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BACKGROUND DOCUMENT REGARDING THE CONVICTION OF CERTAIN ACCUSED
IN THE CASE OF THE STATE V P M BALEKA AND OTHERS (CASE CC
482/85)

1. INTRODUCTION

1.1 On 15 November 1988 judgment was delivered in the Transvaal Provincial Division of the Supreme Court of South Africa in the above-mentioned case. (The names of the accused appear in Annexure "A").

1.2 The trial commenced on 16 October 1985 and lasted 437 court days, stretching over a period of 37 months. Judgment was delivered for a period of approximately one week. During the trial 278 witnesses testified - 152 for the state and 126 for the defence. The record of evidence and argument till judgment consists of 459 volumes and runs to 27 194 pages. Furthermore, 1 556 documents consisting of 14 425 pages, as well as 42 video and audio tapes, 5 rolls of 16 mm film and numerous photographs and maps were handed in during the trial.

1.3 During his judgment the trial judge commented particularly on the length of the trial and stated inter alia that -

"The fact that our quest for justice follows a route so tortuous that it seems neverending and is costly beyond endurance to both the state and accused is a sharp indictment to our procedure in the criminal courts. One

should not run an ultra marathon to determine the guilt or innocence of an accused. It is not fair to the accused. It is not cost-effective to the state. It stretches our judicial resources to the limit. Whichever way the matter is regarded, justice delayed is justice denied".

The judge continued to mention certain aspects regarding the procedure in the criminal courts which had contributed to the prolixity of the case, e.g. "... the fact that the indictment of the state in the present case of necessity led to a wide field of investigation."

Other factors mentioned in this regard include the passive role relegated to judges, the repetitious and lengthy cross-examination, irrelevant matters presented as evidence and the fact that interference by the court to legitimately speed up the process is unfairly regarded as impatience. These factors are inherent in our judicial system. The trial judge suggested as remedy that a judge be given drastic powers to curtail cross-examination.

1.4 Notwithstanding these remarks the judge went out of his way to commend the legal teams of both the prosecution and the defence on their labourious efforts to keep the legal process flowing uninterruptedly. The legal teams had, for example, reached agreement on a wide range of issues beforehand and the pre-trial conference held by the judge helped considerably in shortening the trial.

1.5 The court also commented on the expressed view that treason trials should not be heard by the ordinary courts of the land, as our procedure is not suited to this type of trial. The trial judge was, however, of the opinion that the answer lies in correcting the procedure and not in excluding the courts: "South African society is changing. In this process its people, their views and their institutions are being subjected to tremendous tensions. It is imperative that in these times the courts remain a bulwark to preserve the integrity of the state and protect the rights of the individual."

1.6 The approach of the court appears from the following passage from the judgment:

"It should be remembered that ideas cannot be snuffed out by closing a prison door and that the court-room is not the forum for a political debate. We do not try men for their convictions but for their deeds. The political views so strongly held by the accused were frequently eloquently and forcefully expressed. Each in his way, they impressed upon us their perceptions, personal problems and experiences as Black people in the developing South African situation. They told of frustration, indignities and suffering which accompanied their political, social and economic plight.

They feel cheated and rejected in being excluded from the governmental decision-making processes that effect their very lives. We have listened to their interpretations of South African history, to their ideas of what should and should not be done, the changes required and how those should be brought about. Though we do not go along with everything that was said, it is not our function to judge them in this respect.

We hope and trust that the radical and repugnant views expressed by speakers at some meetings about which we have evidence and by the authors of some documents put before us will, when history is written, be allotted their proper niche - a passing phase in the birth-pains of the new South Africa."

1.7 The case in question revolves around the fact that the state endeavoured to draw an inference from the contents of speeches and documents that the accused had conspired with others to overthrow the state. In this regard the court remarked: "This case is not about the freedom of speech or the right to disseminate ideas or about freedom of association. These rights are part of our common law and exist unless they are curtailed by statute and then only to the extent specified."

1.8 It should be pointed out that although certain witnesses had testified in camera, the court in its judgment stressed the fact that "(t)hey were not secret witnesses. Members of the

press were permitted to be present during their evidence and publicity was given thereto. Their identities were, however, withheld to ensure their safety."

2. THE STATE CASE

2.1 During judgment the court gave an historical overview of the background against which the UDF was formed.

2.2 In the court's view the indictment can be divided into two sections.

"One deals with the UDF and its aims generally and the alleged effect of its actions country-wide. The other pertains to the effect of the UDF's actions in the Vaal Triangle and the activities of its affiliates and other groups active in that area. This division amounts to two separate cases held together by the spider's web of an alleged conspiracy."

