisation bent on the violent overthrow of the South African government and that large scale violence occurred in our land.

A guide-line which can be extracted from the judgments in Adams' case is that a court should guard against regarding one swallow as making summer or use a few speeches or documents out of hundreds as basis for a finding that a policy of violence exists. To this should be added, however, that each case has to be decided on its own facts and that much will depend on the nature, wording and context of the speech or document, the office of the speaker or author, and whether there is evidence of a contrary nature.

The court held that the policy of a political organisation or party is not only proved by its constitution and official pronouncements. Its policy is always a question of

fact. It depends on the circumstances of the case. One looks at its constitution, at resolutions taken at conferences, at declarations of responsible leaders and other relevant facts. These include the publications of such organisation and may in certain circumstances also include publications of organisations supporting it.

What further emerges from Adams' case is that a court will hold the prosecution strictly to its indictment should any deviation therefrom prejudice the accused in the conduct of their case.

Counsel for the defence in our case sought to extract from the judgment in Adams' case a principle that the object to coerce the government to deviate from the policy of apartheid, albeit by illegal means, cannot be treasonable. The court did not go so far. The prosecution referred the court to the following dictum of SCHREINER, J in R v Leibbrandt (Special Criminal Court 1943) where he said:

" Now in South Africa there is a lawful method of getting constitutional changes effected, that is by Act of Parliament, and there is a lawful method of changing the Government, that is by gaining a parliamentary majority through victory at the polls. These are the lawful, the constitutional

" methods and the only ones. No other method exists which does not rest upon the use of illegal force.

There is no intermediate course between constitutional action through the ballot box and treasonable action through the illegal use of force. Members of an organisation may not themselves desire to use bombs or other weapons. But this will not avail them if their purpose is to act outside the constitution to achieve their ends. "

On the basis of this dictum the prosecution in Adams' case submitted that any coercion of the government was illegal and treason. The court however declined to decide the matter as it fell outside the scope of the indictment.

Defence counsel by studious comparison between some of the speeches in Adams' case and the speeches in our case sought to convince us that the former were much more violent than the latter and that therefore there can be no conviction in the instant case. There are two answers to this argument. Each case has to be decided on its own facts assessed against the conditions prevailing at the time. The court in Adams' case held that these fiery speeches did not constitute the policy of

the Congress Alliance (because of overwhelming evidence to the contrary) and as the whole case hinged on the question whether the policy was one of violence, the case for the prosecution failed.

SEDITION

A competent verdict on a charge of treason is a verdict of sedition - section 270 Criminal Procedure Act 51 of 1977. The crime of sedition was said in R v Endemann 1915 TPD 142 to bear the same meaning as "oproer" in Roman-Dutch Law and implies a gathering or concourse of people in defiance of the lawfully constituted authorities for some unlawful purpose. See also R v Viljoen & Others 1923 AD 90, 93, S v Twala & Others 1979 3 SA 864 (T) 869 and S v Zwane & Others (1) 1987 4 SA 369 (W).

The principal difference between treason and sedition is that in the latter there is an absence of hostile intent as defined above. The intent is to defy the authority of the state or its officials. The seditious gathering need not be accompanied by violence or force.

Again the remarks quoted above from the judgment in S v Turrell & Others are apposite. The right to protest should not be confused with seditious gatherings.

THE CHARGES UNDER THE INTERNAL SECURITY ACT

The law involved in the alternative charges of terrorism and subversion, based on sections 54(1) and 54(2) of the Internal Security Act 74 of 1982 need not be discussed here. The material portions of the sections have already been referred to. It remains to find the facts and apply the law.

The last and least serious alternative charge under the said Act is that of contravening section 13(1)(a)(v) - furthering the objects of the unlawful organisations the ANC and SACP. This section of the Act is not as lucid as could be expected and has in the past called for judicial interpretation. As we do not agree with the conclusions reached it is necessary to set out our reasoning at some length.

The sub-section reads:

" 13.(1) As from the date upon which an organization becomes an unlawful organization by virtue of a notice under section 4(1) or (2) or, for the purposes of paragraph (a) of the definition of 'unlawful organization', as from the date of commencement of this Act-

(a) no person shall-

....

