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COURT RESUMES ON 6 SEPTEMBER 1988.

MR CHASKALSON: I want now to turn to make submissions to your lordship in regard to the law. Now the state's argument on the law was brief in the extreme. In fact there is very little to reply to. I assume that the state was not seeking to secure some advantage by holding back its argument on the law until the reply stage and that it addressed very little argument to your lordship on the law because it really stands or falls by the proof of violence and that that is the key to its case. But let me begin by dealing with the issue of conspiracy. (10) Now conspiracy of course is an agreement to achieve a defined object and the submission we make to your lordship is that the evidence must be sufficient to enable the court to determine the terms of the agreement and that there must be evidence from which you can determine those terms with sufficient certainty so that if the agreement had been unlawful, and not unlawful, it could have been enforced. Now that proposition I do not think is in dispute because the state referred to it at the time of the application for discharge. It was the case of Alexander, S v Alexander 1965 2 SA 818 (C). It was at (20) the bottom of page 821 where it is said that:

> "A conspiracy is an agreement between two or more persons to commit a crime. The parties to the agreement must be ad idem as to their object and in terms of decisions of the English courts the agreement must be such that if lawful it would have been capable of being enforced."

That means that discussions, proposals, propositions advanced by individuals who may have been members of the affiliates of the UDF, either in speeches or in writings, are insufficient in themselves to establish the agreement necessary to found (30)

the conspiracy unless it can be shown that consensus was reached in regard to such matters and that the parties were ad idem that that was to be their goal. A judgment which demonstrates this proposition very clearly is a judgment in the case of Labuschagne 1941 TPD 271. It was a judgment of the full bench of this division.

ASSESSOR (MR KRUGEL): What volume is that please?

MR CHASKALSON: 1941 TPD 271.

ASSESSOR (MR KRUGEL): Oh Transvaal, sorry.

MR CHASKALSON: It was a judgment of the full bench of this division. Their lordships Greenberg, J. and Malan, J. His lordship Greenberg, J., who delivered the judgment, at the bottom of page 272 points to the fact that the crime of treason is constituted by an agreement between the parties that they will commit acts which constitute the crime of high treason. He says it is not the only species of acts but it was the one which has to be considered in the case before them. And the question was whether the evidence proved that there was such a conspiracy and whether any of the accused was party to the conspiracy. The case was one which in fact was argued at the end of the state case and so the test would be different there to what the test is at this stage of our case. And the argument had been that there was a conspiracy, that military instruction would be given with a view to attacking a military camp. The facts were that certain soldiers had met with certain other people. It was during the time of the last war. The proposal was that they should attack the military camp at Potchefstroom and possibly other camps as well and a number of people met, there were references to the organisations to which they belonged, the Ossebrandwag and other discussions. And

the judgment at page 273 says that:

"It was pointed out that this request was not assented to and there was certainly not agreement on that point. There may have been agreement that the camp should be attacked at a later date and that at a later date the details would be agreed upon. That is possible but I am doubtful whether an agreement of that kind has been proved between any persons whatsoever. However I have no doubt that there is no evidence which would justify a finding that no. 3 accused was a party to such an agreement at that stage. There was a discussion which might have constituted an agreement between certain of the persons present but the evidence of no. 3 accused's limited participation in what happened and indeed limited acquaintance with what was happening makes it impossible to hold that there is evidence at that stage that he was a party to the conspiracy."

And then he refers, the judge goes on to refer to other evidence and at page 274 he refers to the production of a formal plan to attack the camp and he says that:

"The evidence shows that the plan was produced, that it was studied by all the persons present, including the first and third accused. They all looked at it and the plan was explained to them by Van Jaarsveld. There was then a discussion and Kennedy mentioned the proposal that 150 of the people whom he claimed to control and whom he described as 'stormjaers' would attack the camp. It was pointed out by one of the soldiers present that it was out of the question to attempt to attack the camp with 150 men and I think that the evidence is that this soldier

said that 500 or 600 men would be necessary."

And then the judgment continued a little later on by saying:

"As far as we can see nothing further was done. It certainly was not agreed at that meeting that there would be an attack on the camp. Kennedy at an earlier meeting said that the attack had to take place within six weeks. There is, however, nothing to connect accused no. 1 and no. 3, or accused no. 2 for that matter, with knowledge of that statement. The first accused was then called upon to deliver what was described as a 'slotwoord', a sort (10) of benediction on the meeting, but that does not mean that there was any final decision at that meeting because the evidence negatives this. The evidence does not go so far as to show that the project was dead but it certainly does not establish that anything was decided or that it was decided to prorogue the meeting and consider the matter at a further date. I think, therefore, that the evidence does not disclose a conspiracy at that stage and if the evidence does not disclose a conspiracy the accused cannot be convicted either on the ground that they took (20) part in the conspiracy or on the grounds that they did not report it."

Now in the case before us the state has produced no direct evidence of any agreement or any form of discussions to overthrow the state by violence but that of course is in itself not necessarily fatal to the state case. It could, if the evidence were there, prove such a case by circumstantial evidence but then of course the evidence would have to be sufficient to meet the rule in Blom's case and there are a number of major difficulties which confront the state. (30)

First there is credible and direct evidence denying the allegations made by it. Secondly the case as pleaded by it is in many respects speculative and uncertain because what is pleaded is that there was a conspiracy to mobilise and organise people with the ultimate goal of pushing them into violent acts and into actions which would make South Africa ungovernable and develop into a violent revolution. Now it seems extremely improbable that there would ever be such an agreement. Who would commit themselves, well let me put it to your lordship somewhat differently. So much could happen on the way that it seems unlikely that anybody would settle down seriously and commit themselves to a course of conduct which has that particular purpose in mind. After all if they wished to turn to violence there were, as we know from the evidence, a number of organisations which were committed to violence, which had structures for violence, which were promoting violence within the country. If that is the way they wished to achieve their activities they could have gone, left the country and joined such organisations. Now if they were to be planning it would in as many sense be extremely hypothetical that such a situation could ever be reached and it seems in itself improbable that people would commit themselves to that goal in August of 1983, which is what the state case is. After all what was there at that time to suggest that this was likely to be a feasible proposition and who would commit themselves to such a serious undertaking in so speculative a position? And really the state case on this issue is laden with conjecture and speculation. It is no more than well it is possible that these are the sort of things that such people might have had in mind. But where are the facts from which your lordship can infer beyond any

reasonable/....

reasonable doubt that all the people who came together at Mitchells Plain in August of 1983 were ad idem on this issue and were committing themselves to this goal? And your lordship will bear in mind in this regard the passages in Adams which we have already referred to and which I do not want to repeat, where this point is made in a different context in relation to the Adams trial. So the submission which we make to your lordship is this, that bearing in mind firstly the direct evidence to the contrary, secondly the difficulty of proving that a front of some 600 organisations, each retaining autonomy, in (10) fact have committed themselves to a policy different to that contained in the official documentation of the front, the constitution, the working principles and the like, and contrary to the public statements made by the front and the equivocal nature of the documentation that the conspiracy pleaded has not been proved. Now your lordship at an earlier stage asked me a question which was what if there were a different conspiracy or what if one could find from the evidence a different conspiracy? I think there were two hypothetical possibilities put to me. One was that the conspiracy did not con- (20) sist of the front of a whole but of certain individuals, as it were a secret conspiracy involving certain individuals and, secondly, what if the organisation when it came into existence did not have such a policy but at some later stage a different policy were adopted? And I think thirdly a question which was asked was what if some people decided to come together at some stage for a particular specific purpose. I have in mind possibly the Vaal or something like that. What would be the position there? Now our broad submission to your lordship, and we will come back to that at a later stage in our argument, is (30)

that/....

that there is indeed insufficient evidence to make findings in regard to what I might call sub-conspiracies or alternative conspiracies and that there is certainly insufficient evidence to find that any of the accused were party to such conspiracies. But we go further than that. We submit to your lordship that it is not open to the state to advance such an argument on its indictment. And here we rely first on a judgment of the court of appeal in England in the case of R v Greenfield. It is reported in 1973 1 Weekly Law Reports, page 1151.

COURT: Is it not reported elsewhere? The All Englands? (10)

MR CHASKALSON: I have, I will have to check that. I have only the Weekly Law Report reference.

COURT: Yes I am sure you have but normally it is also reported in the All Englands.

MR CHASKALSON: Well I will ...

COURT: Can you get me that reference.