3. The law regarding treason, terrorism

3.1 The main charge was one of 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 the Appellate Division of the Supreme Court of South Africa in R v Erasmus 1923 AD 73 at 81 and 87.

3.2 The essence of the crime of treason is 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 constitute such an act. R v Adams & Others 1959 1 SA 646 (Special Criminal Court 666.)) This act, evidencing hostile intent, need not be a violent act (e.g. spying). Hostile intent may also exist even if there is no feeling of enmity towards the State.

3.3 As was stated in R v Leibrandt & Others 1944 AD 253, 280 and 281:

"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."

3.4 Hostile intent is thus present where the wrongdoer intends to overthrow the state. 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.

3.5 During judgment the judge mentioned in passing 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 1984 1 SA 934 (A) 940). Thus propaganda and protest action which have the object of coercing the government in a certain direction may in given circumstances amount to treason.

3.6 A line has to be drawn between legitimate protest and criticism and lawful mass demonstrations against the government on the one hand and foul play on the other hand. The judge accepted the following principles:

"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 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).

He also added the following remarks by Rumpff, J A 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."

3.7. The approach of the court in the case in question is further illustrated by the following extracts from the judgment:

- "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."

- "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 (the) pamphleteer 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."

- "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."

3.8 The terrorism charges are based on section 54(1)(i), (ii) and (iv) of the Internal Security Act, 1982. In terms of section 54(1)(i) of the said Act any person who with intent to

- (a) overthrow or endanger the State authority;
- (b) achieve or promote any constitutional, political, industrial, social or economic aim or change in the Republic of South Africa;
- (c) induce the government to do or abstain from doing any act or to adopt or abandon a particular standpoint;
or
- (d) put in fear or demoralise the general public, a particular population group or the inhabitants of a particular area or to induce them to do or abstain from doing any act,

commits an act of violence or threatens or attempts to do so, is guilty of an offence.

In terms of section 54(1)(ii) any person who with the intent stated above performs any act which is aimed at causing,

bringing about, promoting or contributing towards such act or threat of violence or attempts, consents or takes any steps to perform such an act, is guilty of an offence.

In terms of section 54(1)(iv) any person who with the said intent incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act of violence, is guilty of an offence.

4. IMPORTANT FINDINGS OF THE COURT

The Azanian Peoples Organisation (AZAPO)

4.1 The court concluded that it is clear from the evidence that AZAPO, a Black consciousness organisation is an

"... organisation which is committed to a revolutionary overthrow of the South African government and the existing social order in South Africa, with a view to create a totally new socialist order where the land and all the means of production, distribution and exchange shall be collectively owned and managed by the Black workers. This new order is to be a socialist worker republic. Even theology is hijacked. Catholic and Protestant theology is regarded as capitalist and is replaced with Black theology which is to supply the religious base for the liberation struggle. Convicted terrorists are regarded as heroes and violence and chaos are regarded as inevitable and necessary."

The Azanian Students Organisation (AZASO)

4.2 The court found that AZASO, an organisation for students at universities, technicons and teacher training colleges, and which is affiliated to the United Democratic Front (UDF), is a

"revolutionary organisation supportive of the ANC..."

Evidence showed that at its fourth annual congress during a women's evening there had been "dancing with AK47's and freedom songs were sung". Further evidence showed that AZASO was of the opinion that the state should be engaged through mass mobilisation and mass organisation:

"We have gone beyond the stage of militant rhetoric and therefore we've got to show people that we can actually take on the state ... (society has to be restructured on Marxist principles and) the masses of the national democratic struggle is to be determined by the working class hegemony within the alliance of class One of the roles of students is to expound the revolutionary theory".

The Congress of South African Students (COSAS)

4.3 The court found that the evidence proved that COSAS - "was a progressive organisation used by the ANC to further revolution" that COSAS was "intensely politicised ... (and) vehe-

mently anti-government" and that their statements amounted to "incitement to and/or condonation of violence and revolution". The court also found that "COSAS was Marxist / Socialist".

The UDF

4.4 The court found that "there can be no doubt that the ANC claimed fatherhood of the UDF". Evidence showed that witnesses were told by the ANC that "the UDF is the internal mission of the ANC" and that the "UDF works with the ANC". Furthermore, witnesses testified that the ANC claimed leadership of the UDF and that Alfred Nzo, general secretary of the ANC, had stated that "the ANC played a major role in the formation of the UDF".