" (v) advocate, advise, defend or encourage the achievement of any of the objects of the unlawful organization or objects similar to the objects of such organization, or perform any other act of whatever nature which is calculated to further the achievement of any such object; "

The problem encountered in the interpretation of the sub-section is ostensibly the wide meaning of the word "objects" (Afrikaans oogmerke). It can mean that a perfectly acceptable object, eg to support a charitable institution which the unlawful organisation has amongst its objectionable objects, would be tainted, resulting in the cessation of all support for that charity from other sources. This would be absurd. To meet this situation the courts have limited the scope of the section. It is the nature of this limitation that now concerns us.

The minister may declare an organisation unlawful if he is satisfied that:

(a) it engages in activities which endanger or are calculated to endanger the security of the state or the maintenance of law and order; or

(b) it propagates the principles or promotes the spread of communism (section 4).

The objects of such organisation would therefore include:

- to endanger the security of the state;

- to endanger the maintenance of law and order;

- to promote the principles of communism; and

- to promote the spread of communism.

(Communism is defined).

Those are the objectionable objects which the legislature intended to frustrate.

Those are the objects which are the perimeters within which section 13(1)(a)(v) has to be interpreted.

Of necessity an unlawful organisation has to have one or more of those objects. It may have other objects as well but those are not objectionable (in terms of section 4) and will therefore not be taken into account when section 13(1)(a)(v) is applied.

It can no doubt be argued that the endangerment of the maintenance of law and order is not necessarily an object but may be a means of attaining an object, e.g. the endangerment of the security of the state. It can further be argued that the endangerment of the security of the state is not necessarily an object but may be a means of furthering revolution. The latter may, again, not necessarily be an object but a means of creating a Marxist state as a step in the attainment of the final object - Utopia.

This reasoning illustrates that one may have intermediate objectives which may be the means of attaining the ultimate objective. This does not mean that only the ultimate objective is the object. Anything which the organisation seeks to attain in the short, medium and long term are its objects. The attainment of the short and medium term objects may be the means to an end.

It is therefore fallacious to allocate objects and means to separate watertight compartments. There is no reason which we can see why the word "objects" in section 13(1)(a)(v) should be interpreted as referring to the ultimate objects only and not to short term and intermediate objects also.

This approach conforms to the approach of the Appellate Division in S v Arenstein 1967 3 SA 366 (A) 379E-380E where it was held that the word "any" in the phrase "any of the objects of communism" in section

11(a) of Act 44 of 1950, a predecessor to our section 13(1)(a)(v), was wide enough to include both an intermediate or ancillary as well as an ultimate aim of communism. It did not matter that such intermediate aim was also held by other organisations and was lawful. In the latter case mens rea of the accused would determine guilt or innocence. Mens rea being the intent to further the objects of communism (as opposed to an intent to further the (same) objects of a lawful organisation) 383C; 385H-386H. At p.381 (top) VAN WINSEN, AJA states:

> " Now while the promotion of disturbance may very well be one of the methods by which Marxian Socialism seeks to achieve its aims, it could quite clearly not in itself be regarded as a fundamental principle of Marxian Socialism, although it could correctly be characterised as one of its intermediate objects. Nevertheless the Legislature has chosen to equate a doctrine having such an aim to Marxian Socialism. Sub-para. (d) affords similar evidence of the intention of the Legislature in regard to the meaning of 'objects of communism', and goes to show that matters of method and short-term objectives could also be numbered thereunder. "

In my view the approach should not be to attempt to limit the interpretation of "objects" to ultimate objects, but to employ an interpretation which takes section 4 of the Act as a starting-point - as set out at the beginning hereof.

As the offence is the furthering of the objects of a particular unlawful organisation or objects similar thereto, it has to be proved which of the objectionable objects it has as its own. One cannot be left to speculate.