MR CHASKALSON: I will look for it. We will have time to do that and we will look for it. It is a judgment of Lord Justice Lawton who gave the judgment of the court and the passage which I have - and if it would be convenient to your lordship (20) since I am quoting from this edition I could photocopy the judgment which is short and make it available.

COURT: Yes thank you.

MR CHASKALSON: The passage which I am citing from is at page 1156 B and the case was there concerned with conspiracy. It was a case which came from I think Ireland. It concerned explosions and possessing ammunition and the like and the argument was that the case should have been withdrawn from the jury because the evidence did not support the allegation of a single continuing conspiracy but revealed independent conspiracies (30)

which could not form the subject of a conviction under such an indictment. And his lordship Lord Justice Lawton at the page I have given to your lordship said this:

"Duplicity and a count is a matter of form. It is not a matter relating to the evidence called in support of the count. It is shown by contrasting the cases of West Davey with the case of Griffith. In West's case the reference in the conspiracy count to orders made under regulation 55 of the defence regulations should have alerted the trial court to the fact that during the period of the alleged conspiracy the orders made under the regulation which the defendants were said to have conspired to and infringed had changed from time to time. They could not be said to have conspired together to infringe regulations which had not been issued but during the period specified in the count they could have conspired to and threatened each regulation after it was issued. It followed that the count embraced not one conspiracy but a number. In Davey's case the conspiracy was alleged to have gone on for eleven years and it was manifest from the form of the count that the depositions considered as particulars that the prosecution were alleging that the defendants had conspired to defraud companies which either had not been incorporated at the beginning of the conspiracy or had been wound up before some of the defendants were alleged to have joined it. The charge against the defendant was one of being members of a number of conspiracies. In Griffith's case the conspiracy count alleged one conspiracy and was not that for duplicity. But the evidence led to support the count wholly failed to

"prove the conspiracy charged. Instead of proving that the defendant's had all conspired together for a common purpose it had proved that many of them had conspired with one of their number for their own purposes. No such common purposes charge was ever established so as a matter of proof there had to be an acquittal."

And then his lordship contirues, and this is the passage I think that is important. He says:

"In our judgment the distinction which exists between form and proof is a clue to the problems provided by this case. The prosecution was alleging that these appellants and the other defendants had a common purpose to cause explosions. All the defendants in their different ways challenged the basic allegation of common purpose and they did so by submitting that the evidence revealed the possibility that those charges may have had, in relation to some of the incidents, purposes which were not common to all. What they were doing was challenging the existence of the conspiracy as charged which is one way of saying that they were denying that the prosecution had proved their case. A charge which is not bad for duplicity when the trial starts does not become bad in law because evidence is led which is consistent with one or more of the defendants being a member of a conspiracy other than the one charged. Such evidence may make it impossible for the prosecution to establish the existence of the conspiracy charged. Griffith's case was such a case. At the end of the prosecution's case the evidence may be as consistent with the defendants, or some of them, having been members of a conspiracy which

was/....

"was not the one charged as with the one charged. In such a situation the trial judge should rule that there is no case to answer. But if at the end of the prosecution's case there is evidence on which, if uncontradicted, a reasonably minded jury could convict the defendants, or two or more of them, of the conspiracy charged despite the evidence of the existence of another conspiracy then the trial judge should let the case go to the jury."

Now this principle was in fact debated in Adams case and your lordship will remember that in the judgment on the indictment(10) West's case was distinguished and it was distinguished on the basis that the charged laid in Adams' case was a single continuing conspiracy and that since the charge was of a single continuing conspiracy the fact that in pursuit of the single continuing conspiracy the parties subsequently agreed to contravene laws which had not been enacted at the time that the conspiracy was entered into did not affect the charge because it was a single continuing conspiracy and they were implementing the single contrinuing conspiracy and formulating what they were doing from time to time. So the distinction between a (20) single continuing conspiracy and a number of different conspiracies is, in our submission, important and as the prosecution chose to charge a single continuing conspiracy and was indeed the mechanism by which they brought all the people before the court they chose for their own purposes to do that, having done that they are then committed to proving that case and it does not help them at the end of the day to say well I have not proved by that case but out of the evidence which I have put before the court I can find something else. So our submission to your lordship is that the prosecution case stands or (30)

falls/....

falls by the proof of the grand conspiracy as pleaded, with the goal of that conspiracy as defined, being the violent overthrow of the state in the methods referred to in the indictment. But really the violent overthrow of the state. Now if I could proceed a little bit further along this line I understand that though I was not here at the time that there was some debate with mylearned friend Mr Bizos during the argument that some of the Vaal accused might be held liable on the basis of a conspiracy or common purpose formulated at the time of the rent protest in August. I do not know whether that is so or (10) not but could I simply say to your lordship on that issue that apart from the factual disputes, apart from the factual disputes concerning that that it is not a competent verdict on the indictment as framed because the accused are here charged as part of the grand conspiracy and they are not charged with having entered into an ad hoc conspiracy at the particular time which is independent of and separate from the grand conspiracy. Now I would like to move away from the law of conspiracy and to address an issue that your lordship raised with counsel for the state and that was in regard to competent verdicts. (20) Now in response to that I think the answer given was that on the main count a conviction of sedition would be a competent verdict, and in fact at page 25, 264.

COURT: Volume?

MR CHASKALSON: It is volume 431, the state says that:

> "Volgens ons betoog soos ons gister gevra het vra ons die skuldig bevinding van, behalwe vir beskuldigde nr 14, al die beskuldigdes, dat almal van hulle skuldig bevind word aan hoogeverraad. Ek vra dat die hof bevind waar daar nie 'n vyandige opset bewys is nie dan vra (30)

"ons skuldig bevinding van almal van hulle in 'n alternatiewe bevoegde uitspraak dat hulle skuldig bevind word aan sedisie."

Now sedition is of course a competent verdict on a charge of treason but it is not a way in which the state can avoid the difficulties it faces on the indictment and its particulars. If it is, as we have argued to your lordship, set out and tied itself to doing so, to prove a case of treason by violence and it is not entitled on the document to ask for a finding of any other form of treason then a lesser verdict of sedition could only be sedition by violence. Because the state is bound by its particulars and really why sedition becomes a competent verdict is because there is a different intent. The hostile, the difference between sedition and treason lies in the presence or absence of hostile intent and if the state alleges that you committed treason by doing act X with hostile intent and it proves act X but does not prove the hostile intent then it can say sedition is a competent verdict. Now I think that is really clear from the judgment in Viljoen's case, the 1923 appellate division judgment at page 90 and at page 95 in the judgment of the court the point is made that the jurisdiction of the court would extend to including all offences upon which a competent verdict could be entered and then it says:

"The greater includes the less and the principle is not ousted by the mere fact that the two offences are separately listed in the schedule."

And then at the bottom of the page, this is the passage:

"Now when the treason charged takes the form of violence and tumult by a number of persons who have assembled together then the Crown, in order to obtain a conviction,

"must prove (a) that the accused committed the vile acts alleged, and (b) that they were animated by a hostile mind against the state. When (a) is established the requisites of sedition are made out. When (b) is established the essential elements of treason is present. The commission of the latter crime under such circumstances includes the commission of the former. The present is such a case and it was therefore competent for the court to return the verdict which it did, which was sedition."

Now in the Adams case in the judgment of Rumpff, J. there is in fact a discussion of Viljoen's case. So it clearly must have been present to the minds of the court in Adams' case, and to everybody in Adams' case, that on a charge of treason sedition is a competent verdict. Yet because of the structure of the indictment and because the state had tied itself in its indictment to proving a particular ongoing conspiracy with a specific goal when it failed to do that it could not ask that the court should then, though it acquits on the main charge, look in the evidence for an alternative competent verdict which is different to the particulars. So for that same reason we say here that if the state asks for, it can only obtain a conviction of sedition if it proves sedition by violence. Now on that issue we would also - I have given your lordship some cases already about the state being bound by its particulars. I might add another two. The one is the case of S v Ntshiwa 1985 3 SA 495 (T) and the passage is at 495 H-I, and S v Nathaniel 1987 2 SA 225 (SWA) and the passage is at 235 D. Then at page 25 264 to 25 265 the state in its argument said that if it failed on the main count that it submitted that the accused were guilty of contravening section 54 ...

COURT: I am sorry are you referring to the record?

MR CHASKALSON: I am referring to the record, I am sorry.

COURT: Volume?