4.5 The court concluded that:

- "We wish to state clearly and unequivocally that it has not been proved that all the affiliates of the UDF and all the persons named in the indictment as amplified by further particulars, were co-conspirators. We find that there were many people who flocked to the UDF out of disgust or disenchantment with the policies of the government in the expectation that it would be the catalyst for radical but peaceful change on the South African political scene. There must be many members and supporters of the UDF, especially those on the periphery, that would not have become aware of the course the UDF took. There must be many more who, woven in the cocoon of their

political outlook, closed their eyes to the fact that this course was leading to revolt. This is not an accusation. It is a statement of a sad fact. We have had the dubious benefit of an in depth investigation into the policies of the UDF. They did not."

- "... (T)he UDF was conceived in the councils of the ANC and that in its birth the ANC call for a United Democratic Front played a major role".

- "Since its launch the UDF consistently popularized the ANC and formented distrust and even hatred amongst the Black population against the South African government and its organs, especially the Black local authorities."

- "Its policy was in all material respects the same as that of the ANC. It was bent on the downfall of the South African government and the destruction of the Black local authorities. It was not as explicit on the question of violence as the ANC. The UDF did not openly and directly advocate violence. That would have brought about immediate state intervention and cessation of its activities. It created a mass organisation of intertwined affiliates which could be called into action when the time was ripe. In order to further its organisation and to prepare the ground for the final onslaught by the masses, it set about

to foster dissatisfaction and create a revolutionary climate amongst the Black population."

- "The expressed purpose of the UDF's propaganda campaigns was to politicise the masses by harping on their grievances in order to mobilise and organise them against the government. Formenting resentment and hatred against the government and its institutions was an integral component thereof."

- "As we have seen, the front changed its tactics. What had been a movement for protest against proposed legislation became a force which challenged the state itself".

- "Where the support was sought of the White, Indian and (possibly) the Coloured sections of the population the speeches did not suggest violence, but where Blacks were addressed the mask of peace was removed and the language used was, when not revolutionary, often open to such interpretation by those who were so inclined. By speeches, poems and songs a revolutionary climate was nurtured."

- "When the riots broke out country-wide against the Black local authorities and other government institutions, UDF affiliates often played a leading role in fanning the flames of hatred against these

institutions and their incumbents. They received the UDF's full support. In fact they were executing UDF policy."

- "The security forces, attempting to restore order, were denigrated and the UDF persistently called for their withdrawal from the townships. At no stage did it deplore the murder of the councillors and the arson of their businesses."
- "It openly sided with the ANC and regarded the government of the Republic of South Africa as 'the enemy' which had to be destroyed."
- "We find that the dominant core of the leadership of the UDF formulated and executed a policy of mass organisation whilst fomenting a revolutionary climate in order to lead to mass action against governmental institutions. Violence was an intended, necessary and inevitable component of such action by the masses. It was intended to make South Africa un-governable."
- "... (I)n respect of the leadership of the UDF the State has proven the crime of treason."

5. Judgment

5.1 The following judgment was passed on the accused:

"Accused No 16, No 19, No 20 and No 21 are found guilty of treason.

Accused No 5, No 7, No 8, No 9, No 11, No 15 and No 17 are found guilty of terrorism in terms of section 54(1) of the Internal Security Act 74 of 1982.

Accused No 1, No 2, No 3, No 6, No 10, No 13, No 14 and No 22 are found not guilty and they are discharged."

5.2 The role of the respective accused that were convicted is summarily set out in Annexure "B".

6. Synopsis of findings

6.1 In the course of the trial the court found inter alia that -

- (a) AZAPO was a revolutionary organization;
- (b) COSAS and AZASU were marxist revolutionary organizations;
- (c) the UDF management was the internal wing of the ANC;

- (d) the UDF had been conceived in the councils of the ANC;
- (e) the UDF was constantly popularizing the ANC;
- (f) the policy of the ANC and that of the UDF were on all points identical;
- (g) the UDF did not advocate violence as openly as the ANC, because it would have resulted in summary measures being taken against them by the authorities;
- (h) the UDF had nurtured the discontent in the Black communities and applied it to the creation of a revolutionary climate in the RSA;
- (i) when Black people were addressed members of the UDF endeavoured to promote the revolutionary climate;
- (j) during the countrywide unrest the UDF affiliates had often played a major role in the advancement thereof;
- (k) the UDF had openly chosen sides for the ANC and regarded the government as "the enemy";
- (l) the intent of the UDF was no less hostile than in a war situation;

- (m) the dominant nucleus of the UDF leadership had mobilised and encouraged the masses and fanned the flames for a revolutionary climate with the purpose of rendering the RSA ungovernable; and
- (n) the State had succeeded in proving treason in regard to the UDF leadership.

DELMAS TREASON TRIAL 1985-1989

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