If the ostensibly wide meaning of "objects" as used in section 13(1)(a)(v) is thus limited there is no absurdity and no need for applying the so-called "distinctiveness test" of DIDCOT, J in Ndabeni v Minister of Law and Order 1984 3 SA 500 (D). The same result would there have been achieved.

In so far as it can be argued that "unlawful organisation" includes an organisation declared unlawful in terms of previous legislation and that an interpretation which has reference to section 4 only is not acceptable, it should be pointed out that in terms of previous legislation an organisation could only be declared unlawful on the same basis as set out in section 4. See section 2(2) of Act 44 of 1950.

The so-called distinctiveness test of Ndabeni's case is open to criticism. According to this test an object is to be distinctive of that particular organisation (p.508B), but even then it is not necessarily hit by the sub-section (as it might be so mundane or innocuous as to lead to an inference that the legislature did not intend to outlaw it) (p.508E).

So stated the test is not a useful criterion at all. The ultimate test is then not one of distinctiveness but of absurdity and amounts to an application of the principles expounded in Venter v Rex 1907 TS 910, which should only be used as a last resort in the interpretation of statutes.

The end result of the so-called distinctiveness test is then a question whether the object is mundane or innocuous - for which no criteria are laid down. The meaning of section 13(1)(a)(v) is therefore left unsettled. This absence of clarity is not conducive to legal certainty, and in our respectful opinion, it is wholly unnecessary.

Should only those objects of an unlawful organisation which could in terms of section 4 lead to its being declared unlawful be taken into account when section 13(1)(a)(v) is interpreted no question of absurdity can arise. All are unlawful.

We are aware that STAFFORD, J in S v Ntshiwa 1985 3 SA 495 (T) at 507B approved of the test of distinctiveness with which we have dealt. This was, however, a portion of the judgment which was obiter (see p.505H) and there is no indication that this aspect was fully argued. It was however argued in S v Ramgobin & Others 1986 1 SA 68 (N). The learned judge-president there referred to the test of distinctiveness in Ndabeni's case and found that it was not an essential element of the

offence (pp.81A and 85E) and that it was not an absolute concept but a purely relative one (p.84I). In Mokoena v Minister of Law and Order 1986 4 SA 42 (WLD) the matter was argued very tentatively (p.49I) but the cases mentioned above were approved of.

We have considerable difficulty with the test of distinctiveness. Suppose a number of organisations have as object to propagate communism. Only one is declared unlawful - the others not, because they are underground. The propagation of communism will not be distinctive of the unlawful organisation. Yet clearly this is something which the legislature wanted to stamp out and the test of absurdity is inapplicable. On the distinctiveness test there could be no successful prosecution under section 13(1)(a)(v). Another example will suffice. One hundred organisations are declared unlawful because the object of each is the overthrow of the state. There can be no prosecution under section 13(1)(a)(v) for furthering the object of one of them as that object is not distinctive. That would be absurd.

The test of distinctiveness has, in my respectful view, to be rejected and replaced with an interpretation which limits the word "objects" in section 13(1)(a)(v) to the perimeters laid down by section 4.

The argument against an interpretation of section 13(1)(a)(v) which limits its wide scope by reference to section 4 is that the

reasons for declaring an organisation unlawful are not based on what the objects of the organisation might be, but what its activities, purposes, etc. are. S v Ramgobin & Others 1986 1 SA 68 (N) 81H. In my view too strict an interpretation is given to the word objects (oogmerke). It is clear that in terms of section 4(1)(b) the purpose of the declaration as an unlawful organisation is to stop the propagation of the principles or the promotion of the spread of communism. The objects of communism are spelt out in section 1:

(a) the establishment of any form of socialism or collective ownership;

(b) the establishment of a despotic form of government by one political party, group or organisation; or

(c) to bring about any political, economic, industrial or social change under direction etc. of any foreign government etc. whose aim it is to establish (a) or (b).

These objects create no difficulties of interpretation. What does is section 4(1)(a):

" any organisation which engages in activities which endanger or are calculated to endanger the security of the state or the maintenance of law and order; "

can also be declared an unlawful organisation. This separate sub-section was previously part of the definition of communism in Act 44 of 1950 and read:

" any doctrine or scheme ...