MR CHASKALSON: 25 264 to the very bottom of the page, it is about line 27, where the state says that it asks for a conviction under section 54 of the, it is really the Internal Security Act. It draws attention to the fact that there were three counts and the way it is put that:

> "Hulle wel die dade van geweld aangestig het, dat hulle deel geneem het aan die geweld om te verkry en selfs by was, teenwoordig was toe dit verkry is of dit uitgelok en aangestig het."

COURT: I am sorry now, I am still not with you. Is it 25 264?

MR CHASKALSON: That is what my page number says.

COURT: Now which volume is it then?

MR CHASKALSON: I am sorry my lord, it is the same volume that I gave your lordship, it is 431. And then there is reference to intimidation and to the events in the Vaal and the black local authorities and there is an argument then that on the principles of conspiracy that everybody had the same common purpose and that everybody, whether they participated in the violence or not, should be held guilty for everything that happened around the country. And that the same argument is extended to the murder charges and I seem to remember also that there was reference at one stage to road obstructions, "pad versperrings". Now the broad submission that we make to your lordship again is that this has been charged as part of the grand conspiracy, that of course the state, if it does not prove the grand conspiracy and no doubt this is why it

charged so many different charges in the alternative, can fall back on the position of the individual accused. The accused having committed acts in their individual capacity. But we make the submission that the UDF has not been shown to be responsible for intimidation or for any acts of violence and in particular on the issue of the intimidation of councillors it has not been shown that the UDF as a matter of policy adopted intimidation as a means of campaigning against black local authorities. The documentation at the time suggests the contrary and the direct evidence points in the opposite (10) direction. We had here the evidence of the statement made by Mr Lekota immediatley after the Parys incident where he drew attention to the fact that the UDF was opposed to the use of violence and wanted to employ different methods, such as boycott. There is the evidence of a number of speeches and public statements made by people of the UDF. There is the evidence of the instruction to activists at the time of this campaign to act lawfully and to avoid conflict with people and there is the direct denial of such a policy of intimidation from a number of witnesses. What is very significant here (20) is that the state says that councillors all around the country were forced to resign as a result of threats of intimidation. It did not call councillors to say that is why they resigned. Can they not find a single councillor, I think there was some evidence of one incident in Worcester and I, so perhaps it did find a single councillor and I will have to recollect that but broadly this allegation that as a matter of policy the UDF nationally was intimidating councils. If you are looking for a matter of policy - if there was such policy - could not the councillors have been brought to court and explained the (30)

threats/....

threats that had been made to them, how they had been intimidated, how they had been forced to resign? If that indeed was so. So there is a massive gap in the state's case, in its attempt to establish such a policy and there is, as I have put to your lordship, everything, all the bits of evidence which I have referred to to the contrary. Then as far as the second alternative charge is concerned there was a reference at some stage to road obstructions. It is a reference to "die vrye beweging van die veiligheidsmagte, die polisie en weermag belemmer was". Now first of all the charges as formulated (10) refer - and I am dealing here with section 54(2). The charges were laid under section 54(2)(a) and section 54(2)(e). Those are the only two sub-paragraphs charged. The state did not charge under the other sub-paragraphs. The other sub-paragraphs deal with a variety of matters but one of which is covered by a different sub-paragraph is (f), "impeding or endangering at any place in the Republic the free movement of any traffic on land, at sea or in the air, or attempts to do so". So the question of road obstructions is not relevant to any charge in this case. Here too the charge is tied to the grand con- (20) spiracy but we do need to consider the position of individuals. If the grand conspiracy fails. And section 54(2)(a) creates an offence if the other requirements are satisfied, if any person causes or promotes general dislocation or disorder at any place in the Republic or attempts to do so and the Afrikaans refers to "algemene ontwrigting of wanorder op enige plek in die Republiek veroorsaak of bevorder of poog om dit te doen". Now at any place would include probably a house or a residence. It is not necessarily a big area. There is a discussion of the ordinary meaning of those words in Minister of Justice (30)

v Hodgson 1963 4 SA 535 (T) at 539F. Now in that context the phrase "general dislocation or disorder" must imply something akin to a riotious assembly. It obviously implies a state of tremendous unrest characterised by disorder and the like. Now there are two aspects to the charge, cause or promote. The submission we have made to your lordship is that there is no evidence to show that anything that the UDF did caused general dislocation or disorder, there is no linkage been established between the unrest and the UDF and as far as the individuals are concerned that there is nothing that has been shown that any of them as an individual caused such a state of affairs to come into existence. As far as the word "promote" or "bevorder" is concerned that word can be used in different senses. It can be used in the sense of fermenting or furthering but it can have a different meaning. In the case of Bunting, R v Bunting which is reported in 1929 EDL 326, and the passage is at 332 the discussion of the word "promote" in the context of the statute there under consideration - and I think the Dutch equivalent was "bevorder". It said:

> "The word 'promote' does not seem to have been happily chosen. The Dutch equivalent is 'bevorder' and both these words seem more appropriately used in connection with feelings already existent, being usually employed in the sense of improving or furthering some condition which has already been created. Taken with the context I think, however, that'promote' includes 'cause, provoke, foment, further, advance or encourage' in its meanings and shall so interpret it in dealing with section 29."

If we go back to the context of section 54 there are a

number of, there are two different lines which lead to a contrary conclusion in the interpretation of the Internal Security Act. Firstly if we look at the other sub-paragraphs, apart from sub-paragraph (a), we will see that they are designed to cover a wide range of contingencies. For instance sub-paragraph (b) deals with the "cripples, prejudice or interrupts any industry or undertaking". Sub-paragraph (c) deals with the impeding or endangering of the manufacture or storing of commodities and the like. But sub-paragraph (g) is couched in these terms:

"Causes, encourages or foments feelings of hostility between different population groups". (10)

Etcetera. So where the legislature intended to use or to penalise encouraging or fomenting it said so. It did not use the word "promote" and we see again that there is actually a separate sub-paragraph under (k) which deals with "inciting, instigating, commanding, aiding, advising, encouraging or procuring any other person to commit, bring about or perform such act or result, which is a reference back to everything which went before.

COURT: That is now (k)? (20)

MR CHASKALSON: That is (k).

COURT: Now if you interpret "promote" in any way do you not then cover the contingencies mentioned in that sub-section?

MR CHASKALSON: No, because (k) is a separate sub-section.

COURT: Does it not use the word "promote" there?

MR CHASKALSON: No. "Incite, instigate, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or result."

COURT: Now if you say that is not meant by "promote" what does "promote" then mean? (30)

MR CHASKALSON: Its normal meaning according to Bunting's case is to continue something which has started, something which is on the go. In other words you may not have caused the disorder or dislocation but if, when disorder and dislocation is there, you continue it then you are promoting it. That is the ordinary meaning of the word according to Bunting's case. And in the context of the statute that we suggest is the meaning which should be given to it. So when your lordship comes to deal with the position of the individual accused on section 54(2)(a) the questions we submit which have to be asked is did any of the accused, did an accused cause general dislocation or disorder by any act which that accused did or did the accused promote dislocation or disorder in the sense that we have submitted to your lordship by any act that that accused did. In other words once the dislocation and disorder had been caused and was on the go did any of the accused in their individual capacity do anything to promote it, to carry it forward at that stage? Now as far as the UDF, if I might call them, as far as the UDF is concerned the accused who are sought to be held liable through their, through - let me deal first with the march in the Vaal. As far as the march in the Vaal is concerned none of the individual UDF people - and here I have in mind specifically accused nos. 19, 20 and 21 - they are not shown, well let me put it this way the UDF is not shown to have initiated the march or to have played any role in the march or to be linked to the march and none of the three individuals are shown to have done anything in that regard and in our submission the march, if it is outside of the scope of the grand conspiracy in the sense that it is not linked to the grand conspiracy and then the march in the Vaal ceases to

be an issue relevant to such persons. As far as people who may have participated in the march is concerned the submissions which we make to your lordship are first that a peaceful march was planned, secondly that the state has not shown that the march was not peaceful. On the contrary the evidence shows that the march was a peaceful march and remained a peaceful march until the police broke it up and at that stage there is very little evidence concerning any of the individuals, well there is no evidence concerning any of the individuals to link them to any event which may have happened after the march. (10) Thirdly the evidence is that the accused thought that they were entitled to undertake the march and we go further, we say indeed they were indeed entitled to do so. But in any event once they thought they were entitled to undertak the march then on the basis of the judgments in R v De Blom 1977 3 SA 513 and S v Mdingi 1979 1 SA 309 there would not be any element of mens rea which would be a necessary requirement for any offence under section 54. As far as the murder charges are concerned that will be dealt with more fully by my learned friend Mr Bizos but our broad submission to your lordship is that (20) none of the accused are shown to have been party to any of the murders charged and that as a matter of fact that case fails.

Now I want to deal with the charge, the last alternative charge which is concerned with furthering the objects of an unlawful organisation. Now we have referred to the cases before. Let me just give your lordship the relevant cases at this stage - and I do not intend reading them to your lordship but I will be making submissions concerning the legal principles applicable. The cases are the case of S v Nokwe 1962 3 SA 71 (T); S v Arendstein 1967 3 SA 366 (A); Ndabeni v Minister (30)

of Law and Order 1984 3 SA 500 (N); S v Ntshiwa 1985 3 SA 495 (T); Mokoena v Minister of Law and Order 1986 4 SA 42 (T), and S v Ramgoben 1986 1 SA 68 (N). And then there is the unreported judgment in the case of Thevar v S. I think I have previously handed it up to your lordship but it was a long time ago and I do have another two copies.

COURT: It will be somewhere Mr Chaskalson.

MR CHASKALSON: Yes, but I would not like your lordship to have to do that.

COURT: Thank you. (10)

MR CHASKALSON: Now in all of these cases, in all of these cases the courts had to grapple with the problem of how to construe the statute, this provision of the statute, in a way which will not result in penalising conduct which clearly falls outside the scope of the Internal Security Act. And in fact in the case of Arendstein in a passage at page 382 C - 383 D Van Winsen, J., who gave the judgment of the court in that case, said that this was clearly necessary. He said that Trollip, J. in Nokwe's case had been correct in his approach to the problem because it could never have been the inten- (20) tion of the legislature to penalise conduct which fell outside of the broad scope of the act simply because what people were promoting, or what people were encouraging or advancing, was something which an unlawful organisation might also do. He said you could not have that sort of situation. Now I am going to come back to that a little later but I want first of all to ask your lordship to see how this charge has been formulated. The charge as formulated is this, that there is a preamble in which there is a reference to the fact that the African National Congress and the South African Communist Party, (30)

"hulle/....

"hulle het dit tendoel gestel het om die oogmerke soos uiteengesit in die aanheg van die akte van beskuldiging en ook een of meer of al die volgende oogmerke in die RSA te verwesenlik." Now I have already referred your lordship - and I am not going back to that - to the passages in the pleadings where the goals of the ANC and the SACP are set out, the objects, and that it is clear from that that the primary allegation is that it is the violent overthrow of the state. But then the state goes on to say that in addition they have the following goals, and then they set out a number of sub-paragraphs. I will give your lordship the first one as an example:

> "Dat 'n kampanje gevoer word teen die regering se beleid tenaansien van die nuwe grondwet en drie kamer parliamentêre stelsel."

And it goes on listing a number of matters which are said to be goals of the African National Congress. And then it goes on to plead further. Now the first difficulty, the first difficulty that confronts the state is that it has called no evidence to show that the matters referred to in paragraphs (a) to (s) in its alternative charge were indeed objects of the African National Congress. The onus is on the state to prove that that is so or to prove what the objects are. That point was made in Thevar's case and it is clearly so. Your lordship will find that in, the judgment in Thevar's case at page 5 lines 16 to 22 where the learned judge puts it this way:

> "In my view before it can be decided whether or not attempted actions of the appellants amounted to a conspiracy to further the achievement of an object of the ANC it is a pre-requisite that the state is required

to/....

"to prove the objects of the ANC. In other words the onus of proving those objects beyond a reasonable doubt rests upon the state."

Now the state called an expert but it did not ask the expert a single question about the ANC or its objects. It is usual in these cases to call experts and we have no reason why that has not been done in the present case. It did call a number of witnesses who formerly were associated with the ANC and they gave evidence but their evidence broadly comes down to this that the object of the ANC was to overthrow the state (10) by violence and install a, well there were different, I think there are different emphases in the different evidence but basically to install a new society based on the Freedom Charter. The evidence does not show that the UDF or any individual associated with the UDF sought to overthrow the state by violence and the evidence shows that during the period of the indictment that the UDF had not adopted the Freedom Charter and that the UDF sought a solution through a national convention under which the result of a representative national convention will be respected. So there is nothing from the (20) evidence to, from the oral evidence to prove the objects or connection between the UDF and ANC as far as that is concerned. Now the state produced a large number of Sechabas. We have already addressed argument to your lordship that on the basis of S v Tinto these publications are not admissible on this count and I do not want to take that argument any further. I have addressed it already and I do not need to add to it. But we go further, we say that in any event the court cannot, without the assistance of an expert, be expected to ascertain the objects of an unlawful organisation from writings in (30)

its journals. One cannot say that the object of an organisation or the object or objects of an organisation are by looking at matters which are written in which the authors in that journal express opposition to or state themselves to be in favour of certain activities. And in Thevar's case that point is also made. There was some production of a pamphlet, there was objection to it and the conviction proceeded on this basis that, before it was upset by the appeal court, the magistrate had said this, he said:

"On the evidence the court must hold that the state did prove that one of the objects of the ANC was that they were against the elections. That was admitted by the defence witnesses. The defence even admitted in its address that it was established that the ANC was against the election. We have so far reached the stage that the court found that it was proved that one of the objects of the ANC was that they were against the election. The accused intended to send out a letter under the name of the ANC and that there was a conspiracy amongst the accused."

And his lordship continues:

"In my view the aforesaid reasoning of the magistrate is fallacious. It confuses an attitude with an object. The fact that the ANC was against the election does not constitute proof that such an attitude is an object of the ANC. An 'object' as defined in the Shorter Oxford English Dictionary as 'the thing aimed at, a purpose or an end'. Being against or opposed to an election is not something which is aimed at or a purpose or an end. It is a philosophy or an attitude to a state of affairs

"which may lead to the determination of an object but it is not in itself an object. To draw an analogy many people or organisations which may not support or sympathise with the ANC may be opposed to apartheid. That attitude is shared with the ANC. The object of the ANC is reputed to be to bring an end to apartheid by violent revolution. It would in my view be ludicrous to suggest that such a person or organisation has the same object of the ANC or shares an object with the ANC."

Now the evidence has shown your lordship that certain of the attitudes which may be expressed and may be found in the Sechabas express positions in relation to issues which are similar to positions which have been taken up and are shared by lawful organisations and the distinction is that the ANC carries out its activities as part of a programme directed to the violent overthrow of the state and that other organisations which function lawfully in South Africa carry out such activities non-violently and the element of violence we submit to your lordship is inextricably linked to all the ANC's activities and that it cannot be divorced from them and that it is this quality which amounts to a quality of distinctiveness that attaches to the activities of the ANC and makes them different to the activities of other organisations. Thus we submit to your lordship that on the basis of Ndabeni, Ntshiwa, Ramgoben and Mokoena, two of which have been decided in the Transvaal, that the absence of that quality from any of the actions under consideration in this case means that the individuals and the organisations did not further the objects of the ANC. Nor, in the absence of that quality of violence, could it be said that such activities can be regarded as

similar/...

similar to the activities of the ANC because the difference, the difference between violent and non-violent political activity is so fundamental that actions linked to a non-violent policy cannot really be regarded as similar to actions linked to a violent policy. Let me give your lordship an example which I think will illustrate this. Let us take the Conservative Party. It pursues a policy - and I may not put its policy correctly but let me give a policy of strict racial segregation and differentiation as practised in the 1960's. Assume a group which pursues an identical policy, (10) ideologically precisely the same, seeking precisely the same objects, precisely the same goal but it chooses to use violence to promote that purpose. It places bombs in non-racial restaurants, it has a quasi-military wing which dresses up in uniform, parades, attacks black persons living in places like Hillbrow and it becomes a danger to law and order and so it is declared unalwful under section 4 of the Internal Security Act. Now the only difference between it and the Conservative Party would be that it has used violent means to pursue and achieve its objects. But it would be inconceivable that the declara-(20) tion of that group as an unlawful organisation would mean that the Conservative Party could no longer function because the objects were the same. It just could not be, and indeed would it mean then that the governing party would have to abandon all its policies of segregation which coincide with the policies of segregation of the organisation declared unlawful under section 4? And again one would say obviously not, and the reason, the reason is because the violence permeates everything that the unlawful organisation does and it gives it the distinctive qualities to its activities which therefore are (30)

not regarded as being similar. And again when one comes back to it one sees that one could not, one would declare, to stop the Conservative Party on my example to your lordship and to curtail the activities of the governing party on my example to your lordship would obviously be quite inconsistent with the Internal Security Act because that could not have been done under section 4. So unless one looks to these matters the effect of the declarations of illegality of different organisations under section 4 - there is a long list of them, I do not know how many there are. I am told, well there is certainly (10) a long list. There is the Black Community Programme, the Black Parents Association, the Black Peoples Convention, the Black Womens Federation, the Border Youth Organisation, the Christian Institute, the Defence and Aid Fund, the Eastern Province Youth Organisation, Educational and Cultural Advancement of African People in South Africa, the Medupe Rights Association, the Natal Youth Organisation, the National Youth Organisation, the SA Students Movement, the SA Communist Party, the Soweto Students Representatives Council, the Transvaal Youth Organisation, the Union of Black Journalists, Western Cape Youth Organisation, (20) The Zemeli Trust Fund, the Congress of Democrats, the Football League, the Football Club, the African Resistance Movement, and more. Now if similarity is to be gauged by reference to this multitude of different organisations the result would be, unless one looks for the quality of distinctiveness as I have put it to your lordship, the result would be that for practical purposes there would be no room for any social or political activity at all. No that would be possibly going too far but there would be very little room for social or political activity to pursue policies contrary to government policy. (30)