(b) which aims at bringing about any political, industrial, social or economic change within the Republic by the promotion of disturbance or disorder ... "

The object in the quoted portion is change. That object is not present in section 4(1)(a). But is it entirely incorrect to hold that an organisation which engages in activities endangering the security of the state or the maintenance of law and order would (normally) have that as its (perhaps intermediate) object? I do not think that that would stretch the language too far. In any event it is preferable to incorporating a whole new concept like distinguishability into the interpretation.

The word "calculated" in the phrase "calculated to further the achievement of any such object" in the section does not refer to intention but means that the unwanted result will as a reasonable possibility flow from the performance of the Act. S v Arenstein 1967 3 SA 366 (A) 381F. The word "calculated" is used as a synonym for "likely". S v Nokwe & Others 1962 3 SA 71 (T) 74D.

The last-mentioned case lays down at 74G that the words "achievement of any of the objects of the unlawful organisation" have to be read as achievement by the unlawful organisation of any of its objects. That portion of section 13(1)(a)(v) therefore penalises a person who assists, etc. the unlawful organisation in the achievement of any of its objects.

Bearing in mind the above approach I turn to the objects as pleaded.

I have previously set out the objects as pleaded by the state. It will immediately be clear that many of the objects set out cannot by any stretch of the imagination be a ground for ministerial action in terms of section 4, e.g. to wage campaigns against government policy in respect of the new constitution and Tri-cameral parliamentary system or against government policy and legislation in respect of say Black local authorities, the Koornhoff Bills, removals, group areas, Black education, etc. is acceptable and normal democratic political activity. The fact that these are also issues which the ANC and SACP embrace with enthusiasm to further their aims is as far as section 13(1)(a)(v) is concerned irrelevant.

On the other hand those pleaded objects which relate to the security of the state, the maintenance of law and order, the propagation of the principles of communism (as defined) and the

promotion of its growth are relevant in this respect. The scope of the indictment is therefore to be restricted and limited to those instances.

DOCUMENTS

To a large extent this case deals with documents. The documents before court are not all relevant. Neither can they all be used as proof of the facts set out therein. Even those that can, cannot necessarily be utilised for that purpose in respect of each accused. We further bear in mind that some documents are admissible solely by virtue of the provisions of section 69(4) of the Internal Security Act 74 of 1982 and as such they are admissible only in respect of offences in terms of that Act. That excludes their use on the common law charges.

Evidence admissible for one purpose and not for another does not become inadmissible for that reason. It remains admissible. Lornadawn Investments (Pty) Ltd v Minister van Landbou 1977 3 SA 618 (T) 622H; R v Miller & Another 1939 AD 106, 124; Vengtas v Nydoo & Others 1963 4 SA 358 (D) 374H, 380C; R v R 1961 1 SA 28 (N); Wigmore para 13.

However, evidence which has thus come before court is there for the limited purpose for which it was admitted only. Its admission is not a general open sesame. The words of GRAVES, J in People v Doyle 21 Mich. 221, 227 (1880) quoted by Wigmore para 13 are apposite:

> " Whenever a question is made upon the admission of evidence it is indispensable to consider the object for which it is produced, and the point intended to be established by it. ... It frequently happens that an item of proof is plainly relevant and proper for one purpose, while wholly inadmissible for another, which it would naturally tend to establish. And when this occurs, the evidence when offered for the legal purpose can no more be excluded on the ground of its aptitude to show the unauthorized fact, than its admission to prove such unauthorized fact can be justified on the ground of its aptness to prove another fact legally provable under the issue. "

The state is assisted in adducing documentary proof not only by section 69(4) - which is of limited application - but by section 246 of the Criminal Procedure Act 51 of 1977 which is generally applicable.

The two sections overlap to a certain extent. In terms of section 246 documents that were on premises occupied by an association of persons or in possession or under control of an office-bearer, officer or member thereof shall upon mere production be prima facie proof that

the accused is a member or office-bearer or the author or prima facie proof of the proceedings of a meeting minuted thereby or of the object of such association, if these facts appear ex facie the document.