COURT ADJOURNS FOR TEA. COURT RESUMES.

MR CHASKALSON: If I might just conclude that portion of the argument by drawing attention to the fact that in section 4 of the Internal Security Act the basis for banning or declaring an organisation to be unlawful, there are two primary bases. One is that the organisation engages in activities which endanger or are calculated to endanger the security of the state or the maintenance of law and order. The other one is an ideological one which is propagating the principles or promoting the spread of communism. And then also organisations can (10) be banned if they are controlled by banned organisations or they can be banned if they are being established for the purpose ofcarrying out the objects of a banned organisation. So really there are two fundamental principles. One is the endangering the security of the state or the maintenance of law and order and the second one is the ideological one. Now Arendstein's case was decided under the ideological provision and there there was a definition of the objects of communism. So the problem which presents itself in this case and which presents itself to the other cases to which I have referred (20) your lordship, other than Arendstein's case, did not arise because one had to look at the definition to see what the object was and the only question then was that you were not entitled to pursue such an object, did you have the necessary mens rea and in Arendstein's case there was really no difficulty because there was a definition, the court found that on the facts and on his own evidence he was in fact pursuing such a goal because he said on his own evidence that he wanted to promote communism and that that was sufficient to show that his activities were directed towards that goal and it was (30)

sufficient/....

sufficient to show that he had the mens rea necessary for a conviction. But Arendstein's case does not really help us to answer the question in the present case, which is what are the objects of the ANC and what are objects similar to the objects of the ANC. And we make the submission to your lordship first that there is insufficient evidence to enable your lordship to answer the first question as to what are the objects of the ANC, alternatively that the evidence shows that those objects are inextricably linked to violence and that the distinctiveness of the pursuit of those objects by violence cannot be (10) equated with the pursuit of objects which may coincide in certain respects but which are being pursued without violence. So the submission we make to your lordship is that the essential requirements for a conviction under that charge are not present or are not shown to be present in this case. My learned friend Mr Bizos will now take up the argument.

COURT: Yes Mr Bizos?

MR BIZOS: Before continuing with the argument Major Kruger was good enough to consent to a variation of the bail conditions of Mr Oupa Hlomoka during the weekend and I would ask (20) for leave to hand in the proposed amendment to the conditions I would ask your lordship to approve.

(30)

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85 PRETORIA

1988-09-06

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

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O R D E R

VAN DIJKHORST, J.: I place the following on record. In accordance with paragraph 2 of the conditions of bail accused no. 2, Oupa John Hlomoka, is granted permission to visit Sebokeng during the period 9 September 1988 to 11 September 1988 to attend the unveiling of the tombstone of his late father subject to the following conditions:

1. He reports at Hillbrow police station on 9 September 1988 immediately before leaving for Sebokeng. (20)
2. He reports at Sebokeng police station immediately on arrival in Sebokeng and between 06h00 and 09h00 and between 18h00 and 21h00 on 10 September 1988, between 06h00 and 09h00 and immediately before his departure from Sebokeng on 11 September 1988.
3. He reports at Hillbrow police station between 18h00 and 21h00 on 11 September 1988.
4. During his visit to Sebokeng he limits his movements to 93 Zone 3 Sebokeng, the cemetery in Evaton and the Sebokeng police station. (30)

5. All other conditions of bail stand and are to be strictly adhered to.

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MR BIZOS: I want to revert to one matter that I covered yesterday. I gave your lordship, I made a submission and had the wrong reference, in relation to a concession by Brigadier Viljoen that people ....

COURT: Just give me a moment Mr Bizos, I may be able to pick it up again.

ASSESSOR (MR KRUGEL): Is it still in volume 65?

MR BIZOS: In 65, yes.

COURT: What is your reference?

MR BIZOS: It is volume 65 - and in order to be understood properly you would have to start on page 3 419 line 14 to page 3 420 line 17. I am sure that once the circumstances under which this concession came it will come back to your lordship's memory. I was putting to Brigadier Viljoen that small groups were dispersed with sjamboks by a certain type of vehicle which according to the description that we have been given were called Zola Budds because of the speed with which they traversed the township and then some doubt was expressed by Brigadier Viljoen as to whether those vehicles, the drivers of those vehicles would behave in that way and then on page 3 420, "hulle" - that is the drivers of the Zola Budds -

> "het onder my beheer al verskeie mynonluste en ook terreur voorvalle gaan keer. Hierdie lede het ek, nadat ek versterkings uit Pretoria gekry het en hulle geoordeel het dat van daardie versterkings onnodig aggresief teenoor die publiek optree by my kom kla daaroor. Hulle opleiding en ons benadering is dat in situasies sonder enige geweld gekeer kan word ons liewer langs daardie weg sal doen."

So what I am saying is that the Brigadier conceded, albeit

the reinforcements from Pretoria and not his own men, did that. The example that your lordship had when I could not give your lordship the reference came later. Your lordship will recall that there was only one instance. That came as a result of my putting to Brigadier Viljoen a passage in Professor Van der Walt's report that the professor came across many complaints that people's complaints were not adhered to and he said that he had only heard of one, of this murder case of the one soldier. That was not the passage I was referring to. This is the concession that I was referring to on this page. (10)

COURT: It cannot be the same as this.

MR BIZOS: No it is not the same, it is not the same as that.

COURT: It cannot be the same incident that he is referring to.

MR BIZOS: No my lord, because here it is in the plural and...

COURT: Nee "van die versterkings", it means "van", it is "some of".

MR BIZOS: Yes some of.

COURT: It may be one or it may be more, it is indefinite.

MR BIZOS: It may be more but, yes.

COURT: Now where is your other reference; the one I had in mind? (20)

MR BIZOS: I had it marked, let me have a look. Towards the end of the cross-examination. Mr Tip will find it. We did, but it was in that context. Mr Tip will find it.

COURT: Yes well let us go ahead with something else.

MR BIZOS: As your lordship pleases. I am going to deal with the main submission that none of the charges laid against the accused have been brought home to any one of them. And before going over to individual accused there are certain general submissions that we would like to make. The first is that (30)

your/....

your lordship will, with respect, look to the indictment and the further particulars and not seek criminal liability on the somehow or other principle as the state appears to have done in its argument. Secondly your lordship will take into account that these things happened during uncertain times and difficult times for the people in the Vaal. Special care has to be taken because of the pressures and counter-pressures on witnesses, and particularly those of the state, during this period. That this is a relevant consideration is to be found in the Mdingi case which has twice been referred to your lordship for different purposes. But Wessels, J. in the appellate division at 317 ...

COURT: Yes, just give me the reference again please.

MR BIZOS: 1979 1 SA 309 and I am referring to the passage at 317. I referred, from C-G - I referred your lordship already in relation to the fact that even a threat of detention is enough to make a witness' evidence suspect. But I am at this stage referring your lordship to paragraph H, the concluding paragraph of the judgment:

> "For the foregoing reasons I am convinced that in all the circumstances the evidence led on behalf of the state was not of a sufficiently credible and reliable nature to justify a finding of guilt beyond any reasonable doubt. In coming to this conclusion I have given due weight to the unsatisfactory nature of the evidence given by the appellant in his defence."

That is the approach on the very least basis upon which we submit that your lordship will make the adverse finding of fact on all the major issues that have been put in issue by the accused. I know that your lordship is not bound by decisions

in other cases with other facts but we do have in this division two judgments. One that of Van der Walt, J. in relation to the murder of Motjeane a copy of which judgment I have already handed up to your lordship and the judgment of Preiss, J. in the case of S v Nhlapo in relation to the murder of the late Dipoko. I undertake to hand up a copy of the judgment of Preiss, J. because I submit that it is particularly instructive as to what the approach of a court should be where there has been direct evidence from state witnesses, some of which was tainted with some of the difficulties that I have previously referred to in relation to IC.8, Mahlatsi, Masenya, Koago, IC.9 and where that is to be contrasted with witnesses called on behalf of the defence to deny that which the state witnesses have asserted. The reference is in volume ...

COURT: Just a moment. 67?

MR BIZOS: 67 3 550 line 12 to 3 551 line 4.

COURT: And what does it say there?

MR BIZOS: What I have indicated to your lordship, that there was, if your lordship starts in the middle of the page it becomes clear that I am quoting from the report of Professor Van der Walt, then I say:

C.1541 "Een van die mense wat gearresteer was gedurende die polisie optrede by die begrafnis was onmiddellik na sy vrylating geskiet kort nadat hy vry gelaat was so word dit beweer. Kan u onthou? -- Ek weet van die geval waar 'n polisie beampte 'n kind geskiet het kort na vrylating.

In verband met hierdie paragraaf van professor Van der Walt is daardie polisieman aangekla van die misdaad van moord, is dit nie so nie? -- Dit is so.

Dit/....

"Dit was nog terwyl u daar was? -- Dit was.

Hy was ook onmiddellik onthef van enige dienste. Ons is nou by April 1986. Wat het van daardie saak geword, is dit voor die hof gebring? -- Ek weet nie.

Alhoewel hy agtien maande gelede van moorde aangekla was in 'n situasie soos hierdie wil ek u verseker dat die saak nog nie voor die hof gekom het nie. -- Soos ek sê ek weet nie."

And what I was really, portions of the Van der Walt report which is an exhibit were not transcribed onto the record, only the key words so that the reference could be given but it was really quite a different incident to the previous one that we were really referring to. Now Preiss, J. also had the situation in relation to the Nhlapo case that witnesses came along and gave direct evidence that stones were placed at Diphoko's house early in the morning by the accused, evidence by people who knew Mr Nhlapo and the other accused and evidence was led to rebut that and your lordship will find the approach, I submit, in these circumstances instructive. But the main conflict of fact that your lordship has to decide in relation to the liability or non-liability of any one of the accused really relates to a very small number of incidents. They are the meeting of the 19th in Sharpeville, the meeting of the 26th in Sebokeng, the meeting of the 2nd in Sharpeville, the meeting of the people early in the morning on the 3rd at Sebokeng, at Small Farms. Now, and of course as to what happened at Motjeane's place. Those are the matters. Now the weight of evidence on those issues is so overwhelmingly in favour of the accused that your lordship, with the greatest respect, cannot seriously contemplate rejecting the defence version. Let

us take the 19th. Your lordship has Koago and his associate who, both of whom are friends of Mr Mohage.

COURT: On Mohage is there any evidence that he is connected to this case?

MR BIZOS: Yes.

COURT: Apart from the fact that a number of years ago he was the sole witness against accused no. 16?

MR BIZOS: Yes he went and substituted Mr Mokoena for Mrs Mokoena on the evidence of Mrs Mokoena.

COURT: How do you mean? He substituted Mrs for Mr Mokoena? (10)

MR BIZOS: Yes, that is the evidence of ...

COURT: You mean at ...

MR BIZOS: Your lordship will recall that ...

COURT: Oh you mean that exchange?

MR BIZOS: The exchange. Well ...

COURT: Yes thank you.

MR BIZOS: And also the, here was a great opportunity for the state to clear the air. Masenya, Koago, IC.8, sorry IC.9, were all, it was suggested to them that it is inconceivable that they had this information and that they did not mention (20) it to their drinking pal Mr Mohage. Here was a wonderful opportunity for Mr Mohage to come into the witness box. In fact either correctly or incorrectly I indicated that we were expecting him to be called. Here was a wonderful opportunity to clear the air. Why was he not called to say that either I had nothing to do with the taking of these statements, or the allegations that are made against me are not, there is absolutely no foundation and that I was not involved in this case. But it was not done. And your lordship, I cannot tell you and your lordship does not know what may have emerged (30)

if Mr Mohage was called.

COURT: Six days of cross-examination, that is for sure.

MR BIZOS: Your lordship is asking me a question which, if I were to answer it I may be taking unfair advantage. It may have been a very short cross-examination in view of an appellate division decision, but I had better not say any more. The, relating to him that is, but be that as it may. What I am going to ask your lordship, with the greatest respect, to do in relation to each one of these accused and each one of these incidents that in relation to the 19th against these two witnesses your lordship has heard the three accused which gave evidence, eleven other witnesses - and I do not intend leading the list again - the probabilities created by the defence case by the evidence of Mr Kevin Harris in EXHIBIT V.31. Now I submit, with the greatest respect, nothing more need be said about which way that finding of fact should go. And we submit that no adequate reasons have been given as to why the evidence of the fourteen witnesses, including Mr Raboroko of course, who wrote a contemporaneous report. And what we submit in relation to that is that it does not help the state in its "Betoog" to say that one witness said that the crowd was not angry or emotion charged. What is "angry" and what is "emotion charged" is journalese for what, that the people were upset. Now if one person says that the people were upset and the other puts it in the dramatic forms of the journalist it does not mean that one or other of them has got to be disbelieved and the criticisms of the accused as witnesses, and their, and the supporting witnesses, does not in the main amount to much more than that. In relation to the 26th at Sebokeng the evidence is that of Masenya and Mrs Mokoena. Coupled with of course

the evidence of Mahlatsi. We would submit that the evidence of those three witnesses is contradictory and self-contradictory, the one contradicting the other and completely unsatisfactory. As against that your lordship has had the evidence of accused no. 5, accused no. 7, accused no. 8, accused no. 9, accused no. 10 and another battery of defence witnesses. We submit that the weight of evidence is overwhelmingly in favour of the accused in relation to what happened on the 26th and that those three cannot be believed. One of the features of the state's case is that we have not seen any defence witness, that your lordship being asked to accept the evidence of any defence witness except, if I read the "Betoog" correctly, Mr Sekwiya on whose evidence they do rely and they misinterpret to a certain extent. We would submit, from Craddock. It would be passing strange if the state was correct in pasting over the cracks in its own case with what we established in relation to IC.8 in particular, to Rina Mokoena, to Masenya and others and suggests to your lordship that you should find reasons which have not been given to your lordship. Your lordship has been asked to disbelieve on inadequate grounds and without valid details having been given, to disbelieve all the accused and all the defence witnesses. Well I would submit that your lordship has been given - if your lordship will excuse the expression - a very tall order by the state. The criticisms of the defence witnesses are trivial if we compare them to the statutory perjury that has been committed by Mr Mahlatsi, the assaults committed on IC.8, the programming of IC.8 over a period of four months, the leaving out of these allegations of violence from the indictment. Where are criticisms of such grave consequence in the defence case?

With/....