The defence submitted that section 246 was not applicable as the UDF was not an association of persons but a front consisting as it does of affiliates which are not persons but associations of persons. We reject this submission. The words "association of persons" in section 246 have a wide meaning as is evident from the use of the words "any" and "incorporated or unincorporated" in the section. The word "association" is not defined in the Act. The ordinary meaning is an organised body of persons for a joint purpose (Oxford English Dictionary). It need not have a standard or usual pattern. It need not have a constitution or subscribed members. It need not even have a fixed leadership or executive. The defence interpretation disregards the provisions of section 2 of the Interpretation Act 33 of 1957 which defines person as "any body of persons incorporate or unincorporate". An association of persons would therefore also comprise an association of associations of persons.

Section 69(4) makes documents (and reproductions thereof) admissible as prima facie proof of their contents if:

(a) processed or under control of the accused or an office-bearer, officer, member or active supporter of an organisation of which the accused was one; or

(b) found or removed from premises used by an organisation of which the accused is alleged to have been office-bearer, etc; or

(c) they ex facie are documents of or emanating from such organisation.

These two statutory provisions assist the state to prove the truth of assertions made in those documents which would otherwise be inadmissible hearsay.

We reject the construction forced by the defence onto section 69(4) which seeks to interpret the words "prima facie proof of the contents thereof" not as meaning proof of the truth of the facts set out therein, but that the words merely assist the state to prove that the document is what it purports to be. The example given is if a document ostensibly is a Sechaba then under the section it is prima facie proven to be a Sechaba. We do not understand this construction. It does not accord with the wording of the Act.

We are fully aware of the wide scope of this section, but it should not be forgotten that the proof it furnishes is merely prima facie proof and not the final word on the subject and a court will when applying the section bear in mind the type of document, its ostensible origin and where it was found when its evidentiary weight is assessed. The ghosts raised by counsel can thus be laid to rest without reconstructing the section beyond recognition.

Defence counsel relied on S v Nkosi 1961 4 SA 320 (T) 322D where this division admitted a document in terms of the precursor of section 69(4) as prima facie proof of the contents thereof. The learned judge did, however, not regard that as adequate and relied on the precursor of section 246(a) for his decision. The matter was not argued by counsel and no interpretation of the words "prima facie proof of the contents thereof" is given. For the purposes of the judgment no reference to that section was necessary. Under section 246 the document could have been produced by the prosecution.

In S v Twala & Others 1979 3 SA 864 (T) 876D this division interpreted section 2(3) of Act 83 of 1967, a section similar to our section 69(4), to mean that the contents of such documents are prima facie true. There is likewise no indication that the matter was argued.

This interpretation is, however, in accordance with that of the Appellate Division in S v Matsiepe 1962 4 SA 708 (A) 712C and F which dealt with the same section as the court in S v Nkosi, supra.

This court reached the same conclusion in S v Mabitselo 1985 4 SA 61 (T) 67A-C.

For the purposes of section 69(4)(a) we determine that those persons are active supporters of the UDF who at the relevant time were office-bearers or officers of organisations affiliated to the UDF or who attended general council meetings of the latter organisation.

Without utilising these two statutory provisions documents like pamphlets, placards and posters may be used as real evidence - not to prove the truth of the facts set out therein but to prove the existence and nature of propaganda campaigns and the extent thereof. Cf R v Miller & Another 1939 AD 106, 119. These documents can also indicate who the active supporters of the UDF are and what the target of such propaganda is.

There are other documents before court like letters and drafts of speeches which even in the absence of proof of delivery may afford proof of the attitudes and thinking prevalent in the top echelons of the UDF.

The nature of all this evidence is circumstantial but it is substantive evidence nevertheless. Lornadawn Investments (Pty) Ltd v Minister var Landbou 1977 3 SA 618 (T) 622; R v Levy & Others 1929 AD 312, 327; International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd 1953 3 SA 343 (W); S v Alexander & Others (2) 1965 2 SA 818 (C) 822/3; S v Twala & Others 1979 3 SA 864 (T) 875.