With those factors in mind I will now turn to the position of each one of the accused. We will start with accused no. 1, Mr Baleka. He has not given evidence and the allegations against him are that the meeting of the 19th, 327 to 328 of the indictment. The other allegation that he spoke at a meeting in the Vaal triangle on 25 August 1984 attended by members of COSAS, VCA and AZANYU and the Vaal Youth Congress. Your lordship will find that at 344-5. Then the allegation is that he was a member of an organisation which actively co-operated with the UDF in the Vaal in order to fight the black local (10) authorities and make the area ungovernable so as to lead the people into rebellion and unrest, making South African ungovernable and promoting revolution. Your lordship will find that in the further particulars 27.2 page 72. He actively identified himself - it is alleged - at least in the Vaal triangle with the goal of the UDF to overthrow the government by violence, by taking part actively in the institution of the UDF campaign against the government and the black local authorities in order to destroy the black local authorities. At least in the Vaal triangle, to make the area ungovern- (20) able. All this being in accordance with an agreement between AZAPO and the UDF to work together in the Vaal triangle against the government and the black local authorities. It would appear, in relation to Mr Baleka, that at one stage those who drafted the indictment and the further particulars confused AZAPO with AZANYU. Did I give your lordship paragraph 8.5.1 on page 38 of the further particulars? The evidence, on the evidence it is common cause that he spoke on the 19th, that he was a visitor to the Vaal, according to the State's evidence he was introduced as a person from the Soweto Student Organisation which (30)

further shows the confusion that there was in the mind of Sergeant Koago. He changed that after an adjournment to AZANYU. Does your lordship want the references for that? I have them readily, 1 154, 12-31 and 1 213, 27-28. There was also evidence that he spoke at the funeral of 23 September on behalf of AZANYU which was not really alleged to be a party to the conspiracy or to have been party to the agreement that is supposed to have been in existence between the UDF and AZAPO. It may be that your lordship should bear in mind that the indictment alleges that no. 1's association with the alleged (10) conspiracy arose out of a decision taken by AZAPO and the UDF to work together in the Vaal triangle. What that has to do with AZANYU in Soweto has not emerged in the evidence. Your lordship will find that in the further particulars, 8.5.1 on page 38. There is no direct evidence as to which student organisation accused no. 1 may have been connected with or that the student organisation was an affiliate of the UDF. No organisation called the Soweto Students Organisation is shown to have affiliated or to have had any contact with the UDF. Of course your lordship will note that this funeral (20) is not alleged in the indictment. I am not going to take up any more time in relation to the meeting of the 19th save to say that there is no reason to reject the evidence of the 11 defence witnesses and the three accused have given evidence that no violence was advocated by accused no. 1. In cautious statements such as what happened to the rent money or what use the defence force may or may not hav made of it does not assist the state to prove that violence was advocated by accused no. 1 at this meeting. He is not on trial for his fair mindedness nor on trial for expressing strong views about the political (30)

situation/....

situation in the country. Even though the Joseph Sithole funeral of 23 September was not pleaded, and I reminded your lordship yesterday of your lordship's expressed view questioning the relevance of the funeral of the 23rd and the 15th, the evidence of Brigadier Viljoen that he looked as if he was misbehaving outside the church by giving what Brigadier Vijoen called black power signs at the funeral is to be read with the evidence of the other state witness, Reverend McCamel, who although in his evidence-in-chief said that accused no. 1 was making a fiery speech he conceded in cross-examination that (10) he, the person who was actually stopped by one Sipho Sabusi.

COURT: Could have been.

MR BIZOS: Might have been, I am sorry, might have been Sipho Sabusi. Your lordship will find that in McCamel, 1 600 line 20 to 1 601 line 10 to be read with 1 647, 8-11. This was the sum total, yes I am reminded that the evidence of accused no. 6 was to a similar effect. He actually went further than McCamel and said that it was not accused no. 1 but it was the person. That is the sum total of the direct evidence against accused no. 1. What your lordship will take into account (20) is this, that there is no evidence about AZANYU being a party to any conspiracy. It was hardly heard of by Mr Raboroko, it was never heard of by IC.9. There is no evidence as to what its objects are or were, what its membership was and that we submit is the totality of the evidence against no. 1. There is some documentary evidence which was not relied on by the state and we therefore do not make, find it necessary to make any submissions in relation to it. The framework of the indictment as analysed before your lordship seeks to make liable persons who were members of the management committee or (30)

management structure of organisations. There is no evidence that he was a member of any such structure. I have already made submissions to your lordship in relation to an accused's failure to give evidence and what inferences, if any, are to be drawn by that failure. In the case of Mr Baleka, accused no. 1, the dictum by Trollip, J. and Trengove, J. that I read out to your lordship squarely meets the situation that where other evidence has been called to contradict the direct evidence led against an accused no point can really be made in relation to his failure to give evidence. I submit that the (10) evidence, more particularly in relation to teh 19th, of accused no. 3, accused no. 2, accused no. 16, Bachawa, Nhlapo, Mokati, Msimanga ...

COURT: I thought you had dealt already with that meeting?

MR BIZOS: Yes, I am merely saying that all these witnesses supported the, he could not have added anything further to that. In relation to accused no. 2 it is alleged, and it is indeed common cause that he was the chairman of the Sharpeville branch of AZAPO and that he recruited members of AZAPO, to AZAPO. Your lordship will find that allegation at page (20) 321 of the indictment and page 98 of the further particulars. The allegation in that paragraph that he played ...

COURT: Was he chairman of the Sharpeville branch or the Vaal branch?

MR BIZOS: What is alleged is that it was the Vaal branch and he himself, if my memory serves me correctly, refers to it as the Vaal branch. From time to time there was talk in establishing sub-branches in the various townships.

COURT: Yes I understood you to say the Sharpeville branch.

MR BIZOS: Did I say Sharpeville? I am sorry. The (30)

allegation/....

allegation is Sharpeville according to my notes. His evidence was that it was Vaal. It is in issue as to the Radio Freedom as to whether the cassette Radio Freedom was played but if your lordship gives me a moment, in many cases, unfortunately not in all, I may be able to give your lordship the page on which that is to be found in our argument. Your lordship will find the argument in relation to the credibility of IC.8 in relation to this issue in volume 437 and 439. Then the allegation is that during the period of 20 August 1983 to the end of April 1985 your lordship might want to put exclamation (10) marks there in view of the fact that it is common cause that he was arrested in September 1984, he worked with the Vaal Action Committee and promoted the Vaal Civic Association. Your lordship will find that allegation on page 278 and we submit that on the evidence as a whole this is a fantasy. The speech made by him was read at a commemoration service for Steve Biko, 322. Your lordship will recall the evidence that it was actually the speech of some person that had lost his voice and not accused no. 2. It is common cause that he spoke at the meeting of the 19 August 1984 and he is alleged (20) to have been one of the leaders of the march which left Small Farms on 3 September 1984. 355-356. He admits that he was on the march but denies that he was one of the leaders. I do not intend dealing with the meeting of the 19th. The weight of evidence is overwhelmingly in favour of the defence for the reasons that we have already advanced and in relation to the evidence of IC.8 I submit that we have submitted full argument to your lord as to why, where his evidence is in conflict with that of IC.8, the evidence of Mr Hlomoka, accused no. 2, should be accepted and that of IC.8 rejected. In relation to the (30)

organisation as to precisely what the position of AZAPO was he is corroborated by the evidence of Lybon Mabasa and that is an additional reason why the evidence of IC.8 should be rejected. Now insofar as IC.8 tried to connect AZAPO with the VCA or AZAPO with COSAS on the argument placed before your lordship I submit that your lordship will make a finding that there was no association between the UDF, the VCA or COSAS and AZAPO in the Vaal. The meeting at which he says that this agreement was entered into is denied by Mr Hlomoka, accused no. 2, himself and the Reverend Moselane, accused no. 3, and the (10) weight of evidence, we submit again is in favour of the accused. Then we have already dealt with IC.'s evidence in relation to accused no. 2 on the meeting of the 2nd September. The evidence that, of IC.8 that no. 2 called for a stay away and a march is denied by a battery of witnesses again who have not been shown to be untruthful and is consistent with the probabilities that there was no decision to stay away nor was there a decision to march and the subsequent events, certainly in relation to the march, bear accused no. 2 and the other witnesses out. As far as his being a leader of the march the (20) evidence is contrary to that. He is supported in this by accused no. 9 in particular who was one of the leaders of the march and that he himself said that he merely wanted to join it as a resident of Sebokeng. There is of course a tremendous improbability in the state case. If there was an agreement to, of the people of Sharpeville, Sebokeng, Boiphaton, Bophelong and that AZAPO was party to it, represented by accused no. 2, if he had gone to the trouble on the state's basis of going to the meeting of the 19th, the 26th and the 2nd as a representative of AZAPO to Sharpeville why should he go to Sebokeng (30)

on the morning of the 3rd? In relation to the meeting of the 2nd at Sebokeng in order to organise what was going to happen, on the morning of the 3rd, a meeting which the state was constrained to admit that it did take place. There was no suggestion that accused was there at all. How could the chairman of one of the organisations organising this in furtherance of a conspiracy be absent from the planning meeting? And it is significant that the witness Mahlatsi said nothing about it. It is also significant, we submit, that in relation to who came to whom as between IC.8 and accused no. 2, (10) that he is supported, no. 2 is supported by his sister that it is IC.8 who came and the contradictory nature of IC.8's evidence in relation to his movements on the morning of the 3rd are further corroboration of the fact that he merely went there as a participant in the march. Although accused no. 2 was cross-examined at great length about the meaning and effect of many of the documents we do not see anything in the "Betoog", neither the typewritten one nor the two versions, of the final submissions in handwriting that the state relies on any one of those documents in order to ask your lordship to find the (20) accused guilty of any offence charged in this indictment.
I hope that it will be of some assistance to your lordship if I give your lordship the references to the argument where much of this is to be found, particularly in volume 439 25 775 to 25 778 and in volume 439, 25 803 to 25 805. Again at 25 827 to 25 830. 25 850 to 25 852 and 25 870 to 25 872. We submit that the evidence as a whole shows that accused no. 2 was not guilty of any unlawful act himself, nor was he a party to any conspiracy to perform any of the acts alleged in the indictment. It leaves only one aspect and that is IC.8's evidence that (30)