Of course the state will have to prove the origin of such documents if a finding is to be made on the identity of those behind the campaign. On charges under the Internal Security Act section 69(4)(c) would be helpful, but irrespective of this provision our approach is that where a pamphlet bears the logo of the UDF and is ostensibly issued by the UDF or an affiliated organisation for public distribution and so distributed and its reliability is not suspect in the light of acceptable evidence - especially if it conforms with general trends of thought in the UDF - and no officer or office-bearer of the UDF has disputed its authenticity - then such document might prima facie itself afford proof of origin. Normal behaviour would have dictated an immediate repudiation of bogus UDF documents. Silence before and during the trial implies an admission of authorship and origin.

To some extent we find support for this approach in Wigmore para 21.09 and 21.11:

" Documents which are, or have been in the possession of a party will, as we have seen, generally be admissible against him as original (circumstancial) evidence to show his knowledge of their contents, his connection with or complicity in the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as . . admissions (i.e. exceptions to the hearsay rule) to prove the truth of their contents if he has in any way recognized, adopted or acted upon them. "

" Access to documents, if coupled with due opportunity of testing their accuracy, may also, by raising an inference of knowledge and non-objection, sometimes affect a party with an implied admission of their correctness. Thus, the rules of a club or the proceedings of a society, recorded by the proper officer and accessible to the members, or an account-book kept openly in the club-room, as also vestry books have been received against members. "

We bear in mind that in so far as the documents contain statements by others than a particular accused, these statements can only be admissible against such accused on the basis of the conspiracy (if

proved) and then only to the extent that they are executory statements, ie akin to acts done in furtherance of the common design. The test is relevance. R v Mayet 1957 1 SA 492 (A) 494.

By far the majority of the documents pose no problem in this respect. Propaganda material, whether in writing or by speeches, is by its nature in furtherance of an object and, if related to the conspiracy, in execution thereof. So are minutes, working documents and discussion papers. Examples of the propaganda material are UDF News, the numerous pamphlets of the UDF and its affiliates and the video and audio material before court.

A few remarks are necessary about publications like Saspu National, Saspu Focus, The Eye, Grass-roots and Speak. Saspu seems to be a student publication and the others were allegedly also independent of the UDF. They are what the UDF itself refers to as the alternative media or community newspapers as distinct from the commercial press. They are not funded from advertisements as they do not carry any. How they are financed we do not know. Most seem to have sprung up at about the time of the formation of the UDF. Except in name they appear to be extensions of the UDF's propaganda campaign. They were affiliated to the UDF and had representatives at the Transvaal general council meetings of that body. Accused No 21 served on the board of Africa News Association, publishers of one of these publications.

We were told that in July 1984 these alternative media disaffiliated for practical reasons. They continued to attend general council meetings thereafter. We were also told that the UDF had no control over their editorial policy.

In fact their policy as expressed in the publications themselves did not differ from that of the UDF.

We had evidence that some of the publications were sold by the Vaal Civic Association, an affiliate of the UDF, and that they were regarded as UDF literature and were received from the UDF. They were also found in possession of some of the accused. There is also evidence in the minutes of the REC of the UDF Transvaal of a relationship with these media. Exhs S.9 para 8.3 and S.10 para 5. The UDF regarded these media as resources to be used for its campaigns. Exh AL.42 p.4.

Except in annexure Z in the context of cross-examination of witnesses, we have rarely referred to these publications. We may be over-cautious in this approach. There is authority in S v Adams & Others, supra (unreported) that such publications may form part of the global picture. (See the judgments of RUMPFF, J at 100 and BEKKER, J at 35 and 158).

The state handed in through witnesses a number of ANC publications namely Sechaba (the official organ of the ANC, exhs ABA.33, AAE.1-30); (the defence handed in exh AAE.31); Dawn (the journal of Umkhonto we Sizwe, exhs AAG.1-3); Mayibuye (a journal of the ANC, exhs AAF.1-16) and official documents like the statements of the NEC of the ANC on 8 January (exhs AAH.1-3). We also had Voice of Women (journal of the ANC women's section, exh AAJ); Forward to Freedom: Documents on the National Policies of the ANC (also known as Strategy and Tactics, exh AAM) and The African Communist (journal of the SACP, exhs AAK.1-5. As this journal is not relevant for our purposes it will not be referred to again.)