he was a spectator at Motjeane's house on the morning of the 3rd. He has denied this. We submit that the comparative merits of accused no. 2 as a witness and the demerits of IC.8 would leave no option to your lordship but to accept no. 2's denial, or at any rate find that your lordship cannot reject it. The question of course may well be posed why would IC.8, a friend of accused no. 2, place himself there and place his friend no. 2 there. Generally speaking in terms of the dicta of Schreiner, J. and other eminent judges in seeking corroboration of an accomplice's evidence one may find such corroboration if one implicates one near and dear to him. That of course is so on the general probabilities but the record shows other reasons as to why IC.8 may have wanted to falsely implicate his friend, even to the extent of being a spectator at the place where the late Motejeane and the late Modibe were killed. He was arrested, he denied that he was there, he denied that accused no. 2 was there, he was assaulted and as a result of this nightmarish assault over a lengthy period of time he decided that this was a way out for him. I gave your lordship the references to all this during the period that I was arguing the case, the credibility of IC.8 and I submit that your lordship will find that no. 2 was not there. Of course it does not mean that any wrongful act would have been committed by accused no. 2 even if your lordship were sceptical as to whether or not his denial was the truth or not. On the evidence of IC.8 only some 20 people left the march as individuals. On the evidence as a whole the trouble had started there long before and anyone attracted to the scene would not make himself guilty of any offence. We submit therefore that your lordship will find no basis upon which to hold accused no. 2/....

no responsible for anything and find him not guilty and discharge him.

The basis upon which the Reverend Moselane, accused no. 3 is sought to be held responsible on this indictment is that he became part of the conspiracy or conspiracies pursuant between the UDF and AZAPO and carried out the conspiracy in co-operation with the VCA to further the UDF's campaign against local authorities in the Vaal triangle. Your lordship will find that in the further particulars, paragraph 12.3(iv) on pages 81 to 82 and also at page 72. That he was present at the launch of the VCA and attended and indeed was responsible for the meetings of the 12th, the 19th, the 26th and 2nd September, that he played an active role at these meetings, he opened them and he spoke at them. Your lordship will find that in the indictment, page 323, 325 and 329. Without the intention alleged most of that is common cause. What is alleged on page 90 of the further particulars, that he led a crowd which disrupted the meeting at Bophelong on 29 August. Further particulars page 90, has not only been proved, has not only not been proved. On the contrary the evidence is overwhelming that he was the victim of the councillor's intimidation and threats of violence the day before that. It was sought to make accused no. 3 responsible, on this indictment, by alleging that he was a member of AZAPO. The only person that gave evidence of this is IC.8. His evidence was denied by himself, Mr Hlomoka, accused no. 2, and above all by the president of AZAPO at the time who said that if he had been a member of AZAPO he, Mabaso, in his capacity as president of AZAPO would have known about it. I submit that your lordship will find as a fact that the state has not proved that and that IC.8 cannot be believed

in relation to that. Then the evidence of Major Steyn we submit does not carry the matter any further because no wrongful act was admitted or shown by the evidence and even though the best that the state can make of that evidence is that Major Steyn was concerned about what was going to happen on the 3rd but apparently not sufficiently concerned to tell Brigadier Viljoen about it but to tell accused no. 3 about it. It does not carry the state's case any further in our respectful submission. The evidence of Mahlatsi and Jokozela about the council's desire to live in peace with the religious leaders (10) of the community and accused no. 3's, on the state's version, refusal to have any sort of rapprochement with Mayor Mahlatsi...

ASSESSOR (MR KRUGEL): What was the word you used Mr Bizos? Any sort of what?

MR BIZOS: Rapprochement, I was showing off. A sort of live together.

ASSESSOR (MR KRUGEL): Thank you Mr Bizos.

COURT: Versoening.

MR BIZOS: Versoening, yes, reconciliation. The evidence is, there is a conflict of fact on this. Insofar as it may be (20) necessary for your lordship to make a finding we submit that it is not, we submit that your lordship cannot make a finding of fact on this with the, in favour of the state because the probabilities in the subsequent events, the attack on no. 3's house, shows that there was no love lost between the two parties at the time of the meeting and what is clear on the evidence was that each one wanted reconciliation on his own terms, not an unusual situation when people are far apart in their thinking. The evidence of, I have the references if your lordship wants them. I am in your lordship's hands. I have (30)

not/....

not advanced any argument on this previously. Jokozela is on page 2 480 line 21 to 2 482 line 1, and Mahlatsi 3 108, 26 to 3 109 line 3.

COURT: And no. 3?

MR BIZOS: Could I give your lordship that reference in, no. 3's contention was to the effect that they really were interested only in stopping him from allowing his church to be used for what the councillors called political meetings. That was really the ... Then in relation to the meetings as far as the VCA is concerned his was only a passing interest and (10) that is corroborated by McCamel at 1 532 line 17 to 1 533 line 16. And in relation to the meetings of the 12th, the 19th, 26th and the 2nd your lordship will find the argument in relation to this in volumes 435 to 439. I do not intend ...

COURT: To read them all.

MR BIZOS: To read them all, or to refer to the meetings again but that is the credibility of the witnesses, the probabilities and other matters and what we submit in relation to those meetings that your lordship will find that despite comparative minor contradictions between the accused, the (20) three accused that have given evidence in relation to this, and some of the defence witnesses those contradictions far, are of far lesser importance on matters of detail and they are not of the magnitude as the contradictions between Koago and IC.9. I have already submitted to your lordship that there was no march on the 3rd. He himself had arranged to be at the synod and whatever may or may not have been happening in Seeiso Street, as your lordship remarked, during the course of an exchange between your lordship and myself as to how many witnesses we were going to call in Seeiso Street, that even if (30)

anybody/....

anybody did put up a placard that they want him, we do not know what that really means, "We want Mahlatsi", "We want Moselane" apparently somebody had a placard according to Brigadier Viljoen. I do not know. We do not see in the handwritten "Betoog" any reliance being placed on any documents from which the state seeks to hold the Reverend Moselane responsible, and it is understandably so because even the state may have realised that they cannot ask your lordship to find that he was a member of AZAPO. And he was certainly, it was certainly not even put to him that he was a member of any committee, (10) or management structure of the UDF or UDF affiliated organisation. So that no documents would have assisted the state in proving anything in relation to any of the matters that are charged in this indictment and we submit that your lordship will find him not guilty and discharge him. I may be able to give your lordship, perhaps I should leave it until later. I have some references of accused no. 3's denials. I may get it wrong if I do it now. We will give your lordship the, that is all we want to say in relation to accused no. 3. For the sake of convenience I would like to go, because it is related to (20) the events of Sharpeville to deal with Mr Manthata, accused no. 16 at the same time as I am dealing with Sharpeville before going to the accused who have, who come from Sebokeng. In relation to accused no. 16 it is alleged that he made a strongly worded speech at the meeting of 19 August 1984 at which he called for the, made a conditional call - some say conditional some unconditional, we will not argue about that at this stage - killing of the councillors and the destruction of their property. Your lordship will find that on page 326. It is also alleged against him that he was present at the meeting (30)

held/....

held at the South African Council of Churches on 4 September 1984 at which a report was received about the incidents of the Vaal. Your lordship will find that on page 362. Then it is alleged that he represented the Soweto Civic Association and the UDF Transvaal region. Further particulars 1.3B(1)(i)3. It is alleged that he was a member of both AZAPO and the Soweto Civic Association. Further particulars 1.3B(7)(v) page 26. In relation to the first matter the evidence of Koago and IC.9 has already been dealt with and I do not intend saying anything more about that. He himself gave evidence and he is suppor- (10) ted by very many witnesses that although he spoke his speech did not contain the offending words.

COURT ADJOURNS UNTIL 14h00.

**DELMAS TREASON TRIAL 1985-1989**



### *DOCUMENT DETAILS:*

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