The ANC documents are all documents which are published for public dissemination. They are all ANC propaganda material.

The defence submitted that the court did not have sufficient expertise to determine what ANC policy is from these publications and in any event that they had not been properly proved.

The first submission underestimates the capabilities of this court. A court of law should be able to understand documents which are intended as propaganda material for the masses and does not need expert guidance on the meaning of what is spelt out clearly in plain English. Apart from that there was viva voce evidence about ANC policy which was consistent with the publications.

We turn now to the second submission. The documents are all on the face thereof ANC publications. The accused are alleged in the indictment to have conspired with the ANC and also to have furthered the aims of the ANC. This implies an allegation that they are active supporters of that organisation. The documents are therefore admissible in terms of section 69(4)(c) of the Internal Security Act 74 of 1982 as prima facie proof of the contents thereof in respect of the charges under that Act.

This leaves the common law charge of treason.

The publications were proved through the witness ic.23. He is an ex-ANC cadre who was trained for fifteen months in Lesotho in politics and Marxism. The document Strategy and Tactics (exh AAM) was a prescribed work. In Angola he got weaponry training and also more intensive training in politics. Prescribed literature was inter alia Sechaba, Dawn and African Communist. He also attended a ten months course in politics in Cuba. He is therefore a witness who is extremely knowledgeable as far as political material is concerned.

The witness ic.23 identified as ANC documents exhs AAE.1-30, AAF.1-16, AAG.1-3, AAH.1-3 and AAJ. He also identified exhs AAK.1-5 as the African Communist. He stated that all this literature was used by them at the ANC camps.

The cross-examination on this aspect was very brief. It was to the effect that the witness could not be certain of these documents as they might be perfect imitations.

This suggestion entails that somebody, presumably the police, took the trouble to write, compile and publish a large volume of publications under the name of the ANC in order to discredit the ANC and/or mislead this court. Coincidentally, however, the contents of these documents is exactly what one would expect from a revolutionary organisation which the defence admits the ANC is, and the policy set out therein is corroborated on a number of material aspects by viva voce evidence. We reject the suggestion that they are counterfeit. Even the defence itself handed in a Sechaba.

Defence counsel further argued that these documents would only be admissible if shown to have been prepared or adopted by the person to whom they are attributed namely the ANC. We were referred to a number of cases like R v Prometheus Printers & Publishers (Pty) Ltd 1960 4 SA 888 (C) based on Vulcan Rubber Works (Pty) Ltd v South African Railways & Harbours 1958 3 SA 285 (A) 296 for the rule that a statement in a document cannot itself be evidence of its origin.

This is not the position in our case. The witness did not solely rely on the fact that the documents assert that they are the journals of the ANC, but on the whole "get up" of the publications

and in some instances on the contents as well. That is a far cry from using a statement in a document as proof of its origin.

It was further pointed out that the state has to show that the statements in the ANC documents are executory statements before they are admissible. That submission is correct. The evidence shows, however, that the statements in ANC documents which are relied on were all statements made in furtherance of the ANC's goals and for that purpose disseminated. They fall in the executory class.

After argument was concluded the Law of Evidence Amendment Act 45 of 1988 was promulgated. Section 3 renders admissible at the discretion of the judge certain hearsay statements. In view of the fact that this case was conducted on the basis of the law as it stood before the Act came into effect, we are not prepared to exercise our new found discretion, even if the Act is applicable to these proceedings, upon which matter we express no opinion.

The defence sought to isolate each piece of evidence the state adduced and (often unsuccessfully) sought to give it a possible innocent interpretation. This approach is not in itself incorrect, provided that it does not lead to a distorted picture. We will apply the approach laid down by the Appellate Division in R v De Villiers 1944 AD 493, 508:

" The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way: The Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence. "

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